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The Strategic Use of Human Rights Treaties in Hong Kong's Cage-Home Crisis: No Way Out?

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Abstract
Using a socioeconomic rights framework, this article will evaluate government policy relating to housing welfare in Hong Kong. In particular, it will explore the alarming plight of cage tenants in Hong Kong, a highly marginalized group estimated to be as many as 200,000 in number, who live day to day in cramped, dank dwellings averaging 15 square feet in size. It will argue that current government policies are incompatible with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). It will further look at strategies for domesticating these international human rights treaties. In doing so, this article will contribute to the ongoing debate concerning the legal nature of socioeconomic rights.

Keywords: ICESCR, ICCPR, right to housing, inhumane and degrading treatment, cage-homes

1. INTRODUCTION

Beneath the successful veneer of the Hong Kong Special Administrative Region (HKSAR), an underbelly within Asia's world city exists. Since the 1950s, an inhumane type of housing known locally as cage-homes with conditions unimaginable to an international audience has supplanted itself as the only option for citizens reliant on government assistance.[1] Cage-homes are inhabited by a highly marginalized group estimated to be as many as 200,000 in number.[2] Cage-homes encompass cubicle-flats, bed-space apartments, roof-top slums, and minuscule subdivided units. By any description, though, these are not homes at all. They are the embodiment of squalor—cramped, dank, dimly lit dwellings averaging 15 square feet in size.

With Hong Kong's growing wealth disparity,[3] rising property prices,[4] and a longstanding political ideology demonizing the poor, these subalterns are left to eke out lives in cage-like

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1. For more on the historical background, see Dwan et al. (2013).

2. A research unit tasked by the government to account for the situation estimated over 170,000 people live in such dwellings: Policy 21 Limited (2013), p. 7.

3. Figures indicate that income inequality in Hong Kong is greater than in any of the 32 "very high human development countries" for which data were presented (United Nations (2010): Table 3). Hong Kong's Gini coefficient has worsened in recent years: HKSAR Government, Economy (2012).

4. See Demographia (2015).

structures that permeate the landscape. Many arrived in their youth from mainland China in search of greater prosperity but found themselves socially immobile and "reified as a class of helpless and hopeless wretches."[5] Despite their voiceless presence, cage tenants present a stark human rights challenge to a government fully cognisant that such dwellings "cast a dark shadow over [this] thriving city."[6]

In light of governmental inaction on the use of cage-homes, the phenomenon has attracted international scrutiny and condemnation. The Committee on Economic, Social and Cultural Rights (CESCR), the body entrusted with monitoring compliance of the International Covenant on Economic, Social and Cultural Rights (ICESCR), has addressed a number of aspects of the right to housing. In 2001, the committee criticized Hong Kong for a "large number of older persons [who] continue to live in poverty without effective access to social services"[7] stating it was "deeply concerned that the right to housing of many people in Hong Kong remains unfulfilled." Specifically, it described bed-space apartments and cage-homes as "an affront to human dignity" such structures "constitut[ing] a grave risk to the life and health of their inhabitants."[8] The committee recommended that the HKSAR "give special attention to the impact of current policies … on cage homes,"[9] further imploring "that Comprehensive Social Security Assistance levels permit recipients a reasonable standard of living consistent with articles 9 and 11 of the Covenant."[10] More than a decade later, these concerns have largely been ignored, as highlighted by the CESCR's 2014 report[11] in which the government's efforts to provide adequate housing were found wanting.

Adequate housing is recognized as a fundamental human right in the Universal Declaration of Human Rights (UDHR) which acts "to guarantee minimum housing provision for poor and deprived persons, based on respect for human dignity."[12] The right has come into conflict with "financial globalization, migration, privatization of social housing and marketization of housing as a commodity."[13] This is particularly evident in Hong Kong with the government's relationship with the financial community being one of over-reliance on private-sector solutions to public sector needs—an ideology which has proved ineffective, as echoed by the UN Special Rapporteur in 2008:

> The belief that markets will provide housing for all has failed. The current crises is a stark reminder of this reality. A home is not a commodity—four walls and a roof. It is a place to live in security, peace and dignity, and a right for every human being.[14]

The committee reiterated the failings of Hong Kong's efforts in this regard. On the issue of "adequate housing" under Article 11 of the ICESCR, the committee made it clear that "a high percentage of the population [is] living in informal settlements, industrial buildings,

5. For an account of cage tenants surviving on public assistance, see Cheung (2000).
6. Leung (2013).
7. CESCR (2001a), para. 18.
8. *Ibid.*, para. 25.
9. *Ibid.*, para. 44.
10. *Ibid.*, para. 39.
11. CESCR (2014).
12. GA Res 217A (III) (1948) UN Doc A/810, 71 (Art. 25).
13. Kenna (2010), p. 11.
14. United Nations OHCR (2008).

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cage-homes, and bed-space apartments, which do not have adequate services and utilities."[15] Such pronouncements stand in contrast to governmental rhetoric on this issue. In his 2015 policy address, the Chief Executive explained that helping the "underprivileged" was his government's priority and, to that end, it would build upon the "groundwork laid to provide adequate housing."[16] And yet Hong Kong people continue to suffer from an intractable housing crisis. In spite of the "economic miracle" hailed, there has been a steady erosion of living standards affecting those at the lowest levels of society, who are plagued by dangerous and squalid accommodation.[17]

In the face of official tolerance of these abject conditions, this article seeks to explore the human rights law implications that arise from the alarming plight of cage tenants in light of the developing body of human rights jurisprudence on the right to adequate housing. The issue can be simply stated: outmoded government policy on housing provision is constructively forcing lower-income groups to subsist in inhumane conditions. Decade-long waiting lists for public housing leave no other alternative but to survive on government rent subsidies. Where subsidy is provided for private housing, recipients can only afford cage-cubicles or bed-space apartments, with barely enough money remaining to acquire other basic necessities.[18] This article will address the contentious issue of whether inadequate housing welfare benefits can generate obligations upon the government under human rights law to assist those dependent upon it.

Two important international human rights treaties in this regard are the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR, protecting a range of economic, social, cultural rights (ESCR) and civil and political rights (CPR) of relevance to the discussion here. While the rights enshrined in the ICESCR are expressed in general terms (an "adequate" standard of living), it is notable that the ICCPR contains no explicit right to housing.[19] In relation to the former, the right to an adequate standard of living which encompasses housing conditions requires the government to take steps by all appropriate means and to the maximum of its available resources to achieve that right.[20]

15. CESCR, *supra* note 11, para. 49.

16. HKSAR Government (2015a).

17. Research compiled by the Chinese University of Hong Kong (2014) indicates a significant decline in living standards since 2007.

18. Ngo & Cheung (2012).

19. Art. 17(1) ("*Right to Privacy*"), which is part of Hong Kong law under Art. 14 of the HKBORO, is the closest textual link to housing, providing that: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." Space precludes a fuller examination of how it might be possible to imply a socioeconomic right ("adequate housing") directly from a right to *respect for home* (which is not an absolute right). Briefly, however, it should be noted that difficulties exist with this approach. When discussing the equivalent provision in the ECHR (Art. 8), Lord Bingham held that the protection did not guarantee a right to a home or to have one's housing problems solved by the authorities: *Kay v. Lambeth London Borough Council* [2006]. In an earlier decision of *Lee v. Leeds City Council* [2002], the English Court of Appeal was unable to derive support (in domestic or European jurisprudence) for the proposition that Art. 8 imposed a general and unqualified obligation on local authorities in regard to the condition of their public housing (para. 49), although it did not rule out the possibility that certain extreme circumstances (i.e. those injurious to health) might entail a positive duty (para. 50). Ultimately, the court saw this matter as one of resource allocation to be determined with democratic input. Although issues of privacy may arise in circumstances of non-self-contained housing, it is submitted that, without a groundswell of jurisprudence building upon these authorities, any protection for cage tenants remains some way off under Art. 17. For some useful meditations on the conceptual perspectives of housing as privacy, see Hohmann (2013), chapters 6–8.

20. See Art. 11. For a comprehensive survey of the ICESCR provisions, see Saul et al. (2014).

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Both treaties were extended to Hong Kong upon the UK's ratification in 1976.[21] Following the Handover, these instruments were referenced in Article 39 of the Hong Kong Basic Law[22]—China's constitutional blueprint for the HKSAR—to ensure continuity in human rights protection following Hong Kong's return to China on 1 July 1997.[23] The extent to which this specific human rights framework is able to confer rights in the realm of housing welfare in Hong Kong remains controversial.

By looking at the implementation of the ICESCR and ICCPR in Hong Kong and the treaties' capacity to improve the cage-home problem, this article will strengthen a scholarly claim made elsewhere that deriving support for basic rights cuts across the two covenants.[24] Unlike the ICCPR, however, the upholding of rights under the ICESCR has been weakened by an uncertain legal status in Hong Kong. This is despite Article 39 of the Basic Law, which provides that the ICCPR and the ICESCR, as applied to Hong Kong, remain in force and shall be implemented through the laws of Hong Kong.[25] While the ICCPR was incorporated into local legislation through the Hong Kong Bill of Rights Ordinance (Cap 383) (HKBORO) in 1991, the ICESCR was not comprehensively incorporated into domestic Hong Kong law, which on a conventional dualist understanding only has legal effects on the international plane.[26] In light of this, the manner in which domestic courts in Hong Kong are able to give effect to its provisions is therefore a matter of interest. Equally, the role that the ICCPR can play within Hong Kong warrants attention given the international and domestic jurisprudential trend emerging whereby ESCR rights are enforced through indirect means of CPR.[27]

Accordingly, this article comprises five parts, including this introduction. Part 2 provides a background to cage-housing and relevant government policy in Hong Kong. This will establish the context in which to assess the various legal arguments made here. Parts 3 and 4 will consider the ICESCR and ICCPR, respectively, examining the way in which they might give practical meaning to the right to adequate housing. First, there will be analysis of the right to an adequate standard of living under the ICESCR. In particular, the article will look to the "minimum core" of the right and ask whether this concept assists in its realization in Hong Kong. Part 4 will provide an assessment as to whether government policy violates its obligations to respect and ensure the right not to be subject to inhuman or degrading treatment (IDT) under Article 3 of the HKBORO, the local adaptation of Article 7 of the ICCPR. On this argument, the article will scrutinize the reasoning of those

21. While Britain did enter reservations preventing aspects of the covenants applying in full, these are less relevant here.

22. Adopted by the National People's Congress in April 1990: 29 *ILM* 1511. For a comprehensive overview of the Basic Law provisions, see Ramsden & Hargreaves (2015).

23. Such assurances being made when Britain and China entered into the Sino-British Joint Declaration of 1984: 1399 *UNTS* 36, (1984) 23 *ILM* 1366.

24. See e.g. Shue (1996).

25. Art. 39: "The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

26. In a dualist system, such as that in Hong Kong, international law and domestic law are treated as separate legal orders, operating on different planes. See *Mok Chi Hung v. Director of Immigration* HCAL No. 371 [2000].

27. On the use of comparative law in Hong Kong, see Mason (2007).

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decisions—international and domestic—pertaining to IDT in the context of upholding socioeconomic rights, specifically housing welfare benefits. It will ascertain whether the alleged treatment meets the minimum threshold of severity required to violate the prohibition. Even if Article 3 is found to be engaged, the hurdle remains as to whether denial of adequate welfare support could reasonably be said to amount to "treatment" that required positive action to be taken on the part of the authorities. Part 5 will provide a conclusion.

2. CAGE-HOMES: UNFIT FOR PURPOSE

This section will provide an overview of the welfare policy applicable in Hong Kong for housing assistance. It will then offer an account of the cage-housing typically occupied by welfare recipients before outlining how a governmental anti-welfare dogma has contributed to the difficulties cage tenants face.

2.1 Housing Welfare Policy

Despite high demand for government public housing, a shortfall exists and is worsening.[28] The average waiting time for allocation of public housing is 3 years, but periods far in excess of this have been reported.[29] The government facilitates those unable to secure public housing through its monthly rent subsidy (MRS) for private accommodation. Comprehensive Social Security Assistance (CSSA), operated through the Social Welfare Department, acts as a "safety net" for those who cannot support themselves financially, providing housing assistance by bringing income up to a prescribed level to meet basic needs.[30] If a person is eligible, the maximum level of rent allowance for a single person is HK$1,640 (*c.*US$209) per month.[31] The crux of the problem is that the MRS does not match the actual private rental cost for adequate accommodation.[32]

On this point, the CESCR has voiced concern that CSSA "may not provide adequate protection to low-income families and persons with disabilities."[33] In view of high-rising rental prices, CSSA applicants receiving MRS absorb these increases by sacrificing living standards, a worry exacerbated by some of the highest living costs in the world.[34] Subsidies have not risen in line with these rent increases[35] and were in fact cut in 2003 (from HK$1,500 to HK$1,230) then frozen at that level for close to a decade.[36] Subsequent increases have

28. See SoCO (2013), Table 1.2, p. 4.

29. SoCO's research reports that "40% of 338 respondents … have waited for public housing for 3 years or more, thus exceeding the government's 3-year maximum wait policy," *ibid.*, p. 18.

30. The applicant must be a Hong Kong resident and have resided in Hong Kong for at least 1 year. For further eligibility criteria, see HKSAR Government, Social Welfare Department (2015).

31. HKSAR Government (2015b).

32. Relying on figures produced by the Social Welfare Department, SoCO states that, for about 60% of welfare recipients, the rent subsidy does not cover their rent: SoCO, *supra* note 28, pp. 32–3.

33. CESCR, *supra* note 11, para. 25.

34. See e.g. FlorCruz (2012).

35. Since the 1990s, CSSA rates have been calculated as being 1.5 times the rent of public housing of the same size in the same district. Yet, figures from the Rating and Valuation Department showed that average rents for Kowloon flats of less than 131 square feet in area rose by 113% between July 2003 and July 2012.

36. The government did not increase the rate until February 2012. See Hong Kong Council of Social Service (2012).

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been negligible, failing to reflect market realities.[37] Where soaring rental prices force CSSA recipients out of the regular housing market, many resign themselves to bed-space apartments and caged cubicles—living environments that give rise to egregious human rights violations.

2.2 *Portrait of a Cage-Home*

Material conditions in cage-homes are unassailably bleak.[38] Often constructed using wire mesh and wooden planks, these cubicles comprise stacked units with barely enough space for a mattress and ceilings too low to stand. Cage tenants share quarters with large numbers of strangers (20 or more in a 450-square-foot space) and innumerable other vermin. Sleeping areas are often infested with bedbugs. The smallest among them are a mere 10 square feet in size, vastly below the *minimum* of 60 square feet set by the Housing Authority for public housing.[39] Each cubicle is accessed via a ladder and sometimes a sliding door, resembling "a concentration camp."[40] Narrow passageways terminate with a poorly sanitized communal toilet and washing facilities.

The holding room may have a single window but ventilation is poor. High temperatures inside inevitably make sleep difficult. Overcrowding "make[s] the air stagnant with odors; urine from the toilet, leftover food from the kitchen, and sweat and smoke from the tenants themselves."[41] There is no separation based on age or sex. Occupants sign their privacy away at the door—but can expect no landlord obligations in return.

To compound matters, a disadvantaged cross section of society lives cheek by jowl: residents include the working poor, the unemployed, new immigrants, people suffering from mental illness, ex-offenders, and other marginalized groups. Needless to say, tensions arise with denizens sharing such cramped living spaces. A dark irony is cage tenants pay—per square footage—more for their abysmal accommodation than Hong Kong's affluent housed in luxury apartments.[42] A 15-square-foot bunk such as that found in structures described above typically costs in excess of HK$1,500.[43] Despite their meagre space, rent on cage-homes has seen price rises of approximately 20% in the past 5 years.[44] When average rents rise, the government does not adjust its rental subsidy accordingly.

2.3 *Hong Kong's Housing Crisis*

Lanse Minkler and Shawna Sweeney[45] argue that a government's *ability* to meet basic ESCR and CPR is a product of its available resources, itself a product of its institutional constraints and national income—as well as factors such as a country's legal origins and the impact

37. From 2012 to 2013, the rise in rental subsidy for one person was HK$105; 2013–14 saw a HK$95 increase. See Legislative Council (2013–14) and Legislative Council (2014–15).

38. For an account, see LSE (2011).

39. The Housing Authority's minimum allocation standard is 59 square feet for public housing tenants: Legislative Council Secretariat (2012–13). See also SoCO, *supra* note 28, p. 10, which states the standard is 70 square feet.

40. Cheung, *supra* note 5, p. 259.

41. *Ibid.*, p. 239.

42. See SoCO, *supra* note 28, p. 4.

43. Wassener & Tsoi (2013).

44. See SoCO, *supra* note 28, p. 8.

45. Minkler & Sweeney (2011).

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of globalization.[46] They suggest that a government's *willingness* to meet such basic rights is a product of its responsiveness to public demands.[47] Ability does not equal willingness, evidenced by many poorer countries being better at realizing basic needs than more affluent ones.[48]

Hong Kong is a case in point. While less than a third of its territory is urbanized, with among the world's highest population density,[49] Hong Kong's housing crisis is not simply a manifestation of its geographical constraints. The government has long limited the supply of land for development—a policy benefitting a coterie of private housing developers (who control prices through the economics of supply and demand)[50] at the cost of better housing conditions for the poor. This relationship with the private sector stems from a governmental ideology sceptical of welfare.

The key study in this regard is that of Leo Goodstadt[51] from which the following account is primarily derived. Goodstadt argues that a major consequence of Hong Kong's governmental obsession with policies rooted in economic vulnerability of the territory and wealth creation is a decline in housing stock capable of meeting the needs of its citizens.[52] He found that those from lower socioeconomic sections of society are at the mercy of Hong Kong's housing lineage—one that led to an official stance that private-sector accommodation, however injurious to health, has been the appropriate market solution for the "problem" of low-income individuals seeking housing.

Initially, Hong Kong's first Chief Executive, Chee-hwa Tung (1997–2005), began his tenure with the proclamation that housing was "the number one priority."[53] But Tung's ambition to build 85,000 new homes a year and lift the ratio of home-owners to 70% of the population was poorly executed, with the result that the "public housing programme was virtually abandoned in 2001."[54] Goodstadt pinpoints Tung's "calamitous decision" to hand over responsibility for the supply of housing to the private sector as a major cause. This transference of responsibility for housing development cut short "the government's traditional commitment to ensuring an adequate supply of public housing, both for rent and sale, to families which could not afford to look for homes in the private sector."[55] Tung came to symbolize a belief that restriction in social expenditure was necessary because welfare spending results in lower business profits and slower economic growth.[56] Remarkably, Tung's position altered from one in support of substantial housing reform to one where "those in need could *rescue themselves* from poverty."[57]

The second Chief Executive, Donald Tsang (2005–12) inculcated this volte-face, resisting the call to improve the lot of the poor on the grounds that closing the gap would do more

46. *Ibid.*, p. 364.
47. *Ibid.*, p. 368.
48. e.g. Barbados, Cuba, Guyana, Honduras, Mauritius, Mongolia, Paraguay, and Qatar.
49. Dwan et al., *supra* note 1.
50. Xie (2014).
51. Goodstadt (2013).
52. *Ibid.*, p. 12.
53. Tung (1997).
54. Tsang (2001).
55. Goodstadt, *supra* note 51, p. 91.
56. *Ibid.*, p. 16.
57. Tung (2004), p. 2500 (emphasis added).

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harm than good,[58] and maintaining the position that "[t]he government must never try to assist the poor using its own resources for this is doomed to failure."[59] Demonizing the "poor" thus remained a thread throughout Tsang's term, which he characterized as the "price to be paid" for prosperity.[60] Consequently, deficiencies in housing became irrevocable; structures became dilapidated and homes slums, as identified by a 2006 UN report noting that "slum dwellers" had grown at an annual growth rate of 150% more than the overall average for the world's developed regions.[61]

Building public disapproval of social welfare improvements with threats to Hong Kong's low-tax regime[62] enabled a culture of prejudice against the poor. This resistance to welfare expenditure escalated to a point at which those "who turned to the government for assistance were defamed without justification, especially those households which could only survive by applying for CSSA benefits."[63]

In light of this governmental and public antipathy, the retrogressive trajectory that housing policy has taken is unsurprising. In 2002, the government withdrew from the housing market (except in developing homes for low-income groups). The rationale was to reduce its "intervention in the housing area, and to restore the *proper role* of the private residential property market."[64] This move was to prove pernicious for lower-income sections of society, resulting in a long-term drought of housing stock.[65]

In 2011, when political pressure led to re-entry of the government into the housing market, it could only do so on a reduced scale, having decimated its professional capacity within the Housing Department.[66] Consequently, the private sector remains the only option for the majority of lower-income groups; private-sector owners in turn have exploited this demand with a growing trend since 2001 to subdivide and rent out premises in older buildings with complete disregard for the health and safety of tenants. Remarkably, in spite of evident risks, the government has "felt unable to rigorously enforce the legislation" which might better protect such tenants.[67] One reason for this is that cage tenants occupy a nebulous legal space with no settled definition of a "subdivided" cubicle. Instead, the government disquietingly concedes such structures are "urban time bombs" which threaten further "injuries and fatalities."[68]

Incumbent Chief Executive, Chun-ying Leung, has since sought to "revive the housing vision" of Tung with renewed focus on "the living conditions of the lower strata of society."[69] As a response to growing community concern over the failure to reduce poverty

58. Tsang (2006), p. 3881.

59. Tsang (2005), p. 8944.

60. Tsang, *supra* note 58.

61. Goodstadt, *supra* note 51, p. 13.

62. Tsang (2009), p. 42.

63. Goodstadt, *supra* note 51, p. 12.

64. Tsang (2001), pp. 809–10 (emphasis added).

65. The annual supply of new public housing fell by 62% for the periods between 1997–2002 and 2007–12: Goodstadt, *supra* note 51, p. 90.

66. *Ibid.*, p. 96.

67. *Ibid.*, p. 100.

68. HKSAR Government, Development Bureau (2010), p. 1.

69. Leung (2012). Leung's sincerity has since been called into question when he suggested an open ballot for Hong Kong's next leader could not be allowed because it would lead to policies favouring the poor: Lai (2014).

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in Hong Kong, Leung introduced Hong Kong's first poverty line.[70] A key difficulty remains: a housing planning infrastructure left barren by government's harmful decision to abandon its programme in 2002 with the government admitting that work needed to resurrect its various planning structures would delay an increase in annual output until 2018 at "the earliest."[71]

Consequently, the housing shortage inflates rental prices substantially and cubicle-apartments have become the reluctant avenue for hundreds of thousands of people. Far from providing an effective solution to such "dreadful standards of accommodation," the government has had to acknowledge the sobering fact that "dilapidated, over-crowded and neglected" slum-like structures are set to elevate significantly by 2030.[72]

3. A FRAMEWORK FOR THE RIGHT TO ADEQUATE HOUSING

This section will analyze the scope, content, and meaning of the right to "adequate housing" as interpreted in the ICESCR, and how that might apply to Hong Kong's domestic law. Particular focus will be given here to Article 11 of the ICESCR. Space precludes discussion of the various dimensions of administrative law that could be considered.[73]

3.1 Article 36 of the Basic Law

Hong Kong residents' broad constitutional right to social welfare is found in Article 36 of the Basic Law.[74] This provision must be read alongside Article 145[75] through which the government controls social welfare matters and the right to develop its own laws and policies.[76]

Although Article 36 (and 145) of the Basic Law is the constitutional guarantee of Article 9 of the ICESCR,[77] the latter provides a far more nuanced right to social welfare. By comparison, Article 36 does not spell out particulars as to specific welfare benefits or eligibility.[78] Two interrelated questions flow from this: first, in what way does the ICESCR build upon Article 36 to the benefit of cage tenants? Second, even if the covenant can provide a more nuanced right to adequate housing, can it be enforced through the Hong Kong courts?

3.2 Article 11 of the ICESCR

In comparing the protections afforded by the ICESCR with the ICCPR, it is first important to note the textual differences that exist: the ICCPR's formulation so as to provide for immediately attainable guarantees ("everyone has the right to") can be contrasted with Article 2 of

70. The Commission on Poverty was re-established in 2012. It was originally set up in 2005 but was disbanded in 2007. Hong Kong's first Poverty Line in 2012 was HK$3,600 (US$460) per person, per month.

71. Chief Executive's Spokesman (2013).

72. Chun-yuen (2010–11), pp. 5–6.

73. On which, see Ramsden (2010).

74. Art. 36: "Hong Kong residents shall have the right to social welfare in accordance with law. The welfare benefits and retirement security of the labour force shall be protected by law."

75. Consequently, it has been argued that the status of Art. 36 as a self-standing right is effectively diminished: Kong (2012). Although note discussion of Art. 36 in recent Hong Kong jurisprudence, *infra*.

76. Art. 145 calls for "the development and improvement of this system in the light of the economic conditions and social needs."

77. The Hong Kong government has stated that Art. 39 of the Basic Law is the constitutional guarantee for Art. 2 of the ICESCR. See HKSAR Government (2003), Annex 2A.

78. Cf. Art. 9 of the ICESCR, which discusses "the right of *everyone* to social security" (emphasis added).

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the ICESCR, which is more exhortatory in tone, framing the provisions as standard-setting directives to be progressively realized ("the State parties to the present Covenant undertake to ensure").[79] In spite of the somewhat indefinite reference to "progressive realisation," not all rights are incapable of immediate enforcement.[80] The CESCR has noted the ICESCR imposes upon governments a "minimum core" of obligations which demand immediate compliance.[81]

3.2.1 A Minimum Core of Adequate Housing

Article 11 of the ICESCR sets out the minimum core or minimum standards of living through which state violations can be identified. In this sense, a greater scope of social welfare protection is offered by the ICESCR as compared with Article 36 of the Basic Law. In particular, the CESCR has provided interpretive guidance on what constitutes the content of the right under Article 11 in terms of adequate housing,[82] distilling the minimum core into a number of dimensions of which the following are most relevant to cage-homes[83]: (1) *Legal security of tenure*; (2) *Availability of services, materials, facilities and infrastructure*; (3) *Affordability*; (4) *Habitability*; (5) *Accessibility*. Each element contains procedures, policies, and regulations that states should implement in order to fulfil their obligations under the covenant.[84] The minimum core approach to obligations thus allows courts to pronounce on the substantive minimum content of the socioeconomic right engaged, which in turn requires the government to give effect to it or, where it departs from doing so, provide sufficient justification.[85]

Extensive criticism of the minimum core concept points to the difficulty of giving normative content to the definition of adequate housing which can impede its being an enforceable indicator of rights violations.[86] As Hohmann points out, the committee does not "consider the concept of adequacy in any depth," which is potentially problematic in that adequacy may not be fulfilled simply by meeting the provision of a minimum core within each element.[87] This presents less of an obstacle in the situation of cage tenants, where violations are readily identifiable and government policy plainly fails to attain the minimum core, let alone a potentially higher threshold of adequacy that Hohmann alludes to.

First, as cage tenants can be evicted at any moment,[88] it is important to note that the CESCR requires the taking of "immediate measures" to confer legal security.[89]

79. See Crawford (2012), p. 639.

80. On this point, the Hong Kong courts have recently observed that "progressive" realization "should not be misinterpreted as depriving the obligation of all meaningful content": *Kong Yunming* [2013] HKCU 2878 (*Kong Yunming* (CFA)), *per* Bokhary N.P.J., para. 179.

81. CESCR General Comment No. 3 (1994) (GC No. 3), paras. 3–5.

82. CESCR General Comment No. 4 (1992) (GC No. 4), para. 8; CESCR General Comment No. 19 (2008) (GC No. 19), para. 59.

83. "Location" and "Cultural Adequacy" are less significant here.

84. In line with GC No. 3, *supra* note 81, para. 9, and GC No. 19, *supra* note 82, para. 64, it could be further argued that there is a plain violation of Art. 9 of the ICESCR, owing to the government's "adoption of deliberately retrogressive measures" pertaining to existing levels of social welfare. By failing to reflect the actual cost of private rental accommodation, the purchasing power of the rent subsidy diminishes (in real terms) over time.

85. Chen (2014), p. 22.

86. See e.g. Lehmann (2006); Young (2008).

87. Hohmann, *supra* note 19, pp. 21, 122.

88. See generally SoCO, *supra* note 28. See also Yung & Lee (2012), pp. 411–12.

89. GC No. 4, *supra* note 82, para. 8.

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This encompasses private rental accommodation and informal settlements. Regardless of the type of tenure that exists, "security" in this context includes guarantees of legal protection against forced eviction—a problem associated with landlords who rent out cage-cubicles.[90] Second, the material conditions outlined above demonstrate that cage-cubicles do not meet the threshold for availability of services, materials, facilities, and infrastructure, which includes adequate sanitation, ventilation, and lighting. Arguably, tenants are also subject to "arbitrary or unlawful" interference with privacy. [91] Third, with respect to affordability, cage tenants' financial costs associated with housing are at such a level that the "attainment and satisfaction of other basic needs" are "threatened or compromised."[92] The rent subsidy under CSSA is woefully insufficient in that it generally limits housing options to cage-cubicles. Fourth, living conditions fall far short of the standard for habitability. For living spaces to be habitable, inhabitants should live with adequate space and be protected against the cold (or heat), damp, and other threats to health and structural hazards.[93] Fifth, the CESCR specifically addresses accessibility to disadvantaged groups, including the vulnerable and mentally ill.[94] The inadequacy of financial support to provide for disadvantaged groups is another indicia of violation under Article 11. It is therefore evident from the CESCR's interpretive guidance that the minimum core is focused on the vulnerable in society who face conditions of destitution—a group within which cage tenants fall squarely.[95]

It is further instructive that the CESCR has explained a national poverty line provides an indicium of what constitutes a minimum essential level within a state to enjoy an adequate standard of living.[96] Indeed, the Hong Kong government rationalized its recent introduction of a poverty line on the basis that it could identify groups who are at risk owing to their socioeconomic circumstances and in need of "targeted assistance."[97] By harnessing its newly drawn poverty line, the government can ascertain the extent to which the minimum content of ICESCR rights is met with respect to the cage tenant population.[98] In this regard, the government must confront damning empirical data that deprivation is at its highest "by a

90. The CESCR has indicated that, even where evictions are justified, the eviction of the individual concerned "should not result in rendering [them] homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the state party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing … is available": General Comment No. 7 (1997) (CG No. 7), Annex IV, para. 17.

91. *Ibid.*, para. 9. Although note the objections to reliance on arguments in this vein, *supra* note 19.

92. Legislative Council Panel on Welfare Services (1999): "Pointing out that half of the CSSA recipients living in private rental housing were paying rents which exceeded the maximum rent allowance under the CSSA Scheme, members called on the Administration to review and increase the level of rent allowance," para. 11.

93. See generally media reports of fires and structural collapse linked to subdivided housing.

94. GC No. 4, *supra* note 82: "Both housing law and policy should take fully into account the special housing needs of these groups," para. 8.

95. GC No. 3, *supra* note 81, para. 12. Müller (2013) explains that the minimum core concept was intended as "essential provision for the most disadvantaged groups who cannot provide for themselves," p. 81. See also CESCR (2001b), para. 18.

96. CESCR (2004), para. 20. This approach is based on the concept of relative poverty as opposed to absolute poverty expressed in terms of basic subsistence but could be a useful guiding line when assessing the rent subsidy cage tenants receive.

97. HKSAR Government, Financial Secretary's Office (2013), p. 79.

98. For a similar argument with respect to the refugee population in Hong Kong, see Ramsden & Marsh (2014a); Oxfam (2014) underscores that "the 2013 poverty line has seriously underestimated" the number of poor households, p. 9. Ngo (2015) reports that more than 1.3 million people in Hong Kong—out of a population of just under 7.2 million—still live in poverty.

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considerable margin" among CSSA recipients.[99] Such data show that this group is beset by a "mean level of deprivation [which] is five times higher on average" than non-CSSA recipients.

3.2.2 Domestic Application of the Right to Adequate Housing

Whilst a promising case can be made that the obligations of the government to ensure the right to housing and that it is not violated by private actors[100] are not complied with in the case of cage tenants, a key issue remains as to the application of this treaty in domestic law; without local enforceability, there is no effective legal mechanism to compel the authorities to respect the rights of cage tenants and give meaning to the minimum core approach.

Although the covenant would appear entrenched by Article 39 of the Basic Law which states that the ICESCR (and ICCPR) "as applied to Hong Kong shall remain in force and shall be implemented through the laws" of the region, the actual effect of this provision is that both treaties require domestic implementation in order to be enforceable. This corresponds with a common-law dualist system such as that in Hong Kong.[101] Article 39 therefore acts as a guarantee that "legislation that serves to implement these instruments" enjoys a constitutional status.[102] Unlike the ICCPR, however, which is domestically incorporated by HKBORO, there is no single law that directly implements the ICESCR.

Some Hong Kong courts have propagated the mischaracterization that the ICESCR is "aspirational" and "promotional"[103] in nature, cementing a judicial stance that it does not create "any obligations."[104] This perception stems from the textual difference, highlighted above, between the two covenants. Unlike the ICCPR, which provides for concrete immediately attainable guarantees, the ICESCR is hindered by more equivocal standard-setting directives to be progressively realized.[105]

Whilst it is reassuring that the government has subsequently "note[d] the Committee's observations that the Covenant is not merely 'promotional' or 'aspirational,'," its stance that the ICESCR "creates binding obligations at the *international* level"[106] would suggest that the government does not consider that the specific provisions of the ICESCR are directly enforceable under domestic law. As recently as 2014, therefore, the CESCR noted "with regret" that the ICESCR's "provisions are not directly applicable by courts and tribunals."[107] It has consequently been said that "this undermines the status of [the] ICESCR," rendering its protection "inadequate and incoherent."[108]

99. Saunders et al. (2014), pp. 567–8.

100. Here meaning landlords of cage-cubicle units. Note that the ICESCR only places duties on the state (rather than landlords) to respect the rights of individuals. The state could respond, for example, by legislating in the area of landlord obligations to strengthen the right to adequate housing.

101. A position summarized by the Court of Final Appeal in *Ubamaka v. Secretary for Security* [2013], para. 43: "International treaties are not self-executing, and unless and until made part of our domestic law by legislation, they do not confer or impose any rights or obligations on individual citizens."

102. Ramsden & Marsh (2013), pp. 587–8.

103. *Chan To Foon and Others v. Director of Immigration and Another* [1998], *per* Hartmann J.

104. *Chan Mei Yee v. Director of Immigration* [2000], para. 46.

105. Crawford, *supra* note 79, p. 639.

106. Second Report (HKSAR Government (2003)), Art. 2, para. 1.12 (emphasis added).

107. CESCR, *supra* note 11, para. 39.

108. Kong & Hong Kong Bar Association (2014).

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3.2.3 Indirect Incorporation: Sector-Specific Legislation

An alternative approach to incorporation could be considered in order that socioeconomic rights become part of the constitutional discourse in Hong Kong. The approach suggested here, although novel, finds support with recent jurisprudential developments. The starting point is the government's stated position on incorporation of the ICESCR which requires emphasis. A chief reason it gave for not enacting an equivalent law to the HKBORO (which incorporates the ICCPR by replicating large sections of it) for the ICESCR was that it is already "incorporated into our domestic law through several Articles of the Basic Law… and through provisions in over 50 Ordinances"[109] which "*more effectively* protect Covenant rights than would the mere re-iteration in domestic law of the Covenant provisions themselves."[110] In other words, the government has contended that rights contained within the ICESCR are more adequately protected by the passage of sector-specific legislation, whereby the scope of those rights is subject to legislation. This position corresponds with the trigger mechanism of Article 39(1) of the Basic Law which provides that the ICESCR "shall be implemented through the laws of the Hong Kong Special Administrative Region." Pursuant to Article 39, incorporation through the mechanism can either take a direct or indirect form: directly through comprehensive implementation of a treaty into one legislative act (e.g. the HKBORO) or indirectly through sector-specific legislation, as described above.

Given this position, a principled line of argument for the courts to adopt in future is that the ICESCR can be used in sector-specific legislation that the government claims incorporate the treaty in Hong Kong's domestic law. While this is an underexplored point in the literature,[111] this approach might circumvent judicial difficulties that have arisen from the lack of incorporation in one single law. Indeed, the committee does not mandate passing a single piece of legislation to implement the ICESCR (though it supports enactment of the covenant's provisions while recognizing that other legislative and other actions are necessary to implement it fully). In General Comment No. 9, States Parties were said to have the discretion to decide the appropriate means to give effect to the rights contained in the ICESCR.[112]

There are growing judicial signals that indirect incorporation is a valid approach to constitutional interpretation. Observations from the Court of Final Appeal (CFA) in *Ho Choi Wan v. Hong Kong Housing Authority*[113] indicate that the principle of affordable housing in the Housing Ordinance (Cap 283) reflects the right to an adequate standard of living, including housing, contained in Article 11 of the ICESCR.[114] Despite rights-friendly leanings here, the decision came with the caveat that the ICESCR had not been taken into account, although it was relevant.[115]

In *GA v. Director of Immigration*,[116] Ma C.J. was more explicit: "... there can be incorporation of individual provisions of the Covenant by different statutes."[117] This reinforced

109. For example: Arts. 27, 36, 37, 137, 144, and 149, Second Report (2003), *supra* note 106, para. 2.3.
110. *Ibid.* (emphasis added).
111. Ramsden & Marsh (2014b), pp. 290–3.
112. CESCR General Comment No. 9 (2009a) (GC No. 9), para. 5.
113. *Ho Choi Wan v. Hong Kong Housing Authority* [2005].
114. *Ibid.*, *per* Bokhary P.J. in his dissenting judgment, para. 67.
115. *Ibid.*, paras. 65–68.
116. [2014] (*GA* (CFA)). For commentary on this case of relevance to discussion here, see Kong (2015).
117. *GA* (CFA), *ibid.*, para. 60.

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earlier recognition by the Court of Appeal (CA) of arguments based on sector-specific provisions in *MA v. Director of Immigration*.[118] Accordingly, there is good authority to support the contention that sector-specific legislation incorporates and gives constitutional effect (see below) to certain rights contained in the ICESCR.[119]

Most recently, in *Kong Yunming v. The Director of Social Welfare,*[120] the CFA relied upon the report submitted to the CESCR by the government to highlight its claim that some of the ICESCR articles have been implemented through different domestic laws, thereby bolstering the argument that the ICESCR is incorporated into Hong Kong's domestic legal order.[121]

The shift in the approach of the courts in this regard is one worth noting. Until recently, the Hong Kong judiciary showed little interest in communications between government and the CESCR.[122] Indeed, one reason precluding the development of justiciable socioeconomic rights in Hong Kong has been the very limited reference to the ICESCR in decided cases.[123] Where reference has been made to the covenant, it has largely been in the sensitive context of immigration matters, involving vulnerable persons[124] at the periphery of destitution.

Perhaps for this reason, Hong Kong courts have been reluctant to engage with the possibility that the ICESCR is able to provide a source of enforceable rights in other contexts or, failing that, guidance when interpreting domestic laws. While it is true that asylum seekers face heightened levels of risk in their country of origin, it is not the case that such risks are present in the host territory. As such, the focus has been on addressing the competing problem of vulnerability and destitution faced by asylum claimants. It is submitted that cage tenants represent similar levels of vulnerability either in terms of their physical and mental health needs, or in light of their inability to maintain economic self-dependence.[125] Without access to the CSSA rent subsidy, cage tenants face an equivalent risk of destitution that places them in need of "targeted assistance."

As underscored by the CFA in *Kong Yunming*, CSSA's purpose "aims to provide a welfare benefit addressing basic, 'safety net' needs."[126] The importance of the courts' dictum here cannot be understated. Prior to the CFA's pronouncements in *Kong Yunming*, there was a tendency for the court to adjudicate on socioeconomic issues using the framework of CPR: litigation invariably focused on the content and scope of the right to equality in the attainment of social welfare entitlements. *Kong Yunming* indicates a shift away from this more traditional approach, by giving meaning to social welfare rights under the Basic Law.

118. [2012] (*MA* (CA)).

119. *Ibid.*, para. 134.

120. *Kong Yunming* (CFA), *supra* note 80.

121. Bokhary N.P.J. in his concurring judgment accepted the use of the ICESCR to inform the content of the right to social welfare. However, his judgment makes it clear that the claim could have succeeded without reliance on the ICESCR: *ibid.*, paras. 173–174.

122. Petersen (2007), p. 48.

123. *Ibid.*

124. "Article 41 of the Basic Law calls for purposeful construction in the context of the Basic Law as a whole. Upon such a construction, it will be seen at once that some Chapter III fundamentals, for example freedom from torture, must by their very nature and in conformity with international human rights norms, extend to all persons present in Hong Kong. But that is not so in regard to the right to social welfare": *Kong Yunming* (CFA), *supra* note 80, para. 163.

125. In 2009, the government conceded that individuals were made vulnerable because they had no access "to essential services and opportunities such as housing": HKSAR Government, Labour and Welfare Bureau (2009), pp. 4–5.

126. *Kong Yunming* (CFA), *supra* note 80, para. 23.

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Article 36 of the Basic Law recognizes the right to social welfare.[127] Jurisprudence prior to *Kong Yunming* essentially treated this right as non-justiciable, its having to be read in line with general government discretions to "develop and improve" the system, which could go either way—progressively or retrogressively. However, by delineating CSSA as a form of welfare benefit which addresses "safety net" needs, the CFA has demonstrated its "preference for establishing a core content for the right [to social welfare]."[128] By acknowledging that the protections afforded by Article 36 contain *at a minimum* the provision of "basic needs" of residents, this decision paves the way for future contestation as to the precise scope of welfare and what amounts to "basic needs." Indeed, in ruling that the constitutional protection for the right to social welfare provided by Article 36 is imbued with a minimum core content, Albert Chen has argued that the difficulties of justiciability ordinarily associated with enforcing socioeconomic rights under the ICESCR are circumvented[129]—an outcome that was "perhaps an unintended consequence."[130] This is germaine to categories of persons like cage tenants whose essential allegation of rights violations focuses on the failure of government to meet its minimum core obligations with respect to the right to adequate housing. Following *Kong Yunming* (CFA), such claims appear to be on a stronger (constitutional) footing.

Against this, the Hong Kong government has recourse to the leading judgment in *Kong Yunming* (CFA), where Riberio P.J. stated that the constitutional right to social welfare was not absolute. Limitations to Article 36 are therefore possible although they must be justified on a proportionality analysis.[131] He further held that this was not a "fundamental right"[132] but one that involves allocation of financial resources under the auspices of socioeconomic policies.[133] As such, a "wide margin of discretion" would be afforded to government when the court conducted its constitutional review and proportionality scrutiny. The only circumstances in which such policies would be struck down would be those where the act of government was "manifestly without reasonable foundation," "manifestly unreasonable," or "wholly irrational."[134]

While this may appear at first blush to have a restrictive effect on the development of socioeconomic rights protection in the territory, two important ramifications flow from *Kong Yunming* (CFA). First, as a result of this landmark decision, the Hong Kong courts have signalled that justifications provided by the government on public policy and resource allocation to restrict such rights are more open to scrutiny. The corollary of this is that the government will be expected to undertake its constitutional duty to protect the right to social welfare (a right that naturally encompasses claims to adequate housing) with more seriousness.

Second, while it is correct that wide discretion is given to the state when devising its socioeconomic policies, and that arguments based on proportionality will be open to

127. As explained by the court, the approach taken in *Kong Yunming* "has the advantage of dispensing with proof of the element of discrimination," *ibid.*, para. 19.

128. Kong (2014).

129. Chen, *supra* note 85, p. 23.

130. *Ibid.*, p. 24.

131. *Kong Yunming* (CFA), *supra* note 80, paras. 36, 39.

132. *Ibid.*, para. 42.

133. *Ibid.*, para. 41.

134. Chen, *supra* note 129, p.16.

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government to argue, the growing influence of the ICESCR and treaty-compliant manner in which Article 36 of the Basic Law is interpreted will inevitably lead to courts' being confronted with a need to faithfully give effect to provisions of the covenant. In particular, the approach of restrictions on ICESCR rights, under Article 4 of the ICESCR, is relevant to understanding minimum core obligations. The provision states that limitations must be "compatible with the nature of these rights." The Limburg Principles on the Implementation of the ICESCR (Limburg Principles) indicate that this element "requires that a limitation shall not be interpreted or applied so as to jeopardize the essence of the right concerned."[135] In other words, "non-derogable" components of the ICESCR exist which "rule out certain extreme restrictions."[136] These components, which represent minimum core rights within the ICESCR, cannot be restricted.[137] From this, it can be argued that limitations on essential care or basic needs are clearly precluded under the covenant. This position is reinforced by the Limburg Principles interpretation of Article 4 as a provision which "was not meant to introduce limitations on rights affecting the subsistence or survival of the individual or integrity of the person."[138]

Equally, limitations grounded in proportionality arguments face difficulties where the limitation that is under examination relates to a minimum core obligation under the ICESCR. The minimum core already corresponds to such a low baseline level as to make any governmental claim that the "public interest" should necessitate the extirpation of survival rights unconvincing.[139]

Reading Article 36 alongside Article 145 of the Basic Law, the CFA in *Kong Yunming* further recognized that "the intention of the Basic Law must be taken to be that such administrative system … is to be treated as a system providing 'social welfare in accordance with law'."[140] It provides the "framework for identifying a constitutionally protected right to social welfare" and modifies its scope accordingly through a "crystallised set of accessible and predictable eligibility rules."[141] Reviewed and evaluated by the Legislative Council (LegCo) (Hong Kong's legislature[142]), it follows that CSSA becomes a legal manifestation of the right to social welfare, constitutionally protected by Articles 36 and 145 of the Basic Law (in tandem with Articles 9 and 11 of the ICESCR, via the trigger mechanism of Article 39 of the Basic Law).

It is argued therefore that Article 11 is indirectly incorporated and given constitutional effect (at the very least, by providing a minimum core content to the housing dimension of social welfare) through the CSSA. Indeed, the government itself has recognized, in principle, the importance of assisting everyone with "access to adequate and affordable housing,"[143] thus substantiating the purpose embodied by the CSSA. By directly acting to provide a rent subsidy, the government has recognized (and undertaken)

135. Limburg Principles, para. 56.
136. Saul et al., *supra* note 20, p. 257.
137. *Ibid.*
138. Limburg Principles, *supra* note 135, para. 47.
139. Saul et al., *supra* note 20, p. 258.
140. *Kong Yunming* (CFA), *supra* note 80, paras. 23, 25.
141. *Ibid.*, paras. 33–36.
142. Legislative Council (2008).
143. HKSAR Government, Transport and Housing Bureau (2014), p. 3.

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responsibility[144] to assist those who cannot support themselves in meeting their basic needs. Therefore, through the concept of indirect (or sector-specific) incorporation, the Social Welfare Department is bound to exercise its administrative discretion consistently with the ICESCR.[145]

In the face of abundant violations relating to cage-housing, not least those identifiable through the minimum core approach, it cannot be ignored that the obligation under Article 11 is also tied to the economic abilities and regulatory capacities of the state. Where Hong Kong fails to meet the minimum core content of Article 11, it bears the burden of showing it has used all available resources to prioritize fulfilment of its duty.[146] The territory has an enviable budget surplus[147] which, accordingly, subjects it to a higher level obligation of realization.[148] The difficulty however remains with a judicial deference towards the state that places limits on intervention where social welfare is concerned. Stock V.-P., in *Kong Yunming* (CA), observed in *obiter* that the extent to which the covenant can be enforced depends on the nature of the relevant ESCR. It was not that the covenant contained a set of "second-class rights," but rather that "it is always a question of the particular right in issue and what measures are required to fulfill the obligation." In this regard, some rights not categorized as "resource sensitive" were immediately enforceable. On this basis, social welfare rights were excluded.[149]

The reticence of Hong Kong courts in this regard appears to stem from the implication that they cannot steer government towards obligations that may be financially onerous.[150] This deference is, no doubt, a corollary of the concern about the courts' institutional competencies including its lack of expertise to implement, manage, and appreciate the ramification of allocation of social welfare benefits.[151] Yet, Hong Kong's absence of democratically elected political branches, executive-led government, and a distinct lack of mechanisms for popular participation in public affairs arguably places an increased onus on the courts to take a more robust approach to developing human rights principles. Indeed, the arguments raised here against limitations on the minimum core of social welfare rights should assist the judiciary in this regard.

As long as China decides not to be a party to the Optional Protocol to the ICESCR, the committee cannot accept individual complaints related to Hong Kong, and cage tenants will have no effective means of redress for their grievances other than through the local courts. A shift in the current legal and political environment therefore is needed to use the ICESCR as a tool for challenging insufficient rent subsidies. As can be seen with the recent recognition in the CFA that indirect incorporation is a viable basis to argue for covenant rights, this shift has already begun. Additionally, *Kong Yunming* (CFA) represents a significant departure from previous judicial practice. This decision underlines not only the importance of the Basic Law

144. As supported by the government's own research statistics on the percentage of the local population inhabiting "temporary housing" (i.e. residences akin to roof-top structures or cage-cubicles): HKSAR Government, Housing Authority (2015).

145. See Ramsden & Marsh (2014b), p. 271; see also Ramsden & Marsh, *supra* note 102, p. 591: if a court considers that the Social Welfare Department has failed to strike the correct balance between human rights and public interest, taking into account competing administrative alternatives, the impugned decision can be invalidated.

146. GC No. 3, *supra* note 81, para. 10.

147. For 2015–16, a surplus of HK$36.8 billion is forecast with fiscal reserves of *c.*HK$856.3 billion, which is the equivalent to 23 months of government expenditure: Hodgson Impey Cheng (2015).

148. See Langford & King (2008), p. 495.

149. *Kong Yunming v. Director of Social Welfare* [2012] (Kong Yunming (CA)), paras. 79–84.

150. *Kong Yunming* (CFA): "... courts are not ideally equipped to undertake resource allocation," *supra* note 80, *per* Bokhary N.P.J., para. 147.

151. See Fuller (1978); see also Chan (2010).

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guarantees, but also a new preparedness on the part of the courts to properly analyze the substantive justification and proportionality of policies in the arena of social welfare. If this trend is to continue, the fulfilment of the ESCR may move beyond the exclusive prerogative of executive policy, with the result that the mere discourse of human rights standards currently inhabiting judicial decision-making transforms into a constitutional discourse upon which a future for cage tenants can be built.

4. ICCPR: INDIRECT PROTECTION OF ESCR

As the foregoing analysis has shown, if a cage tenant wishes to claim a right to adequate housing via Article 11 of the ICESCR, they face difficulties domestically relating to its unincorporated status. Against them, there is little evidence of claims which have gone before the courts in that vein—applicants instead relying on policy-based arguments which ultimately have proved unmeritorious.[152]

The ICCPR, which has been incorporated into domestic law, does not directly recognize a right to an adequate standard of living. Nonetheless, it can be used to challenge restrictive social welfare policies that impact upon CPR.[153] Invoking the ICCPR in this way recognizes the indivisible nature of the two treaties.

4.1 Article 3 of the HKBORO

One argument involves the injunction against IDT as prescribed by Article 3 of the HKBORO (cf. Article 7 of the ICCPR).[154] This could be raised if the welfare subsidy complained of is sufficiently connected to housing conditions tantamount to IDT.[155] The difficulty with IDT lies in the highly context-specific nature of the right. Definition of all conditions that will engage the right has evaded the court's reach.[156] Nonetheless, a survey of Hong Kong and international jurisprudence illustrates that it is possible to draw a correlation between conditions endured by cage tenants and conditions courts have accepted as encompassed by the protection of Article 3.

4.2 Severe Ill-Treatment

The extent to which this right is of practical value will turn upon the minimum level of severity for the right to be engaged. Hong Kong courts have explained ill-treatment must

152. On 11 June 2014, the Court of First Instance delivered its judgment in the first challenge brought by a CSSA recipient who sought judicial review over the adjustment mechanism for the private rent subsidy (*Suen Mo Joel v. Director of Social Welfare* HCAL 117/2012). The court was not required to engage with the ICESCR or ICCPR. Instead, the applicant's claim focused on a 1996 policy under which the allowance paid to CSSA recipients renting private flats would be enough to cover the level of rent paid by 90% of recipients, i.e. the object of the rent allowance was to cover the majority of the actual rent paid by the CSSA recipients. Requesting that the government should revert to that original policy, the applicant asked the court to quash the current policy which provides a maximum level of allowance based on inflation only. Ruling against the applicant, the Judge referred to a memorandum between departments in 1998 and decided the 1996 system was never adopted as a policy.

153. See remarks, *supra* note 19. For an example of this in the context of the right to work, see Ramsden & Marsh, *supra* note 102.

154. See also UDHR, *supra* note 12.

155. Generally, the courts have not delineated between the two types of treatment, referring instead to the "proscribed treatment," which encompasses both: Amos (2014), pp. 228–30. See e.g. *R v. Drew* [2003].

156. *R (on the application of Q) v. Secretary of State for the Home Department* [2003] (Q [2003]).

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attain a "minimum level of severity" and involve "bodily injury or intense physical and mental suffering,"[157] adopting the approach taken in English jurisprudence. In this vein, IDT must amount to serious ill-treatment.[158] It must deny "the most basic needs of any human being" to a "seriously detrimental extent."[159]

An objective test is applied, with the result that "minimum" becomes a relative term.[160] In defining severity, all circumstances of the case are relevant,[161] including sex, age,[162] as well as the nature and context of the treatment, such as its duration and its physical and mental effects and impact upon the health of the victim.[163] A person's living conditions could therefore come within the ambit of IDT if this minimum level is attained.[164] While a right to receive welfare benefits is not expressly provided for in human rights instruments which contain the injunction against IDT, where a person cannot work or would be destitute without support, an obligation to provide welfare may be indirectly engaged.

Case-law has directly addressed this issue. In *R (Q and others) v. Secretary of State Home Department*,[165] the English courts were confronted with destitute asylum seekers who were prohibited from working and denied social security and accommodation. As this involved a group of individuals who were unable to support themselves, the court found that withdrawal of support could constitute a violation under Article 3 of the European Convention on Human Rights (ECHR).

In *Larioshina v. Russia*,[166] the European Court of Human Rights (ECtHR) dealt with the causative impact of an insufficiently low pension plus additional social benefits on the physical and/or mental health of an elderly woman who lived off these combined benefits. It held insufficient benefits received which led to a health condition could amount to the minimum level of severity falling within Article 3 of the ECHR, although no violation was found on the facts.

Koch has rightly argued that the decision leaves a great deal of ambiguity as to the line drawn between underpay and IDT.[167] Koch focuses on the amount of money awarded to frame the discussion: "Since the Court in principle has acknowledged that there exists a decency threshold or minimum core right to social cash benefits under Article 3, one cannot avoid asking how small a cash payment can be without infringing the threshold?"[168] Whilst Koch's instinct that "[p]overty does not necessarily amount to IDT"[169] is well founded, her

157. *Ubamaka v. Director of Immigration* [2011], para. 173.

158. *R (Pretty) v. Director of Public Prosecutions* [2001], *per* Lord Hope, para. 90.

159. *MA v. Director of Immigration* [2011] (*MA* (CFI)), para. 76.

160. *R (Pretty)* [2001], *supra* note 158, *per* Lord Hope, para. 91. See also *Grant v. Ministry of Justice* [2011] EWHC 3379 (QB).

161. See e.g. *Soering v. UK* Application no. 14038/88.

162. *Ireland v. UK* Application no. 5310/71.

163. *R (on the application of B) v. Responsible Medical Officer, Broadmoor Hospital* [2005], para. 52.

164. As held in *Pancenco v. Latvia*, 28 October 1999 (inadmissibility decision), which looked at IDT in the context of Art. 3 of the ECHR.

165. *R (Q and others) v. Secretary of State Home Department* [2003]. See also *R (on the application of Bernard) v. London Borough of Enfield* [2002]; *R v. Secretary of State for the Home Department, ex parte Adam* [2006].

166. *Larioshina v. Russia* Application no. 5686900, admissibility decision dated 23 April 2002. See also *Francine Van Volsem v. Belgium* Application no. 14641/89 admissibility decision of European Commission of Human Rights dated 9 May 1990.

167. See Koch (2009), chapter 8.

168. *Ibid.*, p. 182.

169. *Ibid.*

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delineation of the threshold for Article 3 in this context extends only so far as the duration of treatment. Comparing *Tyrer v. UK,*[170] which equated three strokes with a birch to degrading treatment under Article 3, Koch posits that "one may ask why or whether it is less degrading and humiliating to live permanently on € 25 than having to tolerate a physical interference for an even very short period? (sic)."[171]

Whilst the duration of treatment is undoubtedly determinative of the gravity of the violation endured, it says little about the violation itself. In further elaborating upon the scope of IDT, the Hong Kong courts have relied upon *Pretty v. UK*,[172] in which the ECtHR discussed the type of treatment that would come within the scope of Article 3:

> Where treatment humiliates or debases an individual, showing a lack of respect for, or *diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority* capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion *or other measures*, for which *the authorities can be held responsible*.[173]

This test was also referred to by Lord Bingham in *Limbuela v. Secretary of State for the Home Department*,[174] which concerned denial of support to asylum seekers who failed to claim asylum in the UK as soon as reasonably practical. Lord Bingham summarized that "[t]reatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being."[175] He further reasoned that "[i]n a context … not involving the deliberate infliction of pain or suffering, the threshold is a high one."[176]

The issue of establishing IDT in Hong Kong under Article 3 of the HKBORO has since arisen in the context of ESCR. In *MA*,[177] the applicants, comprising four mandated refugees and one screened-in torture claimant, argued that the government's stringent policy violated their rights under both the ICCPR and ICESCR. Specifically, they argued that government policy infringed the right to work, right to privacy, and, of particular relevance here, the prohibition on IDT. The court held that the factor of a prolonged period of prohibition on work was a "causative factor"[178] of severe major depression, further conceding that severe major depression could amount to an extreme form of "intense physical or mental suffering."[179] The judgment also underscored that IDT was not solely focused on treatment that placed refugees in a position of destitution, but also the denial of individual dignity. Life as an individual was "not all about survival and subsistence"; an individual

170. *Tyrer v. United Kingdom* Judgment of 25 April 1978.

171. Koch, *supra* note 167, p. 182.

172. *Pretty v. UK* (2002) 35 EHRR 1. See *GA* (CFA), *supra* note 116, para. 48.

173. *R (Pretty)*, *ibid.*, para. 52 (emphasis added).

174. *Limbuela v. Secretary of State for the Home Department* [2006].

175. *Ibid.*, para. 7.

176. *Ibid.* See also *Ubamaka* (CFA), *supra* note 101, para. 172.

177. *MA* (CFI), *supra* note 159.

178. Andrew Cheung J.: "... where it is medically established that the prolonged prohibition on employment in the circumstances described has resulted in or materially contributed to the development or maintaining of a serious mental condition, such as a major depression … the case for saying that the individual has suffered, or, if the prohibition [on work] is not relaxed, would suffer, inhuman or degrading treatment is strong," *ibid.*, para. 84.

179. *Ibid.*, para. 76.

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could suffer IDT arising from feelings of helplessness and social exclusion in being unable to work.[180]

An analogy can be drawn with cage tenants. Waiting lists for public housing are of such a length as to have a deterrent effect, constructively forcing them to reside in cage-cubicles instead.[181] There they are surrounded by overbearing uncertainties of gaining public housing and spontaneous evictions, as has been evidenced by local non-governmental organizations (NGOs).[182] Given the statistics on the duration of the waiting list for public housing, the indefinite nature of waiting to improve living conditions may lead to conditions including helplessness, social exclusion, and severe depression. No doubt for these reasons, the UN described cage-housing as "an affront" to dignity.[183]

However, despite *obiter* discussion in *MA* on this point, a loss of dignity is relevant but not determinative.[184] The courts are ultimately required to look at the effect of the specific treatment alleged and, although a factor, emotional distress would not satisfy the threshold by itself.[185] It would be necessary to show certain circumstances specific to cage-housing[186] in fact caused them serious suffering. This could be either physical or psychiatric injury or even psychological harm.[187] Distress which is deemed particularly serious and can be evidenced, directly or inferentially,[188] would therefore meet the objective standard.[189]

Cage-housing conditions affect residents physically and psychologically. Direct evidence of anguish and distress caused by the conditions in cage-cubicles abounds.[190] Without proper facilities for the everyday satisfaction of basic needs, life is made problematic and unsanitary; cooking, eating, cleaning, personal hygiene routines, sleeping, and even intimacy are all relegated to a publicly shared complication. With large numbers living together so squalidly, the risk of contracting diseases becomes unavoidable[191] and the resultant lack of security, loneliness, and despair can only impair mental health.[192] It is possible to infer that distress of a sufficient level for IDT would follow. There is also a further risk of cage tenants suffering "from a mental condition that meant that [they] could not fully appreciate [their] own

180. *Ibid.*, para. 81.

181. Despite the government's target to secure public housing for applicants within 3 years, waiting times exceed this: HKSAR Government, Housing Department (2015). See further SoCO, *supra* note 28.

182. *Ibid.*, para. 8.5.

183. CESCR, *supra* note 7, para. 25.

184. *R (on the application of T) v. Secretary of State for the Home Department* [2003] (*T* [2003]), para. 12, in reliance upon *East African Asians v. UK* (1973); *Lorse v. Netherlands* (2003).

185. (*T*) [2003], *ibid.*

186. *Ibid.*, para. 16.

187. Medical evidence would substantiate a claim: *MA* (CFI), *supra* note 159, para. 84.

188. Where a claimant has the burden of proof, the standard is the balance of probabilities: *Grant* [2011], *supra* note 160, para. 14.

189. *Ibid.*, para. 52.

190. Referenced throughout this article though see generally SoCO, *supra* note 28.

191. This is supported by research conducted by SoCO since 1990 on cage-homes, indicating chronic illnesses are common among residents, with only 21% of cubicle residents and 31% of cage-home residents surveyed not suffering any chronic illness: see LSE, *supra* note 38, p. 2.

192. When surveyed by SoCO, 40% of people with mental illness said that their mental health had worsened as a result of living in inadequate housing: *ibid.*, pp. 2–3. The causal link between crowded conditions and deterioration of mental and physical wellbeing is well-established: See e.g. Altman (1975); Freeman (1975); Jain (1987), all cited in Cheung, *supra* note 5.

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suffering, or protect [themselves] from it"—a form of vulnerability English courts have highlighted as being capable of satisfying the objective test.[193]

It is further necessary to factor in the status of the victim of the ill-treatment in making a determination. In this regard, children and, by analogy, the elderly[194] are particularly vulnerable if exposed to cage-cubicle conditions and this is a factor which the courts must consider.[195] In the case of children, family life is disrupted. Children are likely affected in that some develop low self-esteem through self-comparison between themselves and their peers.[196]

In determining then whether the threshold for IDT has been met, a contextual approach requires examination of the length of time that the individual was or is to be deprived of the right in question, along with the nature of the detriment suffered as a direct result of the treatment.

4.3 A Duty to Assist

Once it has been established that there is a "substantial and imminent"[197] risk of ill-treatment of the kind that falls within the scope of IDT, the question becomes whether denial of sufficient rent subsidy could reasonably be said to amount to treatment that required positive action to be taken on the part of the authorities. In other words, how is responsibility imputed upon the government for the suffering of cage tenants? A finding of liability is significant in light of the absolute nature of the Article 3 right.[198]

The injunction against IDT imposes both negative and positive duties on a government which equate to acts (treatment) and failures to act (failure to treat).[199] Positive obligations are distinguished from negative obligations in that the former require positive intervention by the state, whereas the latter require it to refrain from interference.[200]

Confusion in the English courts on this issue has shown that distinguishing between positive and negative duties is no simple task.[201] A line of English authority which interpreted the scope of state obligations under Article 3 of the ECHR suggested that the dichotomy between negative/positive had become diminished in importance: "The real issue in all these cases is whether the state is properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim."[202] Despite the boundary often being an artificial one, the jurisprudential line taken by courts indicates that it is a distinction to be maintained.[203]

In the example of cage tenants, while it is possible to demarcate between the state's obligation to ensure that no one is destitute (a positive obligation to provide social assistance) and the state's obligation to protect persons against violations by non-state actors (also a

193. *Grant* [2011], *supra* note 160, para. 52.

194. A relevant concern because Hong Kong is a dramatically ageing population, whereby one in three people will be a senior citizen by 2041: Li (2015).

195. See *In re E (a child)* [2008], *per* Baroness Hale, para. 8; *R (M) v. Secretary of State for the Home Department* [2010], para. 1.

196. See Hong Kong Committee on Children's Rights (2012), para. 141.

197. *GA* (CFA), *supra* note 116, para. 2.

198. *Ibid.*, para. 44.

199. Amos, *supra* note 155, p. 230.

200. For more, see Akandji-Kombe (2007).

201. See discussion by Laws L.J. in *Gezer v. Secretary for State for the Home Department* [2004].

202. *Limbuela* [2006], *supra* note 174, para. 92; see also Lord Hope, para. 53.

203. Amos, *supra* note 155, p. 232.

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positive obligation), the distinction is unproblematic. The imposition by LegCo of a regime that provides rent subsidies to individuals, without which recipients would face destitution, and with knowledge that the subsidy bears no reflection of the actual cost of adequate accommodation, amounts to positive action directed against them and not to mere inaction.[204] On this basis alone, denying substantive and adequate welfare support for housing needs constitutes positive action undertaken by the Social Welfare Department that violates Article 3 of the HKBORO. Put differently, the Hong Kong government is under a positive obligation to provide support insofar as it is necessary to prevent cage tenants from experiencing conditions of degradation which would violate the injunction on IDT.

On this point, Lord Bingham in *Limbuela* explained that "A general public duty to house the homeless or provide for the destitute cannot be spelt out of article 3."[205] While this appears to navigate away from a general right to housing the destitute, he continued:

> But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, *by the deliberate action of the state*, denied shelter, food or the most basic necessities of life.[206]

While Lord Bingham's discussion of the threshold was in the context of destitute asylum seekers whose only recourse for survival was via welfare provided by the host state, the parallels in vulnerability between the former category of claimant and cage tenants, as argued earlier, is such that hard distinctions become less sustainable. Both have limited or no means to support themselves, and rely upon the state (which has undertaken to support them) in obtaining basic essentials, including accommodation.

It is further arguable that the rent subsidy policy in Hong Kong merely amplifies the reliance CSSA recipients have upon the state. Housing policies which, in effect, *compel* residents to reside in accommodation indistinguishable from a cage for survival can lead to perpetual dependence, isolation, loss of confidence, psychological and social problems, and the erosion of skills, as noted above, thereby placing this group at risk of perpetual supplication.

Indeed, an approach to articulating the right grounded in economic survival has gained traction in the Hong Kong courts. Fok J.A. in *MA* observed in *obiter*:

> … there is more to cruel, inhuman or degrading treatment and human dignity than either destitution or complete mental breakdown. It seems to me it is certainly arguable that *an inability to function economically* may well give rise to cruel, inhuman or degrading treatment.[207]

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204. Treatment implies something more than passivity on the part of the state: *Q* [2003], *supra* note 156, para. 56, where the denial of appropriate support amounted to positive action directed against asylum seekers. Bear in mind that it is not unlawful for the Secretary of State to decline to provide support unless and until it is clear that charitable support has not been provided and the individual is incapable of fending for himself. See *R (on the application of T) v. Secretary of State for the Home Department* [2004], para. 10; cf. authority that a state's mere inaction, such as the denial of social welfare, can also constitute IDT: *R (Adam) v. Secretary of State for the Home Department* [2004], para. 63.

205. *Limbuela* [2006], *supra* note 174, para. 7. Clements & Simmons (2008), p. 417, argue that Art. of the 3 ECHR would require states to provide basic accommodation where destitution was an alternative whereby physical or mental suffering reached the requisite minimum level. The authors explain this interpretation finds support with a line of authority (e.g. *O'Rourke v. United Kingdom* (2001)) and is further supported by the judgment in the government of the *Republic of South Africa v. Grootboom and Others* 2000 (11) BCLR 1169 (CC) which held that s. 26(2) of the South African Constitution must include measures "to provide relief for people who have no access to land, no roof over their heads and who living in intolerable conditions or crisis situations," para. 52. A parallel could also be drawn with Hong Kong's deficient housing programme and *Grootboom* which itself turned on the issue of defective planning. For further, see the discussion of *Grootboom* in Chen, *supra* note 129.

206. *Limbuela* [2006], *ibid.* (emphasis added).

207. *MA* (CA), *supra* note 118, para. 76 (emphasis added).

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This echoes *Khosa v. Minister of Social Development*,[208] where the Constitutional Court of South Africa spoke of the impact on a group of persons excluded from the constitutional right to social security, explaining that such exclusion

> ... is likely to have a severe impact on the dignity of the persons concerned, who, unable to sustain themselves, have to turn to others to enable them to meet the necessities of life and are thus *cast in the role of supplicants*.

Waldron's commentary on "treatment" gives pause for final thought here. He argues that IDT "provisions require *those in total control of another's living situation* to think about whether the conditions that are being imposed are *minimally fit for a human*, with characteristic human needs, vulnerabilities, life-rhythms, and so on."[209] Viewed alongside the Hong Kong and international jurisprudence, this article argues that CSSA recipients genuinely in need are subject to the *total control* of the state (either because of the inadequate subsidy the state provides, knowing destitution is the alternative, or the public housing it restricts to low and deterrent-like levels). In ruling therefore on whether the outcome of a particular policy is justified or not, an individuated assessment of the conditions experienced (i.e. those caused by government policy) would allow the courts to gauge whether they are *minimally fit* for that person—a useful reflection of the minimum core approach under the ICESCR. By virtue of their descriptor alone, it is hard to see how cage-houses could be viewed as *minimally fit* for anyone, not least in light of the material conditions portrayed here. As such, on any analysis, conditions found within all such structures *ought* to fall below this threshold. It follows that the CSSA policy would appear to violate the prohibition on IDT, generating a positive obligation on government to address the source of the mistreatment.

5. CONCLUSION

This article has examined the disturbing conditions endured by cage tenants in Hong Kong by looking at ways in which international human rights standards can be drawn upon in the adjudication and interpretation of constitutional rights in domestic courts. It is hoped the arguments presented in this article could serve as a guide for legislators seeking to give meaning to the right to adequate housing in Hong Kong.

Although the clearest solution to cage-cubicles would be to develop more public housing, thereby negating the need to rely on costly substandard private-sector alternatives, this article has explained why a deeply rooted governmental antipathy towards this subaltern class has resulted in a dearth of housing capacity. Providing sufficient levels of public housing to relocate cage dwellers will take several decades. In the meantime, the next best solution lies with an increase in the derisory rent subsidy to allow all CSSA recipients access to an adequate standard of living. Echoing words of Margot Salomon, it comes as no surprise that the difference between the protection of human rights and their denial is, invariably, political will.[210]

208. *Khosa v. Minister of Social Development* [2004] 6 SA 505 (CC), para. 76 (emphasis added), relied on by Bokhary N.P.J. in *Kong Yunming* (CFA), *supra* note 80, para. 184.

209. Waldron (2010), pp. 280–1 (emphasis added).

210. Salomon (2013), p. 296.

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Without necessary pressure from the courts, progress will remain slow. It has therefore been argued that the ICESCR and ICCPR are both a source of Hong Kong law from which enforceable rights flow and, concomitantly, an obligation upon the government to remedy violations by raising welfare entitlements. Examination of these human rights instruments shows the complexity of realizing the right to adequate housing in Hong Kong. But the fact that there is no comprehensive incorporation of the ICESCR into a single piece of legislation (as in the case of the ICCPR) is no bar. There can be incorporation of individual provisions of the covenant by different statutes. An analysis of the domestic jurisprudence indicates the courts' growing receptiveness to engage with key guarantees from the ICESCR, which do appear in one form or another, throughout different pieces of social legislation.

In light of the severe conditions experienced by cage tenants, the ICCPR may also be of assistance. Although this treaty contains no express reference to a right to adequate housing, this article has taken stock of jurisprudential developments in the arena of the prohibition on IDT in order to demonstrate how socioeconomic rights can be engaged indirectly through this covenant to provide a further avenue of redress for cage tenants. Invoking the ICCPR in this way recognizes the indivisible nature of the ESCR and CPR.

Nonetheless, the respective merits of each approach cannot be ignored. While the advantage of the ICCPR is its domestic incorporation through the HKBORO, its efficacy as an avenue for indirect socioeconomic rights protection is arguably limited by the high evidential threshold posed by the requirements of an IDT violation. Even where the hurdle of satisfying the courts that the requisite level of suffering has been met, this protection remains highly contextual and case-specific, with the result that it may only apply to the individual concerned rather than a category of individuals, thereby reducing the likelihood that this legal remedy will be of wider application. Conversely, despite the fact the ICESCR has not been directly incorporated in Hong Kong law, the protections afforded under the covenant, in particular its elucidation of a minimum core content of key socioeconomic rights, may provide a firmer footing for cage tenants who assert that the current protection of social welfare rights by domestic legislation is inadequate. Crucially, the courts' recent jurisprudence establishing a minimum core content of the constitutional right to social welfare is potentially far-reaching (and avoids the legal obstacle of incorporation (or lack thereof) posed by Article 39 of the Basic Law). By acknowledging that Article 36 of the Basic Law includes, at a minimum, the provision of basic needs of Hong Kong people, the courts have brought local legislation closer in line with international standards. This shift in approach by the judiciary should precipitate, if nothing more, the advancement of ICESCR-friendly statutory interpretation.

The Hong Kong government has implemented a raft of housing policies marked by minimal compassion which, cumulatively, have aggravated rather than relieved the physical and mental distress of those most in need. By devising and administering the policy that provides for rent subsidies—a paradigmatic act of state—responsibility is unquestionably engaged. Yet cage-housing is an issue where signs of improvement are as invisible as the unfortunates captive inside. As the wealth-divide gap widens, the problem can only worsen. Fifteen years following the handover to China, the UN Development Programme indicated that more than a third of Hong Kong's income is controlled by the wealthiest 10%, whilst the bottom 10% share only 2%. Income disparity is only set to rise as an ageing population and low birth rate give way to an ever-shrinking workforce. It is against this background that growing reliance on CSSA will only exacerbate the cage-home phenomenon.

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In the context of welfare subsidies, this should be a matter of grave and public concern. Instead, that which should shock and concern is slowly sanitized as a pragmatic, unavoidable response to ineffectual housing policy. A "safety net" ought to mean an *adequate* standard of living, not merely the bare *minimum*. Nor is placing people in cage-housing conducive to enhancing their ability to re-enter the labour market and recover the ability to provide for themselves and their families. Poor people living in subdivided apartments do so because they have no choice. Political inactivity on this issue simply augments the problem. A more humane approach is called for in the setting of housing welfare policy—one that embraces the international standards highlighted in this article. To this end, human rights jurisprudence has opened a promising door beyond which it can be argued that housing welfare policies violate these standards. For those who inhabit cage-housing, the time has come to step through it.

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