Student Note

Discussions on Rights to Family: Analysis of the Lo-Sheng Case

Hui-ling Hung *

ABSTRACT

Lo-Sheng Sanatorium was built in 1930 as a government-run leprosy institution and it was used for compulsory segregation until 1962. In 2009, the Supreme Administrative Court in Taiwan found a decision by the Department of Rapid Transit Systems to relocate compulsorily the residents of Lo-Sheng Sanatorium to be both lawful and reasonable. This compulsory relocation has drastically changed the Lo-Sheng residents' way of life, which had been established for the past fifty years. However, when this judgment was issued by the Supreme Administrative Court, the ICCPR (International Covenant on Civil and Political Rights) had already come into force in Taiwan. Signing the ICCPR was meant to signify progress and to emphasize human rights protection in Taiwan; instead, the compulsory relocation of the residents of Lo-Sheng Sanatorium amounts to a deprivation of the right to family, and thus depicted the opposite picture of defending human rights. This article will focus on discussing whether the right to maintain residence in a particular place constitutes a right to family under article 17 of the ICCPR. Furthermore, the Lo-Sheng case can be examined as core research into the function of Supreme Administrative Court in Taiwan.

Keywords: *Lo-Sheng Sanatorium, Rights to Family, ICCPR*

* LL. M., College of Law, National Taiwan University. E-mail: r98a21031@ntu.edu.tw.

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I. INTRODUCTION

Lo-Sheng Sanatorium was built in 1930 as a public leprosy institution and it had been used for compulsory segregation until 1962.[1] Although admission since then has been on a voluntary basis, the history of segregation continues to have a traumatic impact on patients' reputation, lives and family relations.

In 2009, the Supreme Administrative Court in Taiwan found a decision by the Department of Rapid Transit Systems to compulsorily relocate the residents of Lo-Sheng Sanatorium (hereafter "the residents") to be lawful and reasonable. This compulsory relocation into two new medical buildings has drastically changed the Lo-Sheng residents' way of life. Their life pattern had been established for fifty years in a well-organized community where space was without barriers and adapted for disabled residents. However, when the judgment (hereinafter "the *Lo-Sheng* case")[2] was issued by the Supreme Administrative Court, the International Covenant on Civil and Political Rights (hereinafter "the ICCPR") had already come into force in Taiwan. The ratification of ICCPR was meant to signify progress and to emphasize human rights protection in Taiwan; however, the compulsory relocation of the residents in Lo-Sheng amounts to a deprivation of the right to family, and thus depicted the opposite picture of defending human rights.

Investigations have shown an increasing number of similar cases relating to aboriginal tribes which have been compulsorily relocated due to urban planning in Taiwan.[3] The main issue within these cases discussed in this paper is whether the right to maintain residence in a particular place constitutes rights to family under Article 17 of the ICCPR. Furthermore, the *Lo-Sheng* case can also be examined as core research into the function of Taiwan's Supreme Administrative Court.

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1. The Lo-Sheng Sanatorium was built during the Japanese colonial period, during which the Japanese government adopted a policy of compulsory isolation towards the leprosy patients. The organization of leprosy control programs in the South-East Asia and Western Pacific Regions was discussed at a WHO interregional conference in Tokyo in 1958. The conference recognized that leprosy is low infection risk, and recommended the abolition of segregation. In 1961, the government of the Republic of China promulgated The Regulations of Leprosy Control in Taiwan Province, and abolished segregation, which was replaced by outpatient treatment. The text is available (in Chinese) at Happy Losheng, *Lo-sheng Yüen Wanchêng Shuiming* [*The complete introduction to the comteporary situation of Lo-sheng Sanatorium*], (Mar. 3, 2006), http://www.wretch.cc/blog/happylosheng/3528457.

2. Tsuikao Hsingchêng Fayüen [Sup. Admin. Ct.], 98, P'an Tzu No. 1515 (2009) (Taiwan).

3. The relocation of the San-Ying aboriginal tribe to New Taipei City is another example of compulsory relocation due to the urban planning.

II. FACTUAL BACKGROUND TO LO-SHENG SANATORIUM

Lo-Sheng Sanatorium is a public leprosy institution, built in 1930, where leprosy patients were formerly compulsorily segregated. The sanatorium was built according to traditional Taiwanese architectural design, consisting of a courtyard and single-story houses spread out in an open field. The compulsory segregation policy was not abolished until 1962, and the segregation had a traumatic impact on patients' reputations and their family lives.[4] During the period of the compulsory segregation, the patients were forbidden to contact their families, and by the time this policy was abolished, they had long lost all contact with their relatives. Furthermore, the segregation had stigmatized and excluded patients from the society, and turned them into a marginalized group. Although residence has been voluntary since 1962, most residents have chosen to remain living there, since they have nowhere else to reside.

The sanatorium is located in New Taipei City, Xinzhuang District, and is managed by the Department of Health under the Executive Yuan. The land, houses, and medical equipment are all State-owned property. In 1994, the Executive Yuan, through the Department of Rapid Transit Systems, approved the construction of the Xinzhuang metro station on the site of the sanatorium. To facilitate this, the Executive Yuan in 2002 altered the titleholder of the land from the State to Taipei City, and put it under the control of the Department of Rapid Transit Systems. At the same time, a conference was held with the Lo-Sheng Sanatorium residents on 10 June 2002 to decide the amount and procedure for compensating residents who would voluntarily relocate to a new medical institution.

Following this, the Department of Rapid Transit Systems informed that the sanatorium should be vacated prior to 13 March 2007. The Taipei County government (now the New Taipei City government) also informed the residents of sanatorium that it should either demolish all buildings and dispose of all equipment before 16 April 2007, or else the government would itself carry out a compulsory demolition. Meanwhile, the sanatorium was relocated to Huei-Long hospital, which has two eight-story modern medical buildings, and the patients were all required to move into this new location.[5]

4. Happy Losheng, *supra* note 1.

5. Taiwan Department of Health, *Losheng Sanatorium Introduction* http://www.lslp.doh.gov.tw/site_content.php?site_content_sn=21 (last visited Nov. 5, 2011).

III. THE SCOPE OF RIGHTS TO FAMILY

A. *The Legal Basis for Applicability of the ICCPR in Taiwan*

The ICCPR and the International Covenant on Economic, Social and Cultural Rights (hereafter "ICESCR") were ratified in Taiwan in March 2009, through the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (hereafter "the Act"). Both Covenants came into force on the 29th of October 2009;[6] nonetheless their legal status remains disputed,[7] although according to article 2 of the Act the protection of human rights under the two Covenants has status in domestic law. Therefore it can at least be inferred that the two Covenants have domestic law status in Taiwan.

Moreover, Article 28 (1) of the ICCPR establishes a Human Rights Committee (hereafter "the Committee") which is entitled to carry out three functions to ensure that the ICCPR is not toothless. The first and second functions, based on Article 41 of the ICCPR, relate to Communications concerning different State institutions, and Communications concerning individuals and the State, based on the First Optional Protocol Article 1 (1). According to Article 40 (4) of the ICCPR, the third function is to interpret the provisions of the ICCPR and to transmit General Comments. Therefore the scope of application of the ICCPR is not limited to the provisions of the ICCPR, but also to the communications initiated by individuals or the State. As for General Comments, these are at least a very useful guide to the normative substance of international human rights obligations.[8] The Committee's interpretation is also strengthened by resorting to a more systematic methodology of treaty interpretation, particularly the principles set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[9, 10]

Though it still remains disputed whether the instruments made by the

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6. HSINGCHÊNGYÜEN KUNGPAO [THE OFFICIAL REPORT OF EXECUTIVE YUAN], YUAN TAI WAI ZIH NO. 0980067638. (Nov. 3, 2011).

7. *See Generally* Wen-Chen Chang, *Kuochi Jênch'üanfa Yü Neikuo Hsienfa Tê Huiliu T'aiwan Shihhsing Liangta Jênch'üan Kungyüeh Chihhou* [*The convergence of international human rights law and domestic constitution: The Following of The Two Covenants Came into Force in Taiwan*], *in* 8 TAIWAN FASYUE SINKETI [THE FUTURE ISSUE OF LAW IN TAIWAN] 1-26 (T'AI WAN FA HSIAO HUI [TAIWAN LAW SOCIETY] ED., 2010); Yi-Kai Chen, *Kuochi Jênch'üan Kungyüeh Chih Neikuo Hsiaoli I Kungmin Yü Chêngchihch'üan Kungyüeh Chi Chingchi Shêhui Wênhuach'üan Kungyüeh Shihhsingfa Weili* [*The Domestic Applicability of International Human Rights Law- Take ICCPR and ICESCR as Examples*], in *id*. at 27-68.

8. Office of the United Nations High Commissioner for Human Rights, HUMAN RIGHTS FACT SHEET NO. 15 (REV. 1), 24-27.

9. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 340.

10. Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189, 242 (2001)

Committee have binding forces to the States Parties,[11] there seems to be no such controversy in Taiwan. Article 3 of the Act,[12] clearly stated that the application of the Covenants in Taiwan is not limited to the provisions under the Covenants, but should also make reference to the legislative purposes and interpretations by the Committee. Therefore, the Committee often interprets the provisions of the ICCPR through other instruments, making these instruments, such as General Comments and communications, essential when applying the ICCPR in Taiwan.

This paper will analyze the *Lo-Sheng* case in Taiwan by focusing on rights to family. Rights to family encompass not only the provisions under the ICCPR; but also the opinions rendered by the Committee. Consequently, this paper will refer to all these sources, so that rights to family may be applied comprehensively.

B. *Introduction to Rights to Family under the ICCPR*

There are two phases when discussing rights to family under the ICCPR. One is the definition of family, and the other is the protection of family lives from interference. Discussions on both two phases will be elaborated as follows.

First, Article 23, Section 1 of the ICCPR defines family as "the natural and fundamental group unit of society" and guarantees that every family is entitled to the protection of society and the State.[13] General Comment No. 19 of the Human Rights Committee (hereafter "the Committee") clarifies the meaning of "protection", as being provided "directly or indirectly, by other provisions of the Covenant."[14] For example, Article 17, Section 1 of ICCPR clearly states 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." It is apparent that rights to family are not only protected under ICCPR Article 23, but also guaranteed under Article 17.

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11. HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS. 873-77 (3rd ed. 2008).

12. Kungmin Yü Chêngchih Ch'üanli Kuochi Kungyüeh Chi Shêhui Chingchi Wênhua Ch'üanli Kungyüeh Shihhsingfa [Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights], art. 3, ("Applications of the two Covenants should make reference to their legislative purposes and interpretations by the Human Rights Committee.") (2009).

13. International Covenant on Civil and Political Rights, art. 3(1), Dec. 16, 1966, 99 U.N.T.S. 171.

14. Office of the Higher Commissioner of Human Rights, CCPR General Comments No. 19, U. N. Doc HRI/GEN/1/Rev.9 (Vol. 1), ¶ 1, (Jul. 27, 1990). "Article 23 of the International Covenant on Civil and Political Rights recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Protection of the family and its members is also guaranteed, directly or indirectly, by other provisions of the Covenant."

In the General Comment No. 19, the Committee nonetheless acknowledges that it is impossible to formulate one particular way to define family, due to cultural variety under General Comment No.19.[15] It therefore broadens the concept of family to encompass a wider range of configurations that are guaranteed the protections mentioned under Article 23 of ICCPR.[16] This approach is similar to the judgment of European Court for interpreting Article 8 of European Convention on Human Rights, for the Court often acknowledging the existence of a family life under Article 8.[17]

Examining broader applications of family relations hinges on many decisive elements, among which one of the most important is economic dependence. Economic issue is crucial when adult children are asserting their rights to family with surviving parents or distant blood relatives. In this perspective economic resources must be in company with emotional tie.[18] Moreover, the Committee has brought up three decisive elements when defining family.[19] It is obvious that the Committee intended to extend the traditional family from married husband and wife, or parents and their children, and broadened the coverage of family.

Second, regarding the issue of protection in Article 17 of ICCPR, the Committee stated that the State should adopt positive legislation to prohibit interference with family life as well as to protect the rights to family.[20] However, the Committee also indicated that "interference" can still take place as envisaged by the law, but only as authorized by the State on the basis of law, which should not violate the aims and objectives of the Covenant.[21]

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15. *Id*. at ¶ 2. "The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition."

16. Office of the Higher Commissioner of Human Rights, CCPR General Comments No. 16, U.N.Doc HRI/GEN/1/Rev.9 (Vol. 1), ¶ 5, (Apr. 8, 1988). "Regarding the term 'family', the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned."

17. Ryan T. Mrazik & Andrew I. Schoenholtz, *Protecting and Promoting the Human Right to Respect for Family Life: Treaty-based Reform and Domestic Advocacy*, 24 GEO. IMMIGR. L.J. 651, 657, 664 (2010).

18. Khan v. The United Kingdom, App. Nos. 2991/66, 2292/66, 1967 (10) Y.B. Eur. Conv. on H.R. 478 (Euro. Comm'n on H.R.); Mrazik & Schoenholtz, *id*. at 655.

19. This point will be elaborated more in next paragraph.

20. "The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right." Office of the Higher Commissioner of Human Rights, *supra* note 16, at ¶ 1.

21. "The term 'unlawful' means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant." Office of the Higher Commissioner of Human Rights, *supra* note 16, at ¶ 3.

C. *The Three Elements Constituting the Substantial Family*

The Committee has interpreted the term 'family' very liberally, covering same-sex relations, and even the relations between individuals and their ancestors buried under the burial ground.[22] Thus, in order to distinguish the traditional explanation of family from the broad concept of family defined by the Committee, the latter will hereinafter be stated as "substantial family".

1. *Life Together*

Communication No. 68/1980 concerned a Polish-born Canadian citizen living in Ontario, whose daughter, B, and grandson, C, were Polish citizens living in Torun, Poland. The Canadian woman complained that the Canadian government's refusal to allow B to enter Canada had breached her rights to family under ICCPR Articles 17 and 23.[23]

Canada argued that though Article 17 prohibits arbitrary or unlawful interference with the family by the State, it should be interpreted primarily in a negative way, and it therefore cannot refer to an obligation by the State to re-establish a family life which was already impaired. As regards Article 23, which entitles the family to the protection of the State, such protection clearly implies that family life must already be established between members of a family. In this case, B, who was born in 1946, had been adopted by the Canadian citizen in 1959 but had lived with her in Canada for two years only. The fact that the Canadian citizen and her daughter had been separated for 17 years clearly demonstrated that there was no long-term family life and that therefore no breach of Article 23 had occurred.

The Committee agreed that the State had not deprived the Canadian citizen of her rights to family, even though Articles 17 and 23 provide that no one shall be subjected to arbitrary or unlawful interference with his or her family and that the family is entitled to the protection of the State. It was argued that these articles were not applicable in this case, because the Canadian citizen and her adopted daughter had lived together as a family for only two years.[24]

In conclusion, without the pre-established reality of a life together, a group cannot constitute a family, and therefore cannot claim protection for the right to family.

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22. Yael Ronen, *The Ties that Bind: Family and Private Life as Bars to the Deportation of immigrants*, 8(2) INT. J.L.C. 283, 289 (2012).

23. AS v. Canada, HRC Communication No. 68/1980, ¶ 1, 2 U.N. Doc. CCPR/C/12/D/68/1980, at 27 (Mar. 31, 1981).

24. *Id.* at ¶ 8.1, 8.2(b).

2. *Blood or Legal Ties are not Necessary*

In the case of *Joslin v. New Zealand*,[25] the Committee stated that they could not find that the State had violated rights to family by refusing to provide for marriage between homosexual couples.[26] The Committee explained that "such differential treatment is permissible,[27] because the Committee's jurisprudence is clear that conceptions and legal treatment of families vary widely."[28]

The Committee confirmed that the definition of marriage should be within the discretion of domestic legislation, and that it is not guaranteed for every form of family. The denial of marriage for homosexuals is not denying homosexual couples constitute a family *per se*. Therefore, some argued that though the Committee did not find a violation of the Covenant on the ground that the right to marry in the second clause of Article 23 applies only to heterosexual marriages, it was not disputed that a homosexual couple constitutes a family.[29]

3. *Defining "Family" in Each Specific Situation*

The case of *Hopu and Bessert v. France*[30] concerned the descendants of owners of a tract of land (approximately 4.5 hectares) called Tetaitapu, in Nuuroa, on the island of Tahiti. It was claimed that the construction work carried out by the RIVNAC hotel corporation on the site they currently resided would forced them to move away.[31] The authors also claimed that the destruction of a burial ground where members of their family were said to be buried constitutes an interference with their private and family lives.[32] The human remains are claimed to be of those ancestors of a subsisting family, and therefore constitutes rights to family.

The State counter-argued that the authors had interpreted the definition of rights to family in a way that was overly broad and that would make it

25. Joslin v. New Zealand, Comm. 902/1999, U.N. Doc. A/57/40, Vol. II, at 214 (HRC 2002) (July. 30, 2002).

26. *Id.* at ¶ 8.3.

27. Hopu and Bessert v. France, Comm. 549/1993, U.N. Doc. A/52/40, Vol. II, at 70 (HRC 1997) (Dec. 29, 1997) ; Aumeeruddy-Cziffra v. Mauritius, Comm. 35/1978, U.N. Doc. A/36/40, at 134 (HRC 1981) (Apr. 9, 1981).

28. *Joslin*, at ¶ 4.8.

29. *See* MANFRED NOWAK, U. N. COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY 394 (2005).

30. *Hopu & Bessert*, at ¶ 2.1.

31. *Id.* at ¶ 2.1.("They argued that their ancestors had been dispossessed of their property by *jugement de licitation* of the Tribunal civil d'instance of Papeete on 6 October 1961. Under the judgment, ownership of the land was awarded to the SHPS hotel corporation. Since 1988, the Territory of Polynesia has been the sole shareholder of the SHPS.")

32. *Id.* at ¶ 2.1-3, 3.2.

impossible to build on any site.[33]

The Committee stated that the objectives of the Covenant require that the term "family" be given a broad interpretation so as to include all those understood to be members of a family by the society in question. It follows that cultural traditions should be taken into account when defining the term "family" in a specific situation. In this case, the authors argued that they consider their relationship to their ancestors to be an essential element of their identity, and that this relationship plays an important role in their family life.[34]

Strong dissenting opinions were written against the Committee's views in *Hopu and Bessert v. France* whereby the concept of "family" is regarded as almost boundless.[35] However, the adequate justification lies in the existence and common experiences promoted in the movement of indigenous peoples, which are essential forms of self-expression, mutual recognition, and leverage for legal and political change.[36] The most powerful argument for a distinctive legal category based on special features of indigenous peoples is wrongful deprivation of land, territory, self-government, means of livelihood, language, and identity. The appeal is related to history and culture, which stance a similar line of argument as the reasoning in *Hopu and Bessert v. France*.[37]

D. *The Protections of Family*

According to the General Comments and the submissions, protections of rights to family can be divided into formal protections and substantial protections.

In situations of formal protection, the burden of proof should be carried by the State. In *Hopu and Bessert v. France*, the Committee found that the State bears the burden to prove that an instance of interference in rights to family is reasonable.[38]

As for substantial protection, General Comment No.19 and Article 17 of ICCPR both indicate that the Covenants include prohibitions against unlawful interference. In a decision relating to legislation in Mauritius, the Committee emphasized the "common residence of husband and wife" and "the normal behaviour of a family", and thus defined "the exclusion of a

33. Aumeeruddy-Cziffra v. Mauritius, Comm. 35/1978, U.N. Doc. A/36/40, at 134 (HRC 1981) (Apr. 9, 1981). at ¶ 9.2. .

34. *Id*. at 10.3.

35. *Id*. at 70, 82-83.

36. Kingsbury, *supra* note 10.

37. *See* Lawrence Rosen, *The Right to Be Different: Indigenous Peoples and the Quest for a Unified Theory*, 107 YALE L.J. 227 (1997) (book review); Kingsbury, s*upra* note 10.

38. *Hopu and Bessert*, at ¶. 10.3.

person from a country where close members of his family are living" as interference with family life.[39]

Besides, Article 17 of the ICCPR states that everyone's family life should be protected from arbitrary or unlawful interference. The word "arbitrary" establishes the need for a State to prove not only its action was in accordance with its domestic laws, but also that the state interests outweighed the individual's interest. Therefore, under the circumstances when the State applying domestic laws, individuals enjoy greater protections since the State is still required to balance its interests against those of individuals in pursuant to Article 17 of the ICCPR.[40]

IV. ANALYSIS OF THE LO-SHENG CASE

A. *Introduction to the Lo-Sheng Case*

The petitioners, on behalf of the residents of Lo-Sheng Sanatorium, sued the Department of Health, the Lo-Sheng Sanatorium and the Department of Rapid Transit Systems, on the grounds that compulsory relocation deprived the residents of human rights such as the right to equality, to personal freedom, to freedom of residence, to life, and to work. Taipei High Administrative Court dismissed the case, and the petitioners therefore appealed to the Supreme Administrative Court.[41]

The Supreme Administrative Court (hereinafter "the Court") dismissed the appeal and sustained the original judgement for three reasons. First, the petitioners argued for reinstatement on the grounds that the residents' human rights had been breached by wrongful compulsory segregation by the State prior to 1962. However the Court found this petition contradictory. The Court articulated that if the residents' human rights had been breached by wrongful compulsory segregation, the petitioners should be asking for restitution to their pre-segregation circumstances, rather than asking for the buildings to remain standing so that they could maintain their current situation.[42] Second, the buildings and equipment are State-owned property, and therefore the petitioners have no rights of disposition, such as opposing their destruction.[43] Last but not the least, the State did not breach the residents' rights to life, since the State has already offered them a new

39. Aumeeruddy-Cziffra v. Mauritius, Comm. 35/1978, U.N. Doc. A/36/40, at 134 (HRC 1981) (Apr. 9, 1981), at ¶ 9.2.

40. Mrazik & Schoenholtz, *supra* note 17, at 678.

41. Taipei Kaotêng Hsingchêng Fayüen [Taipei High Admin. Ct.], 94, Su Zhi No. 2185 (2005) (Taiwan).

42. Tsuikao Hsingchêng Fayüen [Sup. Admin. Ct.], 98, P'an Tzu No. 1515 (2009) (Taiwan), at ¶ 7(3)2(1).

43. *Id.* at ¶ 7(3)2 (3).

location in which to reside.[44]

B. *Claim for Rights to Family in the Lo-Sheng Case*

Although the petitioners have based their claim on the ground of numerous human rights, they have not claimed a violation of their rights to family, which were evidently breached by the compulsory relocation. In relation to the petitioners' claims for reinstatement, this means a restoration of their original status, living in their original location before their rights to family were breached. Only by claiming their rights to family could the residents counter-argue against the judgment made by the Court.

C. *The Residents of Lo-Sheng Sanatorium Constitute Substantial Family*

According to General Comments and the Communications, there are three elements required to constitute substantial family, and the residents of Lo-Sheng need to show they fulfil these in order to claim rights to family.

Although none of the residents share either blood or legal ties, they still constitute substantial family. The case of *Joslin et al. v. New Zealand*[45] dealt not only with marriage, but also considered the necessary requirements for substantial family.[46]

The first requirement is life together. The sanatorium was built in 1930 and compulsory segregation had not been abolished until 1962, when outpatient treatment was introduced. Those who underwent compulsory segregation have been separated from their blood families for up to 30 years. Meanwhile, those who remained voluntarily in the sanatorium after 1962 have lived together for more than 50 years, even though some may have re-established contact with their blood families. Only few patients moved back to their blood families after segregation was abolished, but most remained. This was because the State had made no arrangements for these patients to return to society, and had failed to consider the impact of segregation. In most cases, residents were marginalized from society and even from their blood relatives, so that by 1962 all contact was lost. Those who maintained contact with their relatives were far less close to them than to other patients. The long-term companionship of the patients falls within the definition of life together, and fulfils one of the requirements of substantial family.[47]

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44. *Id.*

45. *See generally* Joslin v. New Zealand, Comm. 902/1999, U.N. Doc. A/57/40, Vol. II, at 214 (HRC 2002) (July 30, 2002).

46. Office of the Higher Commissioner of Human Rights, *supra* note 16, at ¶ 1.

47. AS v. Canada, HRC Communication No. 68/1980, ¶ 8.2 U.N. Doc. CCPR/C/12/D/68/1980, at

D. *The Land of Lo-Sheng Sanatorium Constitute an Element of Family*

According to General Comment No. 16, the definition of family varies from place to place.[48] Therefore, family should be defined according to a particular circumstance and culture, and all kinds of families come under the protection of the Covenant. Even though in Article 10 of the ICESCR, it clearly stated that the protections of family should only be accorded to human beings.[49] However, in *Hopu and Bessert v. France*,[50] the Committee further stated that since the authors deemed the burial ground of their ancestors to be an essential element of their history and culture, the location of the burial ground constituted an aspect of family. Consequently, the Committee found that a family might constitute more than just human beings, and under certain circumstances, it can also include land.

In the *Lo-Sheng* case, the original location also played an irreplaceable role in the residents' lives. Features such as courtyard-style houses, barrier-free spaces, an orchard, a garden, and a pond contrast with the new modern medical buildings. In addition to these significant differences, residents regard the sanatorium as their shelter from the disapproving gaze of society. The sanatorium used to be the place where they were segregated from the society, like a jail, and the abolition of compulsory hospitalization did not abolish their marginalization and exclusion from society. The residents have experienced life together in the sanatorium for up to fifty years together, sharing the same medical condition, history of being segregated, and experiences of being marginalized by society. Consequently, the original sanatorium constitutes an essential aspect of family life under the special circumstances shared by the residents.

Moreover, inside the original Lo-Sheng sanatorium, there are a crematorium, a hall where simple funerals can be held in different religions

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27 (Mar. 31, 1981).

48. Office of the Higher Commissioner of Human Rights, *supra* note 16, at ¶ 5.

49. International Covenant on Economic Cultural and Social Rights, art. 10, Dec. 16, 1966, 993 U.N.T.S. 3. ("The States Parties to the present Covenant recognize that: 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses. 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits. 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.").

50. *AS*, at ¶ 8.1, 8.2(b).

for the dead residents, and also a pagoda where the ashes of the dead ones stored.[51] Since the residents constitute substantial family, the pagoda where stored the dead residents' ashes would therefore constitute the burial place of the living residents' family. Thus, to the living residents, the burial place inside Lo-Sheng sanatorium plays an essential role of their history and culture, which makes the location of the pagoda an aspect of family. In *Hopu and Bessert v. France*, [52] what the Committee indicated in the communication is to expand the term of "family" to the specific land of the burial ground. Same as the *Lo-Sheng* case, the specific piece of land of pagoda inside the sanatorium constitutes a part of the residents' substantial family, and should therefore be accorded with rights to family under the ICCPR.

E. *Protections in the Lo-Sheng Case*

The factual background to the *Lo-Sheng* case has similarities with *Hopu and Bessert v. France*.[53] The Committee found that the burial ground, even though the petitioners were not the title-holders to the land, still constituted an aspect of substantial family and was protected from being interfered with under protection of rights to family. Therefore, although the sanatorium residents did not own the land where they lived, they could still claim for the protection of their rights to family, since compulsory relocation constitutes an unlawful interference to family life.

In the case discussed above, the Committee demanded that the State should examine whether instances of interference with rights to family are reasonable.[54] The compulsory relocation carried out at *Lo-Sheng* constitutes interference with the residents' family, and it should be examined whether this is reasonable. It is clearly stated in General Comment No. 16, that interference is reasonable only when fulfilling the purpose of protecting other rights under the Covenant.[55]

To claim that the compulsory relocation constitutes arbitrary

51. JIA-YING GUO, LO-SHENG: DINGPOJIAO YISIWU HAO DE RENMEN [LO-SHENG: PEOPLE IN DINGPOJIAO NO. 145], (Caituan Faren Guojia Wenhua Yishu Jijinhui [National Culture and Arts Foundation] ed.), 168- 82 (2011).

52. *AS,* at ¶ 8.1, 8.2(b).

53. *See generally* Hopu and Bessert v. France, Comm. 549/1993, U.N. Doc. A/52/40, Vol. II, at 70 (HRC 1997) (Dec. 29, 1997).

54. *Id.* at ¶ 10.3. ("The State party has not shown that this interference was reasonable in the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex.")

55. Office of the Higher Commissioner of Human Rights, CCPR General Comments No. 16, *supra* note 16, at ¶ 4 ("The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.").

interference, it is essential to prove that the interests of the residents in Lo-sheng outweigh the public interests.[56] First, the reason for the compulsory relocation is to construct the Xinzhuang metro station, which can be regarded as for the public interest in terms of convenient transportation; however, it still does not qualify for any rights under the Covenant. Since the reason only constitutes public "interest", which takes second place after human rights, the relocation cannot meet the requirements for "reasonable" interference.[57] Second, there are possible alternative metro routes making it unnecessary to insist on constructing Xinzhuang metro station on the site of the sanatorium. Due to the above reasons, the interests of *Lo-Sheng* residents' remaining on the original site of the Sanatorium outweigh the public interests of constructing the metro station on the specific site. As a result, the construction of the metro station constituted arbitrary interference with the residents' rights to family under Article 17 of the ICCPR.

V. CONCLUSION

The two Covenants came into force in Taiwan in late 2009, and since then the interpretation and application of domestic law, especially when it comes to human rights, should refer to them, as well as to General Comments and the Committee's opinions. However, legislation in Taiwan in practice still tends to overlook interpretation of the two Covenants.

According to Article 2 of the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, human rights protection provisions in the two Covenants have the same status and effect as domestic law. Furthermore, Article 3 states that applications of the two Covenants should make reference to legislative purposes and interpretations by the Human Rights Committee. Since the two Covenants at the very least have domestic law status[58] in Taiwan, the court bears the obligation to rule in accordance with them. However, people in Taiwan are not yet familiar with the two Covenants and do not know how they should be applied. In the current situation, the court should not simply make rulings in accordance with the two Covenants; rather, it should actively articulate ways to enable clients and petitioners to apply them.

Two Human Rights Committee Commissioners, Paul Hunt and Miloon

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56. Mrazik & Schoenholtz, *supra* note 17, at 678.

57. *See* Meng-Siou Chen, *Rencyan Zai Ni Shen San Bu Cunzai ? Lo-Sheng Yuanmin De Goucyu, Yu Sainzai* [*Do Human Right Exist to You? The Past and Present of the Residents in Lo-Sheng Sanatorium*], 11(5) CYANGUOL YUSHIH [TAIWAN BAR J.] 2007, at 5, 19-20.

58. Office of the United Nations High Commissioner for Human Rights, *supra* note 8.

Kothari, have already stated that the compulsory relocation of Lo-Sheng residents may affect their right to physical and mental health[59] and right to a decent life[60] under ICESCR, and that this is *prima facie* incompatible with the provisions of the Covenant.[61] However the Supreme Administrative Court ignored these statements and failed to actively apply the two Covenants in the *Lo-Sheng* case. This has resulted in the frustration of human rights protection in Taiwan.

59. ICESCR, art. 12 (1).
60. ICESCR, art. 7(a) (ii).
61. Chen, *supra* note 57, at 14-15.

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家庭權之內涵與適用
以樂生療養院一案為中心

洪 彗 玲

摘 要

樂生院民因為北市捷運局新莊機廠之工程規劃，被迫搬離居住了50年以上的開放、矮房、方便輪椅活動之家庭式平房原址，遷入兩棟相互隔離之醫療大樓，大樓的生活環境對樂生院民而言，不僅活動不便、交流不易、無法安養、更是重回強制隔離政策下，外界對漢生病友殘疾之負面印象。然而，最高行政法院仍於2009年底作出肯認北市捷運局強制拆遷通知合法之判決，諷刺的是，判決作成時，兩大人權公約已於我國批准、施行，看似極度重視人權保障之我國，難道樂生院民真無法主張任何基本權利以拒絕搬遷嗎？

本文欲以樂生院民之訴訟代理人、及法院皆未提及之家庭權作為樂生院民得主張保留原址的理由，嘗試透過《公民與政治權利國際公約》及其相關文件建構之家庭權，作為檢討樂生強制搬遷案的重心。首先探討長期居住於樂生療養院中之漢生病友是否構成「實質家庭」、而得主張適用家庭權，並論述樂生院民應受到如何之保護，進一步具體指謫最高行政法院98年度判字1515號判決。其中，本文將不僅以公約內文作為得適用之法規範，而將申訴案件及一般性意見一併納為可適用之法，並統整各申訴案件及一般性意見中，人權委員會曾表示對家庭權之各式定義、要件、及適用結果，力求於本案中能更完整、全面性適用《公民與政治權利國際公約》規範之家庭權。

關鍵詞：樂生療養院，家庭權，公民與政治權利國際公約