

## **Bills Committee on Minimum Wage Bill**

### **Administration's response on the Compatibility of the Bill with Article 5 of the Basic Law**

#### **Purpose**

At the meeting of the Bills Committee held on 28 September 2009, a Member requested the Administration to submit a written response as to why the Bill in legislating on statutory minimum wage (SMW) would not breach Article 5 of the Basic Law (BL 5).

#### **The Bill**

2. The main object of the Bill is to provide for a minimum wage so as to forestall the payment of excessively low wages to employees. The minimum wage is expressed as an hourly rate but the Bill does not seek to regulate the number of hours that employees work. Furthermore, the Bill provides for the establishment of the Minimum Wage Commission which is tasked to report to the Chief Executive in Council its recommendations on the precise minimum hourly wage rate and the timing and frequency of rate reviews. In performing its functions, the Commission must have regard to the need to maintain an appropriate balance between the objectives of forestalling excessively low wages and minimizing the loss of low-paid jobs and of sustaining Hong Kong's economic growth and competitiveness.

#### **BL 5**

3. BL 5 provides that "[t]he socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years."

4. It is important to consider whether BL 5 prohibits the enactment of the Bill which provides for a mechanism for deciding the statutory minimum wage. BL 5 only provides for a general principle of maintenance of the previous capitalist system and way of life for 50 years. It does not provide for the details as to what such system would cover. However, the reference to the "previous capitalist system" in BL 5 supports that it would be relevant to consider whether the statutory minimum wage regime under the Bill would be covered by the previous capitalist system in Hong Kong.

## **Approach to Interpretation of the Basic Law**

5. The Court of Final Appeal (CFA) has laid down the purposive approach to constitutional interpretation in the case of *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315. A purposive approach to the interpretation of the Basic Law is appropriate. While the language of the Basic Law text is important, a literal, technical, narrow or rigid approach must be avoided. The relevant provision should be construed in the light of its context, which could be found in the Basic Law itself as well as relevant extrinsic material including the Joint Declaration. The purposive approach to interpretation of the Basic Law has been further developed by the CFA in the case of *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533. As decided in *Chong Fung Yuen* (at 546E-G), the courts, when interpreting the Basic Law provisions, do not look at the language of the article in question in isolation. The language is considered in the light of its context and purpose. Whilst the courts must avoid a literal, technical, narrow or rigid approach, “they cannot give the language a meaning which the language cannot bear”.

6. The CFA explained in *Chong Fung Yuen* (at 546J to 547B) what extrinsic materials the courts may look at in interpreting the Basic Law, in addition to the internal aids to interpretation (namely, what is within the Basic Law). Extrinsic materials which throw light on the context or purpose of the Basic Law or its particular provisions may generally be used as an aid to the interpretation of the Basic Law. They include the Joint Declaration and the Explanations on the Basic Law (Draft) given at the Third Session of the Seventh National People’s Congress on 28 March 1990 shortly before its adoption on 4 April 1990. The state of domestic legislation at that time and the time of the Joint Declaration will often also serve as an aid to interpretation of the Basic Law.

## **Context and Purpose of BL 5**

7. Following the approach of constitutional interpretation laid down by the CFA in *Ng Ka Ling* and *Chong Fung Yuen*, it is important that BL 5 should be construed in the light of its context and purpose. The purpose of BL 5 is clearly to maintain the previous capitalist system and way of life. As regards its context, it would be appropriate to consider any relevant domestic legislation at the time of the adoption of the Basic Law on 4 April 1990. The Trade Boards Ordinance (Cap. 63) (TBO) is a piece of such domestic legislation.

8. Enacted in 1940, the TBO provides that the Chief Executive in Council may, at any time he thinks fit, fix minimum wages for any trade if he is satisfied that the minimum wages being paid to workers in that trade are unreasonably low (see s.2(1)). It also provides for the establishment of Trade Boards which the Chief Executive may authorize to advise him in connection with the fixing of any minimum wage (see s.2(2)). The Court of First Instance (CFI) has

decided in the case of *Chan Noi Heung v Chief Executive in Council* (HCAL126/2006) that s.2(1) of the TBO provides the Chief Executive in Council with a discretion to determine the appropriate circumstances in which, if at all, a minimum wage for any occupation should be fixed. S.2(2) also gives a discretion to the Chief Executive, at any time, to establish a Trade Board. The decision of the CFI was subsequently affirmed by the Court of Appeal (see *Chan Noi Heung v Chief Executive in Council* [2008] 3 HKC 452).

9. TBO at the time of the adoption of the Basic Law was in the same terms as that currently in force and outlined in paragraph 8 above save that it then referred to pre-97 terminologies such as “Governor in Counsel” and “Governor”. These terminologies were adapted after the reunification pursuant to section 3 of the Adaptation of Laws (No. 7) Ordinance 2000 (54 of 2000).

10. Hence, when the Basic Law was adopted in 1990, there was already in existence domestic legislation to combat unreasonably low wages in the workplace by the imposition of minimum wages (cf paragraphs 4 to 6 of the CFI judgment in the case of *Chan Noi Heung*). This provides a relevant context of BL 5 in that the previous capitalist system to be maintained includes as one of its parts legal measures for the fixing of minimum wages.

## **BL 147**

11. Under BL 147, the Hong Kong Special Administrative Region (HKSAR) shall on its own formulate laws and policies relating to labour. The Bill, being legislation which addresses the problem of payment of excessively low wages to employees by providing for a minimum wage, is within the legislative competence of the HKSAR by virtue of BL 147.

## **Conclusion**

12. In the light of the context and purpose of BL 5 discussed in paragraphs 7 to 10 above, the Bill is consistent with BL 5. It is also within the legislative competence of the HKSAR by virtue of BL 147.