

Bills Committee on Minimum Wage Bill

Administration's response on Article 39 of the Basic Law and Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

Purpose

At the meeting of the Bills Committee held on 13 October 2009, Members requested the Administration to submit a written response as to whether the Bill would be in conformity with Article 39 of the Basic Law (BL39) and Article 7 of the ICESCR.

The Bill

2. The main object of the Bill is to provide for an hourly-rated minimum wage so as to forestall excessively low wages. The Bill further provides for the establishment of a Minimum Wage Commission tasked to recommend to the Chief Executive in Council the precise minimum hourly wage rate as well as the timing and frequency at which the rate should be reviewed. In performing its functions, the Bill stipulates that the Commission must strive to maintain an appropriate balance between the objectives of forestalling excessively low wages and minimizing the loss of low-paid jobs, while sustaining Hong Kong's economic growth and competitiveness.

BL39 & ICESCR

3. BL39 provides that:

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.

4. BL39 speaks of three international instruments: the International Covenant on Civil and Political Rights (ICCPR), the ICESCR and international labour conventions. BL39, however, does not have the effect of directly incorporating the three named instruments into domestic law.

5. Under the Basic Law, the law previously in force in Hong Kong including the common law shall be maintained (see BL8). Under the common law, an international covenant does not form part of the domestic law unless it is incorporated into domestic legislation (*R v Secretary of State for the Home Department, Ex parte Brind & Others* [1991] 1 AC 696). Thus in *Lau Cheong and Another v HKSAR* [2002] 2 HKLRD 612, the CFA said:

“In 1990 the Basic Law was adopted to come into effect on 1 July 1997. In June 1991, the Legislative Council enacted the Hong Kong Bill of Rights Ordinance incorporating the ICCPR as applied to Hong Kong.”

6. In *HKSAR v Ng Kung Siu & Another* [1999] 3 HKLRD 907, the CFA stated that:

“The Hong Kong Bill of Rights Ordinance (Cap. 383), in fact provides for the incorporation of the provisions of the ICCPR into the laws of Hong Kong. Art. 16 in Part II of that Ordinance is in identical terms to art. 19 of the ICCPR.”

7. In *Secretary for Justice v Chan Wah & Others* [2002] 3 HKLRD 641, the CFA stated that:

“Article 39 of the Basic law provides among other things that the provisions of the ICCPR as applied to Hong Kong, shall remain in force and shall be implemented through the laws of the HKSAR. The Bill of Rights Ordinance incorporates into the law of Hong Kong the provisions of the ICCPR as applied to Hong Kong.”

8. In *Mok Chi Hung & Another v Director of Immigration* [2001] 2 HKLRD 125, the Court of First Instance compared the status of the ICCPR and ICESCR under Hong Kong law. Cheung J stated that “an international covenant, unless it is incorporated into domestic legislation, is not part of the domestic law”. Cheung J noted that “[t]he ICCPR, as applied in Hong Kong, is by way of the Bill of Rights Ordinance” and he recognized that “[t]he Bill of Rights Ordinance is part of the domestic law in Hong Kong. It was entrenched by the Letters Patent and is now entrenched by the Basic Law”. Cheung J further held that the ICESCR is promotional in nature but can be used as a framework in which Government decision is to be considered. The learned judge noted that the ICESCR is not incorporated into Hong Kong law.

9. The CFA also recognizes that the status of the ICESCR is not the same as the ICCPR under domestic law. It further points out that the nature of rights under the two Covenants is different. In *Ho Choi Wan v Hong Kong Housing Authority* [2005] 4 HKLRD 706, the CFA stated:

“67. Our constitution the Basic Law speaks of the ICESCR in the same breath as it does of the International Covenant on Civil and Political Rights (“the ICCPR”). Article 39 of the Basic Law provides that “[t]he provisions of [the ICCPR, the ICESCR], and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws” of Hong Kong. I am not saying that economic, social and cultural rights enjoy precisely the same status as civil and political rights under our constitutional arrangements. For one thing, civil and political rights are contained in the Hong Kong Bill of Rights which embodies the ICCPR’s application to Hong Kong while economic, social and cultural rights are not contained in any such instrument. And then there are the differences thus noted in *International Human Rights in Context* (eds Steiner & Alston), 2nd ed. (2000) at p.246:

“There are many differences between the two major Covenants, including terminology. For example, the ICCPR contains terms such as ‘everyone has the right to...’, or ‘no one shall be...’, whereas the ICESCR usually employs the formula ‘States Parties recognize the right of everyone to ...’. *Two major differences should be noted, both appearing in the key provision of Article 2(1). First, the obligation of states parties stated in that provision is recognized to be subject to the availability of resources (‘to the maximum of its available resources’). And second, the obligation is one of progressive realization (‘with a view to achieving progressively’).*” (Added emphasis)

Article 7 of ICESCR and nature of rights under the ICESCR

10. Article 7 of the ICESCR reads:

“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.”

11. Article 7 should not be read in the vacuum. Rights guaranteed under Article 7 of the ICESCR must be read together with Article 2(1), the obligation clause of the ICESCR. Under Article 2(1), States parties have undertaken international obligations to take steps to the maximum of their available resources to achieve full realization of rights guaranteed under the Covenant. Article 2(1) of the ICESCR reads as follows:

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

12. The language of Article 2(1) clearly indicates that the ICESCR does not create immediately enforceable rights but allows State parties to take steps progressively, to the maximum of resources available, to achieve the rights guaranteed therein. In *Chan Mei Yee v Director of Immigration*, HCAL 77/1999, Cheung J referred to several academic texts in analysing the nature and legal effect of the ICESCR. He referred to the text, *Human Rights in the World*, 4th ed., by Robertson and Merrills, in which the authors state that:

“... the ICESCR is what is known as a promotional convention, that is to say, it does not set out rights which the parties are required to implement immediately, but rather lists standards which they undertake to promote and which they pledge themselves to secure ***progressively, to the greatest extent possible, having regard to their resources.*** As already indicated, this difference in the obligation results from the very nature of the rights recognized in this Covenant. The authors point out that a comparison of ICCPR and ICESCR reveals a major difference in the way their respective provisions are formulated. The rights contained in the ICCPR are stated in the classic form "everyone has the right to ..." or "no one shall be subject to ...". In ICESCR, the articles adopt a different formulation, usually "the State parties to the present covenant recognize the right ..." or "the State parties to the present covenant undertake to ensure ...". ***In other words, an undertaking or a recognition by States rather than the affirmation of a right inherent in the individual as such.***” (Added emphasis)

13. A further text referred to by Cheung J was *The International Law of Human Rights* by Paul Sieghart in respect of which Cheung J commented:

“In respect of ICCPR, the author stated that the obligations imposed on the States are absolute and immediate. They are absolute because they are not expressed as being limited either by the resources available to the State, or by reference to the means to be employed in performing them. They are immediate in that each State is bound to take the necessary steps to secure the human rights and fundamental freedoms concerned from the moment the treaty comes into force for that State. ***In respect of the ICESCR, the obligations are qualified rather than absolute in that they are limited to the maximum of the resources available to the State parties to appropriate means.*** The obligations are also progressive rather than immediate as they call for steps to be taken with a view to achieving progressively the full realization of the rights concerned.” (Added emphasis)

14. Having considered the nature of the ICESCR, Cheung J concluded that:

“The way in which the ICCPR and ICESCR are formulated clearly supports the argument that the latter covenant is promotional in nature. However, even though it is promotional in nature, it does not mean that the ICESCR cannot be used as a framework in which government decisions or discretion are to be considered.”

15. Article 2(1) clearly shows that the ICESCR only creates binding obligations on the HKSAR in international law to take steps, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means, including the adoption of legislative measures. There is however no obligation under the ICESCR to implement its rights by legislation. The Committee on Economic, Social and Cultural Rights, the treaty monitoring body, thus made the following observation in General Comment No. 9:

“The Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. And there is no provision obliging its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. Although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party.”

16. It may be discerned from the above discussion:

- * BL39 does not directly incorporate the ICESCR into domestic law.
- * The ICESCR is promotional and progressive in nature.
- * The ICESCR does not oblige States parties to implement its rights by legislation but requires States parties to take steps to the maximum of its available resources to achieve progressively the full realization of the rights in the Covenant by all appropriate means including particularly the adoption of legislative measures.

Conclusion

17. The right to enjoy just and favourable conditions of work protected by Article 7 must be considered in the light of Article 2(1), the obligation clause of the ICESCR, and the nature of economic, social and cultural rights.

18. The Bill is to provide for an hourly-rated minimum wage so as to forestall excessively low wages. The Minimum Wage Commission, tasked to make recommendations on the precise minimum hourly wage rate, would adopt an evidence-based approach through data research and analysis as well as extensive consultations with stakeholders. The Commission is required by law to strike an appropriate balance between the objectives of forestalling excessively low wages and minimizing the loss of low-paid jobs, while sustaining Hong Kong's economic growth and competitiveness.

19. Viewed in the above light, the Bill represents a major step taken by the Government of the HKSAR to achieve progressively the rights stipulated in Article 7 of the ICESCR in light of its maximum available resources. It is considered that the Bill is in conformity with BL39 and Article 7 of the ICESCR.

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