

Bills Committee on Minimum Wage Bill

Administration's response to Hon LEE Cheuk Yan's comments on LC Paper No. CB(2)169/09-10(02)

Purpose

At the meeting of the Bills Committee held on 5 November 2009, Hon LEE Cheuk Yan submitted a paper which addressed several issues covered in our earlier paper submitted to the Bills Committee (LC Paper No. CB(2)169/09-10(02)) (Administration's paper). Our response to Hon LEE's comments is spelt out in the following paragraphs.

No omission of "particularly"

2. Hon LEE contended in paragraph 13 of his paper that it was obvious that the Administration sought to mislead the Legislative Council (LegCo) by omitting to mention the term "particularly" in paragraph 15 of the Administration's paper when explaining the legal effect of Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

3. We regret that the Administration's paper has created such an impression on Hon Lee, though we must point out that the Hon Lee's contention is misconceived and without foundation in fact. Article 2(1), the obligation clause of the ICESCR, was set out in full in paragraph 11 of the Administration's paper. More importantly, the obligation to achieve progressively the full realisation of the rights in the ICESCR by all appropriate means including *particularly* the adoption of legislative measures was highlighted in paragraph 16 of the Administration's paper summarising the Administration's view on Article 39 of the Basic Law (BL39) and ICESCR rights.

4. We note that the summary in paragraph 16 of the Administration's paper was accurately reproduced in paragraph 1 of the Hon Lee's paper, including the term "particularly". This is a clear indication that there was *no omission* in the Administration's paper with intent to mislead LegCo, as Hon Lee alleged, nor was he misled in any way.

Nature of ICESCR rights

5. Paragraph 7 of Hon Lee's paper referred to the Concluding Observations made by the ICESCR Committee in May 2001 after

considering the Initial Report submitted by China on the implementation of the Covenant as applied in the HKSAR. The Committee reminded the HKSAR that the provisions of the Covenant constitute a legal obligation on the part of the State Parties. Thus, the Committee urged the Government not to argue in court proceedings that the ICESCR is only “promotional” or “aspirational” in nature.

6. As stated in paragraph 2.12 of the Second Report of the HKSAR:

“We note the Committee’s observation that the Covenant is not merely “promotional” or “aspiration” in nature and accept that it creates binding obligations at the international level.”

7. This is still our position. Nothing said in the Administration’s paper is inconsistent with this position. It should be noted that paragraph 15 of the Administration’s paper also acknowledged that the ICESCR creates binding obligations in international law.

8. With the greatest respect to the Committee, there are distinguished legal experts who hold different views as to the nature of the ICESCR rights. Apart from the Court of Final Appeal’s decision in *Ho Choi Wan v Hong Kong Housing Authority* [2005] 4 HKLRD 706 discussed in paragraph 9 of the Administration’s paper, the nature of ICESCR rights has been considered by the Court of First Instance in three immigration cases. In all these cases, the court agreed that the ICESCR is promotional in nature. In *Chan To Foon & Others v Director of Immigration & Another* [2001] 3 HKLRD 109, Hartmann J, as he then was, further held that Article 2(1) of the ICESCR illustrates the promotional and progressive elements of the Covenant. The relevant parts of the Court of First Instance’s decisions are set out below for Members’ easy reference.

Chan Mei Yee v Director of Immigration, HCAL 77/1999

“47. 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 discretions are to be considered.”

Mok Chi Hung & Another v Director of Immigration [2001] 2 HKLRD 125, para. 11(8).

“The ICESCR is promotional in nature but it still can be used as a framework in which government’s decisions or discretions are to be

considered. See further a discussion on the nature of the ICESCR in *Human Rights in International Law : Legal and Policy Issues* edited by Theodor Meron, pages 210-217. The ICESCR is also not incorporated into Hong Kong law.”

Chan To Foon & Others v Director of Immigration & Another
[2001] 3 HKLRD 109

“68. So far, detailed consideration has been made of the two conventions in respect of which reservations have been entered on behalf of Hong Kong. But no such reservations have been entered in respect of the ICESCR. Why is that? In my view [in Hartmann J’s view, as he then was], the reason must lie in the nature of this convention (entitled a covenant) and the manner in which its nature may be contrasted with the ICCPR and the CRC.

69. In *Chan Mei Yee and another v. Director of Immigration* HCAL 77/1999, my brother Cheung J referred to several academic texts in analysing the nature and binding effect of the ICESCR. In this regard, he referred to the text, *Human Rights in the World*, 4th Edition, by Robertson and Merrills in which, he said, 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 recognised 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.*” [my emphasis]

70. A second text referred to was *International Human Rights in Context* (1996) by Henry J Steiner in which at page 284 the author writes:

“... The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the Covenant on Civil and Political Rights which embodies an immediate

obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. *It is on the one hand a necessary flexibility device reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'etre of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question.*" [my emphasis]

71. In my view, Article 2(1) of the Covenant illustrates both its 'promotional' and 'progressive' elements. The article reads:

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

72. Hong Kong may therefore recognize the rights protected by the ICESCR. But they are rights which, having regard to this Territory's existing social difficulties, may only be guaranteed progressively; that is, as and when those difficulties are overcome."

9. The Administration's view that rights guaranteed under the ICESCR are promotional in nature echoes with rulings of our courts. The question of the precise nature of the ICESCR may, in future, arise in domestic legal proceedings in many different contexts. Where the nature of the Covenant is at issue, the courts may well be aided in their task by being informed of different views. The Administration and the parties involved have the responsibility to facilitate the court's decision by presenting all relevant views for the court's consideration.

Conformity with BL39

10. The legal effect of BL39 was explained in paragraphs 4 – 9 of the Administration's paper. As illustrated in various rulings discussed therein, BL39 does not have the effect of directly incorporating the three named international instruments into domestic law.

11. There is no single law corresponding to the Hong Kong Bill of Rights Ordinance which incorporates the ICESCR into Hong Kong's

domestic legal order. As observed by the Court of Final Appeal in *Ho Choi Wan v Hong Kong Housing Authority* [2005] 4 HKLRD 706, “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.”

12. That said, individual provisions of the ICESCR are implemented under domestic law through many Articles of the Basic Law, and through other provisions of our ordinances. Those laws were listed in Annex 3 to the Initial Report under the ICESCR and have been updated at Annex 2A of the Second Report.

13. As discussed in the Administration’s paper, the ICESCR requires the Administration to take steps with a view to achieving progressively the full realisation of the rights recognised in it by all appropriate means. This process is an ongoing one, and the Minimum Wage Bill is a major step taken by the Government to achieve progressively the rights stipulated in Article 7 of the ICESCR in light of its maximum available resources.

14. The main object of the Bill is to provide for an hourly-rated minimum wage so as to forestall excessively low wages. The enactment of the Bill would only strengthen the rights protected under Article 7, not undermining them. It is therefore considered that the Bill is in conformity with BL39 and Article 7 of the ICESCR.

Legal Policy Division
Department of Justice
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