

## **The Right to Social Welfare: Some Challenges**

Karen Kong

Faculty of Law, The University of Hong Kong

kykong@hku.hk

*“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.”*

*Article 36, Hong Kong Basic Law*

### **I. INTRODUCTION**

Article 36 of the Hong Kong Basic Law states that 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. As one of the “Fundamental Rights and Duties of the Residents” under Chapter III of the Basic Law, the amount of litigation this article has attracted is modest when compared to other civil and political rights guaranteed under the same Chapter. Article 36 states a general principle but does not refer to the right to any specific social welfare benefits, nor does it guarantee any special level of social welfare entitlement. Social welfare right is protected in the constitutions of many jurisdictions and has found its place in as early as the Universal Declaration of Human Rights and more recently the International Covenant on Economic, Social and Cultural Rights (ICESCR) and ILO Conventions under international law. The national debate usually goes to the level of legal protection that the right to social welfare envisages under the court’s interpretation of the right in a particular situation, given the primary responsibility of the administration to balance state resources.

The level of guarantee of social welfare is inherently a politically charged question. It boils down to our belief in the proper model of the society, our political commitment

to social equality and social integration, and the resources we have and are willing to spend on realizing such a commitment. The Basic Law provision underpins the fundamental legal entitlement we are willing to accord to achieve a socially secure society, albeit non-specifically. How it is carried out by the government in practice will be influenced by the political consensus at a given time in the society. Judicial review of social welfare rights is an opportunity for a dialogue between the government, the court and the citizens to deliberate on the issue. It is a valuable platform for deliberation with jurisprudential insights which the political arena may not be apt to provide. In the following, the right to social welfare, including the relevant case law, will be discussed in more detail. As can be seen from the analysis below, the court is rather conservative in its interpretation of social welfare rights, and a great margin of appreciation is accorded to the government on welfare issues.

The author argues that, given that social welfare is recognized as a basic right of Hong Kong residents, and given our commitment to meet up to international legal standards and the increasing demand for social justice, the enforcement of social welfare right can be more than merely labeling it as an aspirational right but is progressively realizable if the court is willing to take a more robust attitude. There are a lot of potentials to achieve equality and social justice through the enforcement of social rights and the court need not abstain from doing so.

This chapter is divided into seven parts. Part I is the introduction. Part II describes the social welfare system in Hong Kong. Part III examines the right to social welfare as protected under the Basic Law. Part IV looks more detailed at the nature and scope of the right. Part V reviews the non-discrimination duty in social welfare. Part VI studies the relationship between the right to social welfare and other rights. Part VII is the conclusion.

## **II. THE SOCIAL WELFARE SYSTEM IN HONG KONG**

The general philosophy of social welfare in Hong Kong is to assist members of the community to “overcome personal and social problems, to fulfill their role in life to the optimum extent”. In particular, it serves to “ help the disadvantaged members to attain

an acceptable standard of living.”<sup>1</sup> The strategies is to provide a “safety net for the needy and disadvantaged”, and “a wide spectrum of preventive, development, supportive and remedial services for the vulnerable and those who require assistance.”<sup>2</sup> The core welfare services in Hong Kong are provided by the Social Welfare Department in accordance with the policies formulated by the Labour and Welfare Bureau. These welfare services include:<sup>3</sup>

- Social security
- Family services
- Child welfare services
- Services for the elders
- Services for young people
- Services for persons with disabilities
- Medical social services
- Services for offenders
- Services for drug abusers
- Community development
- Clinical psychological services
- Volunteerism

Of the above core services, social security comprises the largest share of the expenditure of the Social Welfare Department.<sup>4</sup> Hong Kong provides the Comprehensive Social Security Assistance (CSSA) Scheme which remains the “safety net for individuals and families who cannot support themselves financially for reasons

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<sup>1</sup> White Paper, “Social Welfare in the 1990s and Beyond” (1991).

<sup>2</sup> Social Welfare Department, The Five Year Plan For Social Welfare Development in Hong Kong – Review 1998.

<sup>3</sup> Social Welfare Department, Annual Report 2005-6 & 2006-7.

<sup>4</sup> Social Welfare Department, Annual Report 2005-6 & 2006-7.

such as old age, illness, disability, single parenthood, unemployment and low earnings.” For the employed able-bodied, the Government provides the Support for Self-reliance (SFS) Scheme which aims at assisting the recipients to seek working and training/retraining opportunities, and to engage them in unpaid community work.<sup>5</sup> The Government also provides Social Security Assistance (SSA) Scheme which includes Old Age Allowance (OAA) and Disability Allowance (DA). The cash assistance forms the main part of the social welfare provided by the Social Welfare Department.

The social welfare system in Hong Kong comprises of law, government policies, and practices. There are social welfare services provided by both the government and non-governmental organizations.

### III. SOCIAL WELFARE AS A CONSTITUTIONAL RIGHT

#### **The definition of social welfare**

The Basic Law does not define ‘social welfare’. Nor did it refer to the type of social welfare and the level of benefits that a person may enjoy.<sup>6</sup> Art. 145 refers to “the previous social welfare system” as the basis for future development and improvement of social welfare policies, which gives the indication that the definition of ‘social welfare’ should be understood in light of the social welfare system immediately before the handover.<sup>7</sup>

The meaning of “social welfare” was discussed at the drafting stage of the Basic Law. In the Final Report on Social Welfare Policy by the Consultative Committee for the Basic Law of the Hong Kong SAR, the Committee referred to the definition of social welfare adopted by the Hong Kong government in the White Paper “Social Welfare into the 1980s” published in 1979:

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<sup>5</sup> UN Economic and Social Council, “Initial Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, People’s Republic of China, E/1990/5/Add.59, p. 153.

<sup>6</sup> *Kong Yunming v The Director of Social Welfare*, unrep., HCAL 127/2008 (23 June 2009), at [46].

<sup>7</sup> In *Catholic Diocese of Hong Kong also known as The Bishop of the Roman Catholic Church in Hong Kong Corporation v Secretary for Justice* [2007]4 H.K.L.R.D. 483, the court interpreted “previous education system” under Art. 136(1) as “the system in place immediately before 1 July 1997, being the date on which the Basic Law came into effect” at [49].

“Used in its broadest sense, [the term ‘social welfare’] can embrace all efforts aimed at improving health, education, employment, housing, recreational, and cultural services for the community at large. However, in a narrow sense, (it is) the range of services provided by the Social Welfare Department and the voluntary welfare sector. The two essential components are cash payments, generally known as ‘social security’, and ‘direct social welfare services’ for specific groups who cannot manage without them.”<sup>8</sup>

Looking at other relevant sections of the Basic Law, in particular Arts.144, 148 and 149, where reference is made to “non-governmental organizations in fields such as education, science, technology, culture, art, sports, the professions, medicine and health, labour, social welfare and social work”, social welfare was made separated from other fields. It can be inferred that drafters have in mind a meaning of social welfare which exclude the other fields expressly mentioned, that means the understanding of the ‘social welfare’ in the broad sense as suggested above is less likely. In a pre-handover trust case of *Hong Kong & Shanghai Bank Hong Kong (Trustee) Ltd v Incorporated Trustee of the Islamic Community Fund of Hong Kong & Ors* [1984]HKC 152, the court discussed the meaning of “social welfare work” as stated in a will. Rhind J stated that, “I am satisfied that the words ‘social welfare work’ bears a well understood meaning in Hong Kong.. the meaning of the words ‘social welfare’ in Hong Kong is coloured by the fact that one of the best know organs in Hong Kong has long borne the title of the ‘Social Welfare Department.’ I think they use it in the sense of the type of work done by the Social Welfare Department here. When the testator made that reference to ‘social welfare work’ in his will, I presume he would have had in his mind the type of work which everyone in Hong Kong knows that the Social Welfare Department here devoted itself to.” Rhind J then cited an extract from the Hong Kong Year Book which described the work of the Social Welfare Department. This also seems to coincide with the ‘narrow’ definition. Yet, the provision of social welfare in Hong Kong is not limited to the Social Welfare Department, as in *Fok Chun Wa v The Hospital Authority*,<sup>9</sup> Poon J

<sup>8</sup> Consultative Committee for the Basic Law of the Hong Kong Special Administrative Region, Special Group on Inhabitants’ and Other Persons’ Rights, Freedom, Welfare and Duties, Final Report on Social Welfare Policy, 14 March 1987.

<sup>9</sup> [2008] H.K.E.C. 2161.

when discussing Art 145 of the Basic Law referred to “public healthcare services” (provided by the public hospitals under the Hospital Authority) as an important part of the social welfare system. Certainly the court would interpret social welfare as including the social welfare in both pecuniary and non-pecuniary forms provided by the Social Welfare department, but it would be likely that, in light of the “previous social welfare system”, the court would broadly construe ‘social security’ as including all services under the social welfare system in Hong Kong, including those listed out separately in Art 144, 148 and 149 of the Basic Law.

As pointed out by *Ng Ka Ling*,<sup>10</sup> affirmed in *Shum Kwok Sher v Hong Kong SAR*,<sup>11</sup> and reiterated in *Chan Kin Sum v Secretary for Justice*, “courts should give a generous interpretation to the provisions in Chapter III that contain these constitutional guarantees in order to give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed.”<sup>12</sup> Therefore, the court should interpret “social welfare” in Hong Kong widely and include social services provided by both the Government and other voluntary organizations.

Further, it would seem that “welfare benefits and retirement security of the labour force” would also fall within the meaning of “social welfare” in Hong Kong.

### **Rationale of the Right to Social Welfare**

The purpose of Art. 36 is not to turn Hong Kong into a welfare state, since according to Art. 5, “the previous capitalist system and way of life shall remain unchanged for 50 years”, and Art. 108, Hong Kong shall adopt the “low tax policy previously pursued”. But the drafters of the Basic Law did have the intention of preserving the pre-handover social welfare system, and to its improvement and development in light of the economic development and the social needs of Hong Kong, as expressed in Art. 145 of the Basic Law.

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<sup>10</sup> *Ng Ka Ling v Director of Immigration* (1999) 2 H.K.C.F.A.R. 4.

<sup>11</sup> *Shum Kwok Sher v Hong Kong SAR* (2002) 5 H.K.C.F.A.R. 381.

<sup>12</sup> *Chan Kin Sum v Secretary for Justice* [2009] 2 H.K.L.R.D. 166.

## In accordance with law

The right to social welfare is not an abstract right but is a right ‘in accordance with law’.<sup>13</sup> The meaning of the term ‘in accordance with law’ was discussed in various constitutional law cases. It was stated in *Shum Kwok Sher v Hong Kong SAR*<sup>14</sup> that ‘prescribed by law’ in the context of Art. 39 of the Basic Law and ‘according to law’ in Art. 11(1) of HKBORO mandates the principle of legal certainty. *Chan Kin Sum* in discussing ‘in accordance with law’ in the context of Art. 26, stated that ‘prescribed by law’, ‘established by law’, ‘according to law’ or similar expressions all impose the principle of legal certainty and the requirement of accessibility.<sup>15</sup> These phrases are used in the context of limitation of fundamental rights of Hong Kong residents.

In Hong Kong, not all social welfare services are regulated by legislation. Many, including the CSSA scheme, are administrative and policy based. Though some of the welfare services have legislative basis or are related to legislation in Hong Kong.<sup>16</sup> The issue is whether the social welfare system is thus ‘in accordance with law’.

This question had been debated in the Legislative Council Panel on Welfare Services and the position of the Government was that, the welfare system has some

<sup>13</sup> *Kong Yunming* at [46].

<sup>14</sup> *Supra*, note 10.

<sup>15</sup> *Chan Kim Sum v Secretary for Justice* [2009] 2 H.K.L.R.D. 166, at [51]-[54]. Tang V-P cited *A (Torture Claimant) v Director of Immigration* [2008] 4 H.K.L.R.D. 752 and *Shum Kwok Sher v Hong Kong SAR* (2002) 5 H.K.C.F.A.R. 361 in approval on this topic.

<sup>16</sup> Guardianship of Minors Ordinance (Cap 13); Immigration Ordinance (Cap 115); Mental Health Ordinance (Cap 136); Matrimonial Causes Ordinance (Cap 179); Marriage Ordinance (Cap 181); Legitimacy Ordinance (Cap 184); Domestic Violence (Amendment) Ordinance (Cap 189); Matrimonial Proceedings and Property Ordinance (Cap 192); Offences against the Person Ordinance (Cap 212); Protection of Children and Juveniles Ordinance (Cap 213); Criminal Procedure Ordinance (Cap 221); Reformatory Schools Ordinance (Cap 225); Juvenile Offenders Ordinance (Cap 226); Summary Offences Ordinance (Cap 228); Traffic Accident Victims (Assistance Fund) Ordinance (Cap 229); Child Care Services Ordinance (Cap 243); Education Ordinance (Cap 279); Adoption Ordinance (Cap 290); Probation of Offenders Ordinance (Cap 298); Drug Addicts Treatment and Rehabilitation Ordinance (Cap 326); Community Service Orders Ordinance (Cap 378); Bedspace Apartments Ordinance (Cap 447); Residential Care Homes (Elderly Persons) Ordinance (Cap 459); Post-Release Supervision of Prisoners Ordinance (Cap 475); Personal Data (Privacy) Ordinance (Cap 486); Social Workers Registration Ordinance (Cap 505); Justices of Peace Ordinance (Cap 510); Long-term Prison Sentences Review Ordinance (Cap 524); Drug Dependent Persons Treatment and Rehabilitation Centres (Licensing) Ordinance (Cap 566); Prevention of Child Pornography Ordinance (Cap 579); Director of Social Welfare Incorporation Ordinance (Cap 1096); Social Work Training Fund Ordinance (Cap 1100); Emergency Relief Fund Ordinance (Cap 1103). Source from the Social Welfare Department website, available at [http://www.swd.gov.hk/en/index/site\\_relatedleg/](http://www.swd.gov.hk/en/index/site_relatedleg/).

basis in Hong Kong law and is consistent with the law.<sup>17</sup> Art. 36 has to be read together with Art. 145, since the social welfare in Hong Kong is based on “the previous social welfare system” prescribed by Art. 145, it can be said to be ‘in accordance with law’.<sup>18</sup> Also, the right to social welfare is backed up by various legislation and administrative decisions on social welfare are judicially reviewable.<sup>19</sup> In addition, Art. 9 of ICESCR guarantees the right to social security, which the court may refer to in interpreting Art. 36 of the Basic Law. Therefore, the right to social welfare in Hong Kong as a whole is ‘in accordance with law’.

This should be right in light of *Kong*. Law is given a liberal interpretation to cover policies and practices.<sup>20</sup> The restriction imposed under Art. 145 was certain and accessible. Other restrictions under the Basic Law, legislation and common law will also have to satisfy the same requirement.

### **Hong Kong Residents**

Art. 36 applies to “Hong Kong residents” without distinction between permanent and non-permanent residents. In *Kong Yunming*, which will be discussed in more detail later in this paper, the court ruled that the 7-year residence requirement for eligibility for CSSA, which essentially exclude non-permanent residents from the security benefit, though a prima facie a discrimination, is justified in light of the need to maintain long term sustainability of the social welfare system and is therefore constitutional. Non-residents,<sup>21</sup> refugees, asylum-seekers, visitors<sup>22</sup> and persons who are in Hong Kong illegally will be excluded from the right to social welfare.

### **Protection of the Labour Force**

Art. 36 gives specific protection of the welfare benefits and retirement security of the labour force.

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<sup>17</sup> “Compliance of the Seven-year Residence Requirements for Comprehensive Social Security Assistance and Social Security Allowance with the Basic Law”, 10 March 2004, LC Paper No. CB(2)1616/03-04(01), at [11].

<sup>18</sup> *Ibid*, at [12].

<sup>19</sup> LC Paper No. CB(2)1996/03-04, at [4].

<sup>20</sup> *Kong Yunming*, at [66].

<sup>21</sup> *Santosh Thewse v The Director of Immigration* [2000] 1 H.K.L.R.D. 717, at 721.

<sup>22</sup> *See Fok Chun Wa*.

Hong Kong introduced the Mandatory Provident Fund in 2000 based on the Mandatory Provident Fund Schemes Ordinance (Cap. 485).<sup>23</sup> It is a compulsory contributory retirement saving programme for the Hong Kong workforce .

However, Art. 36 only covers the welfare benefits and retirement security “of the labour force”, which means those who are not in the working population, including homemakers, disabled persons, elderly, are not protected by Art. 36. Indeed, the Committee on Economic Social and Cultural Rights have expressed concern in its Concluding Observation in 2001 that the Mandatory Provident Fund Scheme had excluded the abovementioned and had urged the Government to “adopt a comprehensive pension system that provides adequate retirement protection for the entire population, in particular for housewives, self-employed persons, older persons and persons with disabilities.”<sup>24</sup>

Accrued welfare benefits is a property right.<sup>25</sup> But whether the protection of property extends to other non-contributory welfare benefits is more controversial.<sup>26</sup>

In *Re Ng Shiu Fan*, it was held that Art. 36 does not require that all pension rights should fall outside the bankruptcy regime, meaning that pensions are subject to creditor’s right to repayment of their lawful debts.<sup>27</sup>

#### IV. NATURE AND SCOPE OF THE RIGHT

Art. 36 does not specify any particular type or level of social security an individual is entitled to. The court develops on a case-by-case basis the nature and scope of the right to social welfare.

*Kong Yunming v The Director of Social Welfare* is the most recent authority on the right to social welfare in Hong Kong. This case concerns the challenge by a new Mainland immigrant to Hong Kong against the constitutionality of the seven-year

<sup>23</sup> See generally Alan Siu, *Hong Kong’s Mandatory Provident Fund*, (2002) 2 Cato Journal 317.

<sup>24</sup> UN Economic and Social Council, “Concluding Observations of the Committee on Economic, Social and Cultural Rights (Hong Kong): China, 21/05/2001”, E/C.12/1/Add.58 (21 May 2001) at [36].

<sup>25</sup> *R v Secretary of State for Work and Pensions, ex p Carson* [2005] U.K.H.L. 37.

<sup>26</sup> See generally, Asbjorn Eide, Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights: A Textbook* (2001) at pp204-7.

<sup>27</sup> [2008] 4 HKC 508 at [57].

residence requirement for the entitlement of CSSA. Under the new residence requirement in effect since 1 January 2004, an applicant for Comprehensive Social Security Assistance (CSSA) and the Social Security Allowance (SSA) Scheme must satisfy the residence requirements as stipulated in the policy of the Social Welfare Department. He or she must have been a Hong Kong resident for at least seven years; and must have resided in Hong Kong continuously for at least one year immediately before the date of application.<sup>28</sup> The Director of Social Welfare remains the discretion to grant CSSA to persons who do not satisfy the residence requirement in exceptional circumstances.<sup>29</sup>

The applicant argued, *inter alia*, that the new residence requirement contravened Art. 36 of the Basic Law.<sup>30</sup> It discriminated against the non-permanent residents, and was a retrograde step instead of a “development and improvement” of the existing social welfare system required by Art. 145. The court ruled that discriminatory treatment was justified and thus the policy was one properly formulated under Art. 145 of the Basic Law. No breach of Art. 36 was found.<sup>31</sup>

The court took this opportunity to pronounce on the nature and scope of the right to social welfare, including the restrictions thereof.

The right to social welfare under Art. 36 is one of the fundamental rights of residents of Hong Kong SAR.<sup>32</sup> The right is enjoyed by all “Hong Kong residents”, without distinction between permanent and non-permanent residents.<sup>33</sup> Art. 36 does not set out the type or level of social welfare benefit that a person is entitled to.<sup>34</sup> The content of the right will depend on the subject matter of the case.<sup>35</sup> Even though there is no apparent limitation on the right from the wording of Art. 36, the right is a restricted one.<sup>36</sup>

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<sup>28</sup> Social Welfare Department, *A Guide to Comprehensive Social Security Assistance*, February 2009.

<sup>29</sup> *Ibid*, Residence Requirement A, Note (4).

<sup>30</sup> *Kong Yunming* at [33]-[38].

<sup>31</sup> *Kong Yunming* at [135].

<sup>32</sup> *Kong Yunming* at [40].

<sup>33</sup> *Ibid*.

<sup>34</sup> *Kong Yunming* at [46].

<sup>35</sup> *Kong Yunming* at [47].

<sup>36</sup> *Kong Yunming* at [51].

The court emphasized that the social welfare system in Hong Kong is not static and is “subject to change to meet changing circumstances”, which may lead to a more generous or more restrictive system.<sup>37</sup> As such, Art. 145 provides for the “development and improvement” of policies based on the “previous social welfare system”, taking into account “the economic conditions and social needs” of Hong Kong.<sup>38</sup> Cheung J was of the view that the Basic Law clearly contemplates both expansion and reduction of social welfare benefits. Any restrictions to the right of social welfare lies not in any expanded concept of “in accordance with law” or “prescribed by law” or in the general concept of proportionality, but in Art. 145.<sup>39</sup> In the absence of infringement of other constitutionally guaranteed rights, the content of the government policy is only restricted by Art. 145.<sup>40</sup>

### **Relationship between Art. 36 and Art. 145**

Art. 36 and Art. 145 of the Basic Law are closely connected. In *Kong*, the court stated that the Art. 145 sets out the formula for changes to the pre-existing social welfare system. Firstly, the Hong Kong Government shall formulate social welfare policies “on its own”, meaning that the change in policies is the sole responsibility of the Hong Kong Government, and the Central Government in the Mainland shall not be involved. Hong Kong shall remain its capitalist system and the Chinese socialist system shall not be practiced in Hong Kong under Art. 5 of the Basic Law.<sup>41</sup> Second, the policies must be a “development and improvement” of the previous social welfare system. Third, such policies are made “in light of the economic conditions and social needs”. In determining whether the above criteria are met, the court will be slow to interfere with the government’s judgment and decision.<sup>42</sup> The reason being that, “what constitutes development and improvement of the pre-existing social welfare system is best judged by the government, subject to the scrutiny of the Legislative Council”.<sup>43</sup>

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<sup>37</sup> *Kong Yunming* at [48].

<sup>38</sup> *Kong Yunming* at [49].

<sup>39</sup> *Kong Yunming* at [52].

<sup>40</sup> *Kong Yunming* at [60].

<sup>41</sup> *Kong Yunming* at [52].

<sup>42</sup> *Kong Yunming* at [56].

<sup>43</sup> *Kong Yunming* at [56].

The court is constitutionally and institutionally unequipped to adjudicate on these matters.<sup>44</sup>

Art. 145 is the test for scrutinizing any infringement of Art. 36. Given the high degree of deference accorded by the court to the government, except for a breach of other constitutionally guaranteed rights under the Basic Law or the Hong Kong Bill of Rights Ordinance (HKBORO), e.g. discrimination, the court will be reluctant to declare that a policy is not designed to develop and improve the pre-existing social welfare system under prevailing economic conditions and social needs under Art. 145.

In other words, once a new social welfare policy satisfied Art. 145, the court will be very reluctant, except for breach of other constitutionally guaranteed rights under the Basic Law or the HKBORO, to declare that Art. 36 is infringed.

#### *Development vs. Retrogression*

The author believes that the court, in determining whether a policy is designed to “develop and improve” the pre-existing social welfare system for the purpose of Art. 145, should adopt a more detailed categorization and principled approach. The court should acknowledge that the new residence requirement is in effect an exclusion of a particular vulnerable group of the society from social security protection which previously enjoyed the benefits and who were still in need. This is to be distinguished from cases where social security benefits are increased as a whole or increased to particular groups to satisfy special needs. The former case is likely to be a “retrograde step” from “the previous social welfare system”, as there is an apparent unfairness and disproportionate harm to a particular social group who are in need. “Previous social welfare system” should refer to the standard immediately before 1 July 1997, instead of the colonial system generally. Immediately before the handover, the Social Welfare Department imposed a one-year requirement to entitlement to CSSA. Reference to the five year and ten year requirements were inappropriate. The court should not totally defer to the government on classifying a policy as an improvement or retrogression. Instead, once it has classified a policy as a “retrograde step”, it should adopt a higher

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<sup>44</sup> *Kong Yunming* at [57].

degree of scrutiny and use the proportionality analysis in determining whether the policy is justified.

This is analogous to the right to education under Art. 136(1) in *The Catholic Diocese of Hong Kong*, “This safeguard [of development and improvement] goes to the content and merits of the changes [of policy]. Any change that is not a development and improvement of education based on the existing education system is liable to be struck down. The changes must be changes for the better and not otherwise.”<sup>45</sup> It would be true that the economic conditions and social needs should be best judged by the government, but the question of whether a policy is an improvement or a retrograde step and thus is a prima facie violation of Art. 145 should not be deferred to the similar extent by the court.

In *Kong*, the court stated that, absence infringement of other constitutional rights, it will not say that a policy is not a development and improvement. Yet, even without infringement of other constitutional rights, there are chances that the right to social welfare per se is allegedly infringed, one example would be where the government had a major reduction in the expenditure on CSSA in a particular year in order to finance an infrastructure project. This case may not involve other constitutional rights. The scope of the court in scrutinizing social welfare policy should be broader than a mere determination of infringement of other constitutional rights. In this type of cases, the court should determine whether such retrogressive measures are justified under the proportionality test.

### *Deference*

In *Kong*, as well as the previous case *Fok Chun Wa*,<sup>46</sup> the court emphasized the need to defer to the government in terms of social and economic policies in order to uphold the separation of powers of the three branches of government, and to limit the court to the determination of legal issues. Whereas in civil and political rights, the court adopted the proportionality analysis in scrutinizing restrictions thereof, in economic and

<sup>45</sup> *Catholic Diocese of Hong Kong also known as The Bishop of the Roman Catholic Church in Hong Kong Corporation v Secretary for Justice* [2007] 4 H.K.L.R.D. 483 at [122].

<sup>46</sup> *Fok Chun Wa* at [72]-[78].

social rights, the court tends to exercise the highest degree of self-restraint, leaving the government's decision on the allocation of limited resources unquestioned in almost all cases.<sup>47</sup> This corresponds to the identification by Prof. Mark Tushnet of social welfare rights as "weak substantive rights".<sup>48</sup>

However, in determining the degree of deference to be applied to scrutinizing economic and social policies, the court should acknowledge the difference between the following two categories of cases:

1. The removal of existing social welfare benefits enjoyed by a particular vulnerable group who are in need; and
2. the failure to positively increase the level of social welfare of a particular vulnerable group to respond to the changing need.

In the first type, there is a greater likelihood of unfairness and significant negative impact on the aggrieved party, thus a higher degree of scrutiny should be adopted. This is in line with the approach taken by the South African constitutional court in *Khosa*.<sup>49</sup> As suggested by Sandra Liebenberg in relation to South African court's adjudication of social rights, "claims involving a deprivation of basic needs should attract a high level of judiciary scrutiny".<sup>50</sup> Aoife Nolan et al. also commented, "[i]n general, government will be held to a stricter test in relation to available resources when existing programs are cut than they might be with regard to a simple failure to take positive steps to create programs or enhance them."<sup>51</sup> The stricter test will include increasing the burden on the government to justify the potentially retrogressive measures, and the need to show that alternative measures had been carefully considered. Remedial measures may have to be adopted to the deprived group to ensure that their constitutional rights are adequately protected. It is important that the degree of deference will not be applied to such an

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<sup>47</sup> *Fok Chun Wa* at [77],[78].

<sup>48</sup> Mark Tushnet, "Social Welfare Rights and the Forms of Judicial Review" (2004) 82 Texas L. Rev. 1895, at 1902.

<sup>49</sup> *Khosa v Minister of Social Development*. See Elizabeth Pascal, "Welfare Rights in State Constitutions" 39 Rutgers L.J. 863, at 889.

<sup>50</sup> Sandra Liebenberg, "Needs, Rights and Transformation: Adjudicating Social Rights" (2006) 17 Stellenbosch L. Rev. 5, at 31.

<sup>51</sup> Aoife Nolan, Bruce Proter and Malcolm Langford, "The Justiciability of Social and Economic Rights: An Updated Appraisal" CHRGI Working Paper No.15, 2007.

extent as to lead to an effective failure by the court to provide an effective enforcement of social welfare rights.

### *Proportionality Test*

The court in *Fok Chun Wa* adopted the proportionality analysis in determining whether there is a breach of Art. 36. First, it asked the question whether the right protected by the Basic Law or the Hong Kong Bill of Rights Ordinance (HKBOR) has been infringed, and if so, whether such infringement can be justified. The restrictions to the right may be justified “if it has a rational connection with the pursuit of a legitimate aim and if it is no more than necessary for the achievement of that aim.” But this approach was not pursued in *Kong*. The court seemed to have abandoned the proportionality analysis, as the court stated that in scrutinizing any purported change or restriction in social welfare, “the answer lies not in any expanded concept of ‘in accordance with law’ or ‘prescribed by law’ (phrases found in articles 36 and 39(2)) or in the general concept of proportionality as such, but in article 145 itself.”<sup>52</sup> Even though in *Kong*, Art. 25 was involved and so the justification analysis of discrimination was akin to the proportionality analysis, it is uncertain if proportionality analysis will be used in cases that do not involve a challenge of discrimination. Effectively, if other constitutional rights or the HKBORO are alleged to be breached, e.g. right to life or the right against degrading treatment, proportionality analysis will be used in the determination of whether the breach is justified, but the situation is unsure if other social economic rights similar to social welfare rights are involved, or if no other constitutional rights are involved. It is submitted that for all substantive rights protected under Chapter III of the Basic Law, proportionality should be the proper analysis. The relevant provisions in other parts of the Basic Law should be the additional restrictions, but not replacement of the proportionality analysis, unless there is contradiction between the two. Otherwise, it may run the risk of insufficient protection of certain types of rights where another provision touches upon the subject matter in the Basic Law.

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<sup>52</sup> *Kong Yunming* at [52].

### **Adjudication of Social Rights**

In *Kong*, the court emphasized on looking at the broad picture instead of telescoping one particular right of an individual.<sup>53</sup> It acknowledged that the Government's policy aim to ensure the long term sustainability of the social welfare system in Hong Kong, and to reduce the fiscal burden of Hong Kong in the rising expenditure on CSSA which are proportionally more allocated to new arrivals to Hong Kong. The court looked at social rights as "competing rights". Given limited financial resources, the granting of more benefits to one sector will mean less to another. Therefore the government should be responsible politically to allocate those entitlements and to strike a proper balance between various interests in resource allocation. The court is slow to interfere and should not grant right to an individual who came to challenge in court and thus missing out the competing rights by other people outside the court at present and in the future.

This corresponds to the general approach taken by other constitutional courts at the beginning stage in adjudication of economic and social rights, by giving high degree of deference to social economic policies by the Government. The court has been consistently giving socio-economic rights much less scrutiny compared to civil political rights. This means constitutional protection of social welfare rights remains rather modest. Yet, decisions on social rights serve an important function as a dialogue between the court, the government and the citizens.<sup>54</sup> It also helps to clarify restrictions on these constitutional rights. In the future, the court may move from a more cautious position to a greater level of protection of social rights by developing a varying degree of deference depending on the nature and type of the subject matter involved.

### **Obligations under ICESCR**

The right to social welfare is similar to the right to social security guaranteed under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under Art. 39 of the Basic Law, the provisions of ICESCR as applied to Hong Kong shall

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<sup>53</sup> *Kong Yunming* at [118].

<sup>54</sup> Dennis Davis, "Socio-Economic Rights in South Africa: The Record After Ten Years" 2 N.Z. J. Pub. & Int'l L. 47.

remain in force and shall be implemented through the laws of the Hong Kong SAR. Unlike ICCPR, ICESCR is not incorporated into Hong Kong domestic law in its entirety.<sup>55</sup> However, the rights under ICESCR can be said to be enforceable through various local legislation and local laws in Hong Kong that enshrines economic social and cultural rights. ICESCR is the most significant source of economic, social and cultural rights in international law, and so the court, similar to referring to ICCPR for interpretation of civil and political rights, can make reference to ICESCR in the interpretation of relevant rights and obligations under the Basic Law. Further, so far as possible, the court should interpret domestic law in conformity with international law norms.

Art. 9 of the ICESCR provides that, “The State Parties to the present Covenant recognize the right of everyone to social security, including social insurance.” The term ‘social security’ is often distinguished from ‘social welfare’. The former refers to monetary benefits accrued by the working force in contributory retirement benefits schemes (e.g. mandatory provident fund), while the latter refers to need-based non-contributory social assistance provided by the government drawing resources from taxation.<sup>56</sup> As seen in the literature on ICESCR, social security under Art. 9 is normally interpreted broadly to cover both meanings.<sup>57</sup> In particular, General Comment No. 19 gives a wide meaning to the right to social security:

“The right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.”

Thus the right to social security under ICESCR could inform the right to social welfare under Art. 36 of the Basic Law.

<sup>55</sup> *Ho Choi Wan v Hong Kong Housing Authority*[2005]4 H.K.L.R.D. 706 at [68].

<sup>56</sup> Martin Scheinin, “The Right to Social Security” in Asbjorn Eide, Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights: A Textbook* (2001) at 214.

<sup>57</sup> *Ibid.*

States have the obligation to respect, protect and fulfill the right to social welfare. The obligation to respect requires states to “refrain from interfering directly or indirectly with the enjoyment of the right to social security.”<sup>58</sup> The obligation to protect requires states to “prevent third parties from interfering in any way with the enjoyment of the right to social security.”<sup>59</sup> Obligation to fulfill requires states to “adopt the necessary measures, including the implementation of a social security scheme, directed towards the full realization of the right to social security.”<sup>60</sup> The right to social security requires benefits to be adequate<sup>61</sup> and accessible,<sup>62</sup> and be applied without discrimination.<sup>63</sup>

### *Progressive Realization*

Under Art. 2(1) States have the obligation to progressively realize the right to social security within their maximum available resources. That does not mean that the right is merely ‘aspirational’. General Comment No. 3 requires states to ‘move as expeditiously and effectively as possible towards that goal.’<sup>64</sup> Further, with regard to retrogressive measures, General Comment No.19 states that “there is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the [ICESCR].” States have the burden to justify the measure as having introduced “after the most careful consideration of all alternatives” and “by reference to the totality of the rights provided for in the [ICESCR], in the context of the full use of the maximum resources of the State party.”<sup>65</sup>

### *Minimum Core Content*

General Comment No.19 refers to a list of minimum core obligations of the right to social security which are immediately enforceable, including for example, the provision

<sup>58</sup> General Comment No. 19 at [44].

<sup>59</sup> General Comment No. 19 at [45].

<sup>60</sup> General Comment No. 19 at [47].

<sup>61</sup> General Comment No. 19 at [22].

<sup>62</sup> General Comment No. 19 at [23]-[27].

<sup>63</sup> General Comment No. 19 at [29]-[32].

<sup>64</sup> Committee on Economic, Social and Cultural Rights, General Comment No.3, “The Nature of States Parties Obligations (Art. 2 para. 1 of the Covenant), (14 December 1990) at [9].

<sup>65</sup> General Comment No.19 at [42].

of “a minimum essential level of benefits for all individuals and families”<sup>66</sup> and to “monitor the extent of the realization of the right to social security”.<sup>67</sup>

The above concepts can be applied by the court in aid of the interpretation of the right to social security under Art. 36 of the Basic Law with a view to fulfill also its international obligations.

## V. THE RIGHT TO SOCIAL WELFARE AND NON-DISCRIMINATION

Due to the limitation of resources, it is not uncommon for states to establish criteria which qualify a person to social welfare. States usually establish residency requirement for the entitlement of social welfare, the rationale being the degree of contribution the beneficiary has done to the community. As can be seen from the Hong Kong cases below, different degree of social welfare entitlement is given to residents and non-residents. However, states must not disregard their obligations of non-discrimination under the Basic Law and HKBORO, and should give special attention to vulnerable and marginalized groups. The ultimate aim should always be the inclusion of nationals and non-nationals alike to social welfare. The minimum obligation of provision of basic welfare to non-residents is immediately enforceable.

### Non-residents

In *Santosh Thewe*,<sup>68</sup> the applicant was refused permission by the Immigration Department to reside in Hong Kong as dependent of his wife on the ground that the wife’s financial capability to support the applicant was not established. The applicant argued, inter alia, that under Art. 36, his wife will be able to support him on social welfare benefits when he comes to Hong Kong, and the Immigration should have regard to that. The court refused to grant leave. Stock J was of the view that the Immigration’s refusal was based on a sensible policy. The applicant is a non-resident and so has no entitlement to social welfare. Though the wife will be entitled to such benefits, in such a case, the applicant would be coming to Hong Kong as dependent of his wife but not the state, such application the Immigration did not err in rejecting. This case did not argue

<sup>66</sup> General Comment No.19 at [59].

<sup>67</sup> *Ibid.*

<sup>68</sup> [2000] 1 H.K.L.R.D. 717.

on the ground of discrimination, but it illustrates the entitlement of social welfare benefits based on residency.

The right to social welfare for non-resident is at issue in a case concerning medical services in Hong Kong. In *Fok Chun Wa*,<sup>69</sup> the applicant, a Mainland woman, was the non-resident spouse of a Hong Kong resident who came to Hong Kong on a two-way permit and gave birth to a child at a Hong Kong public hospital. She challenged the policy of the Hospital Authority to classify non-resident spouses of Hong Kong residents as non-eligible persons (NEP) for subsidized obstetric services at public hospitals, and the decision to charged them HK\$39,000 for booked cases and \$48,000 for non-booked cases with effect from 1 February 2007. She argued, inter alia, that the policy and decision was a breach of Art. 36 of the Basic Law and constituted discrimination against them under the equality provisions in the Basic Law and the HKBORO. Because of her close connection with Hong Kong, she should not be treated differently from a Hong Kong resident pregnant woman when it comes to charges of obstetric services at a public hospital.<sup>70</sup>

Poon J made it clear that he would give a wide margin of appreciation to the government on determining general social and economic policies, especially in cases which concern the allocation of limited financial resources in the context of public healthcare.<sup>71</sup> First, he analysed whether the applicant's case was similar to other eligible persons under the policy (EP) so as to require equal treatment under the Basic Law and the HKBORO. Here Poon J was of the view that because the applicant remained a visitor in law, the Government has no duty to confer her the same social benefits as a Hong Kong resident, and so her case is not comparable to an EP.<sup>72</sup> Alternatively, even if the equality provisions were engaged, the higher fee for non-residents satisfied the justification test. The test was the one established in *Yau Yuk Lung*:<sup>73</sup>

(1) The difference in treatment must pursue a legitimate aim. For an aim to be legitimate, a genuine need for such difference must be established.

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<sup>69</sup> [2008] H.K.E.C. 2161.

<sup>70</sup> *Fok Chun Wa* at [81].

<sup>71</sup> *Fok Chun Wa* at [75]-[77].

<sup>72</sup> *Fok Chun Wa* at [86].

<sup>73</sup> *Fok Chun Wa* at [70].

- (2) The difference in treatment must be rationally connected to the legitimate aim.
- (3) The difference in treatment must be no more than necessary to accomplish the legitimate aim.

On the basis of Art. 145 and Art. 138, the court affirmed the duty of the Government to develop and improve the social welfare system to respond to ‘changing social, economic conditions and public needs and meet adequate the challenges and pressures exerted on the system.’<sup>74</sup> It stated that, the policy objectives to bring the eligibility of subsidized public healthcare services in line with other subsidized social benefits, to meet the problem of rising public healthcare expenditure, and to ensure the long-term sustainability of the public healthcare system were legitimate. The differentiation between residents and non-residents were rationally connected to the aim and was no more than necessary to accomplish the aim.<sup>75</sup> Similarly, the decision was held to satisfy the justification test.<sup>76</sup>

The court found it unnecessary to examine the alternatives available to the Government in the absence of evidence that the policy and decisions were “manifestly without reasonable foundations”, giving a wide margin of appreciation accorded to the Government.<sup>77</sup>

Regarding the claim by the applicant that the policy violated the right to social welfare under Art. 36 of the Basic Law, the court dismissed the argument by stating that the pregnant mother, being a non-resident, could not avail herself to the protection of Art. 36.<sup>78</sup> Alternatively, even if there was a breach of Art. 36, the policy was justified under the proportionality analysis mentioned above.<sup>79</sup>

### *Differential Treatment*

In *Fok*, the applicant focused on the differential treatment between a two-way permit pregnant woman (NEP) and a Hong Kong resident pregnant woman (EP). The

<sup>74</sup> *Fok Chun Wa* at [101].

<sup>75</sup> *Fok Chun Wa* at [109]-[112].

<sup>76</sup> *Fok Chun Wa* at [113]-[116].

<sup>77</sup> *Fok Chun Wa* at [119].

<sup>78</sup> *Fok Chun Wa* at [130].

<sup>79</sup> *Fok Chun Wa* at [131].

court ruled that the former, being a visitor in law, was materially different from the latter, and so no discrimination was involved. A two-way permit pregnant woman was treated no differently from other visitors (NEP) who gave birth to children in Hong Kong. However, the proper comparison, it is submitted, should be between a mainland pregnant woman married to a Hong Kong resident, and a foreign pregnant woman married to a Hong Kong resident. Assuming both woman married to Hong Kong residents at the same time, the foreign woman will need much shorter time to obtain Hong Kong residency, usually 6 months, whilst a Mainland woman will normally take up to 5 years before they could obtain a one-way permit. Therefore, when the mainland woman gives birth to a baby in Hong Kong, she is still a visitor in law and has to pay the non-subsidized fee, while the foreign woman will only need to pay the resident rate. There is a difference in treatment based solely on the nationality or place of origin of the pregnant woman which is more difficult to justify.

*Art. 41 Basic Law*

The court will have to refer to Art. 41 of the Basic Law in the analysis of the Government's obligations under Art. 36. Art. 41 states that persons in the HKSAR other than Hong Kong residents "shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in [Chapter III]".<sup>80</sup> Though such duty is not absolute and may not be immediately realizable under limited sources of the government, the obligation of 'progressive realization' should be given due weight and the compliance of which by the government should be scrutinized by the court. The government should be obliged to review the level of social welfare benefits periodically and to establish benchmarks for the fulfillment of its duty to residents and non-residents. The current scrutiny is too loose and is not sufficient to protect vulnerable groups in the society to ensure equality for all.

**Non-permanent residents**

Under Art. 24 of the Basic Law, permanent residents are those with the right of abode while non-permanent residents are those who are qualified to obtain Hong Kong

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<sup>80</sup> Basic Law, Art. 41.

identity cards but do not enjoy the right of abode. Art. 24(3) states that such person will have ordinarily to reside in Hong Kong for a continuous period of not less than 7 years to become permanent residents.

In *Kong*, the court held that, even though Art. 36 did not distinguish between permanent and non-permanent residents in its guarantee of the right to social welfare, Art. 36, when reading together with 145, and taking into account the existence of residence requirement of eligibility of CSSA before the handover, did recognize differentiation based on the length of residence. Therefore, even though the new 7-year residence requirement excluded non-permanent residents from CSSA, it was justified by the social need and economic circumstances in Hong Kong and therefore constitutional.

The applicant failed on the ground of discrimination. Even though there was an unequal treatment of non-permanent residents, the court held that the 7-year residence requirement was justified. The court applied *Carson* and classify discrimination on the ground of length of residence as the second category (grounds which do not go to the very make up or identity of an individual, e.g. ability, education, wealth, occupation) which only required some rational justification but not close scrutiny.<sup>81</sup> The 7-year requirement was adopted to pursue the legitimate aim of long term sustainability of the social welfare system in Hong Kong. The government had to maintain the sustainability of the social welfare system, and to strike a balance between competing interests and rights with the finite economic resources available. The policy was rationally connected to the legitimate aim, by giving benefits only to those who had contributed to the community for a substantial period. The court also agreed that the policy was no more than necessary to accomplish the legitimate aim, by deferring the matter to the government's choice.

### **Refugees and Asylum Seekers**

Even though as non-residents, refugees and asylum-seekers are not entitled to social welfare rights under Art. 36, it seems likely that can claim at least some minimum level of social welfare, including basic medical service, under Art. 41. In international

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<sup>81</sup> See *R(Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173.

law, General Comment No.19 provides that they should “enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards”.<sup>82</sup> General Comment No.20 on “Non-Discrimination in Economic, Social and Cultural Rights (art.2, para.2)” requires that the ground of nationality should not bar access to Covenant rights. The Covenant should apply to everyone including nationals and non-nationals.

In *R (Limbuela & Ors) v Secretary of State for the Home Department*, (refugees, Art. 3), the applicants were asylum seekers who were denied government social support, as a result, they have to sleep on the street and beg for food.<sup>83</sup> The House of Lords held that the government’s refusal to provide support amounts to ‘inhuman or degrading treatment’ of the asylum seekers prohibited under Art. 3 of the European Convention on Human Rights. The prohibition corresponds to Art. 7 of the ICCPR and Art. 3 of the HKBORO.

From the above cases, we can see the overlap between the right to social security and equality rights. The attractiveness of claiming equality rights is that, it is included in the HKBORO and the Basic Law, and is regarded as civil and political rights, which the court has substantial experience in dealing with. The proportionality analysis is aptly dealt with by the court. It is a more secure route to be taken by the claimant. However, at this stage, unless the differential treatment is based on the established grounds of race, gender, religion, or political beliefs, it does not seem to be very helpful to the claimants of the right to social welfare.

## VI. THE RIGHT TO SOCIAL WELFARE AND OTHER RIGHTS

A majority of jurisprudence on the right to social welfare is linked to equality and non-discrimination.

Other than Art. 36, entitlement to social welfare can be protected through the right to life, the right to property, the right to a fair trial and the right against inhuman or degrading treatment under the ICCPR and HKBORO.

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<sup>82</sup> General Comment No.19 at [38].

<sup>83</sup> [2006]1 AC 396.

It has also been argued that the deprivation of minimum level of social welfare is against human dignity.<sup>84</sup>

## VII. CONCLUSION

In light of the conservative view of the court in *Chan Mei Yee*<sup>85</sup> and *Chan To Foon*<sup>86</sup> that economic, social and cultural rights are progressive and promotional, and the strong urge to defer to the government in formulation of social and economic policies, the court will continue to walk on the cautious line in dealing with individual challenges against breaches of the Art. 36 right to social welfare. Even if challenges are coupled with civil and political rights including equality and non-discrimination, unless discrimination is based on established grounds such as race, colour, sex, language, religion and without rational justification, the court tends to adopt a hands-off approach of review.

Nonetheless, in order to prevent the right to social security from becoming effectively unenforceable, the court should take into account and aim at achieving the international standards of the right to social welfare, especially to non-nationals. In particular, the Court should give more emphasis on the duty of the government to progressively realize the right to social security for all, which is under Art. 2(2) of ICESCR, and implicit under the duty to “develop and improve” the social welfare system under Art. 145 of the Basic Law.

The court should also distinguish between differential treatment in positive measures to increase social welfare, from measures which deprive a person of the status quo enjoyment of social welfare. A heavier burden needs to be imposed on the government to justify retrogressive measures of social security which have the effect of excluding vulnerable and minority groups who are previously entitled to such benefits. The current degree of deference to government is too loose and may run the risk of rendering the right to social welfare an empty promise, by disproportionately harming a particular vulnerable group in order to achieve the public interest of sustainability of the

<sup>84</sup> Andras Sajó, “Implementing Welfare in Eastern Europe After Communism” in Yash Ghai & Jill Cottrell (eds.) *Economic, Social & Cultural Rights in Practice* (2004), pp55-57.

<sup>85</sup> *Chan Mei Yee v Director of Immigration* [2000] H.K.E.C. 788.

<sup>86</sup> *Chan To Foon v Director of Immigration* [2001] 3 H.K.L.R.D. 109.

welfare system. Under Art. 145, the court should, at its minimum, be vigilant in the status quo preservation of the social welfare of Hong Kong residents. The duty of periodic review by government is particularly important in monitoring the progressive realization of the right to social welfare for all.