"A Stroke of Genius" in *Kong Yunming*

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When Kong Yunming was decided by the lower courts, it neither occurred to the Court of First Instance nor the Court of Appeal that Art 36 of the Basic Law could be argued to imply that the "right to social welfare" conferred therein on Hong Kong residents can be "concretised" to mean the social welfare benefits that Hong Kong residents enjoyed immediately before the 1997 handover in accordance with the laws or policies prevailing at that time. The "stroke of genius" in the Court of Final Appeal's decision was to define precisely the substantive content and scope of the social welfare right protected by Art 36, at least as far as social security in the form of cash assistance for the needy such as the Comprehensive Social Security Assistance scheme was concerned. This was achieved by reading Art 36 and Art 145 of the Basic Law as a whole, so as to import from Art 145 into Art 36 the level of social welfare provisions as they existed immediately before the 1997 handover. This comment will focus on this adoption of the level or content of social welfare rights as of 1997 as the baseline for the protection of social welfare rights under the Basic Law, and assess it by comparing it with the approach adopted by the lower courts in this case, and with overseas jurisprudence on the constitutional protection of socio-economic rights.

Introduction

Section E.3 of Ribeiro PJ's judgment in *Kong Yunming v Director of Social Welfare*[1] is entitled "The content of the Article 36 right". This is, in my opinion, the single most crucial section in the Court of Final Appeal (CFA)'s decision in this case, as well as a landmark development in the jurisprudence of the social and economic, as distinguished from civil and political, rights enshrined in the Basic Law. The main point in this section of the judgment does not appear to have been considered and addressed in the judgments of the lower courts in this case, nor does it appear to have been argued in exactly the same manner as it is now formulated in

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1 [2014] 1 HKC 518 (CFA).

this section of the judgment. I would describe this point as a stroke of genius in the judgment:

> "Read together with Article 145, [Article 36] provides the framework for *identifying a constitutionally protected right to social welfare*: .... Article 145 ... endorses the rules and policies established under the previous system and ... it implicitly regards them as rules established 'in accordance with law' and thus capable of constituting particular rights protected by Article 36. ... *The relevant right given constitutional protection by Article 36 in the present case is the right* defined by the eligibility rules for CSSA [Comprehensive Social Security Assistance] derived from the previous system of social welfare and *in existence as at 1 July 1997*. Crucially, this means that Article 36 confers constitutional protection on the rules which laid down a one-year, and not a seven-year, residence requirement as a condition of eligibility for CSSA".[2]

It was further held that any post-1997 modification of the one-year rule would be subject to constitutional review and proportionality analysis.[3]

This comment will focus on this adoption of the level or content of social welfare rights as of 1997 as the baseline for the protection of social welfare rights under the Basic Law, and assess it by comparing it with the approach adopted by the lower courts in *Kong Yunming* and with overseas jurisprudence on the constitutional protection of socio-economic rights.

The Lower Courts

In the lower courts as well as in the CFA, Kong's counsel put forward two main sets of arguments, one based on the right to social welfare (Art 36 of the Basic Law (BL36)) and the "development and improvement" of "the previous social welfare system" (BL145), and the other based on the right to equality and non-discrimination (BL25 and BL39). Both the Court of First Instance (CFI) and the Court of Appeal (CA) did not consider the first set of arguments to be strong, and devoted more attention and space in their judgments to the question of discrimination, by considering whether the case concerns discrimination on a "suspect ground" or not, and, if not, the appropriate degree of deference to the government or intensity of judicial review of the government's policy to be adopted in scrutinising the seven-year residence rule for qualifying for CSSA. Let us examine how these lower courts dealt with the first set of arguments.

[2] *Ibid.*, [33]–[35] (emphasis supplied).
[3] *Ibid.*, [36].

In the CFI,[4] Andrew Cheung J held that "the right given under Art 36 to social welfare is not an absolute right but one that may be restricted".[5] He found "the test for scrutinising any purported change or restriction" "in Art 145 itself".[6] BL145 provides that the government shall, "[o]n the basis of the previous social welfare system", "formulate policies on the development and improvement of this system in the light of the economic conditions and social needs". Cheung J considered that "[w]hat constitutes development and improvement … is best judged by the Government, subject to the scrutiny of the Legislative Council".[7] However, "a newly-formulated policy under Art 145 of the Basic Law, even if it should otherwise satisfy the internal requirements for the content of the policy, may still be challenged for infringing other constitutionally-guaranteed rights"[8] such as the right to equality and non-discrimination. Furthermore, a policy which is discriminatory and unjustified "can hardly be regarded as a policy on the 'development and improvement' of the pre-existing system".[9] The learned judge thus concluded that "the present case boils down to the question of discrimination".[10]

On appeal, the CA agreed that "the case boiled down to the question of discrimination".[11] Stock VP summarised Mdm Kong's case as raising the following four questions: (1) breach of BL36; (2) breach of BL25; (3) breach of Art 22 of the Hong Kong Bill of Rights (on equality and non-discrimination); and (4) breach of BL145 (on the ground that the introduction of the seven-year rule was a "retrogressive measure").[12] Here Kong's arguments on the basis of BL36 and BL145 respectively seem to have been treated as separate arguments. Ironically, whereas the CFA ultimately ruled in Kong's favour by reading BL36 and BL145 together, before the CA it was the Government (Director of Social Welfare) which argued "that Article 36 must be read in the light of Article 145, whereby it is clear that a purposive construction of the two articles read together illustrates the discretion given to the Government as to what services are provided, the level of support in relation to each selected service and the flexibility of the system's development dictated by ever-changing economic and social circumstances".[13] According to the Government's

4 [2009] 4 HKLRD 382 (CFI).
5 *Ibid.*, [51].
6 *Ibid.*, [52].
7 *Ibid.*, [56].
8 *Ibid.*, [58].
9 *Ibid.*, [63].
10 *Ibid.*, [64].
11 [2012] 4 HKC 180 (CA), [85].
12 *Ibid.*, [13].
13 *Ibid.*, [23].

argument, "[w]hat [BL36] means is that Hong Kong residents shall have such social welfare as may be accorded pursuant to the formulation of policies envisaged by Article 145; that that right or entitlement carries within itself eligibility criteria".[14]

This argument was basically accepted by the CA, which also pointed out the problems or weakness in Kong's arguments in this regard. As regards Kong's BL36 argument, the CA opined that it "presupposes that Article 36 confers a prima facie right in all residents to all forms of social welfare and even then *regardless of eligibility criteria or level of benefit*".[15] This in turn raises the question of "[w]hat does social welfare encompass?"[16] The CA found the argument unsustainable that "Article 36 envisages, indeed requires, that social welfare is to be accorded to all residents, save to the extent specifically limited or denied them by law, so that, unless specifically excluded, its provision in all its forms is obligatory regardless of oversight and regardless of competing demands".[17] The CA also found unconvincing the argument that the introduction of the seven-year rule was a "retrogressive step"[18] in breach of BL145. It asked "rhetorically, what if an 'improvement' today in one benefit necessarily results in the diminution of another?"[19] There was no reason why the qualifying criteria for social welfare could not be adjusted from time to time "in order to maintain a viable system for future generations".[20]

At this point, it may be observed that it neither occurred to the CFI nor the CA that BL36 could be argued to imply that the "right to social welfare" conferred therein on Hong Kong residents can be "concretised" to mean the social welfare benefits that Hong Kong residents enjoyed immediately before the 1997 handover in accordance with the laws or policies prevailing at that time. Before these two courts, Kong's argument that the introduction of the seven-year rule was a retrogressive measure was apparently made in the context of BL145 rather than BL36. However, since BL145 refers to "policies" to be formulated "in the light of the economic conditions and social needs", the "retrogressive measure" that Kong complained about did not appear to be as serious a matter (given that we have to take rights seriously) as a violation of a constitutional right protected by Chapter III of the Basic Law (on the "fundamental rights and duties of the residents").

[14] *Ibid.*, [51].
[15] *Ibid.*, [53] (emphasis supplied).
[16] *Ibid.*, [56].
[17] *Ibid.*, [62].
[18] *Ibid.*, [66].
[19] *Ibid.*, [66].
[20] *Ibid.*, [67].

The Stroke of Genius

The "stroke of genius" in the CFA's decision was thus to define precisely the substantive content and scope of the social welfare right protected by BL36, at least as far as social security in the form of cash assistance for the needy such as the CSSA scheme was concerned. This was achieved by reading BL36 and BL145 as a whole, so as to import from BL145 into BL36 the level of social welfare provisions as they existed immediately before the 1997 handover. The rule ultimately enunciated by the CFA regarding the constitutional protection of Hong Kong residents' right to CSSA at its 1997 level (at least insofar as the requirement regarding length of residence as a qualifying condition was concerned), subject to constitutional review on the basis of proportionality analysis, could not have been developed if only BL36 or only BL145 was in existence. If only BL36 exists, the content and scope of the social welfare right it refers to would probably be that determined by laws made by the legislature, or, in the absence of such laws, by policies introduced by the government with the support of the legislature (which exercises the power of financial control of public expenditure). If only BL145 exists, it is also doubtful whether it alone can render unconstitutional the seven-year rule in the present case. This point may be elaborated as follows.

There are several provisions[21] in the Basic Law which, like BL145, refer to relevant systems and practices that existed before the handover and evince an intention to preserve them largely and at the same time permit the post-1997 government to introduce new policies and practices. Some of these provisions have been the subjects of judicial deliberations. For example, in *Cheung Man Wai v Director of Social Welfare*,[22] the court considered the application of BL142 (regarding "the previous systems" of professional qualifications), BL144 (on subvented organisations' staff remaining in employment "in accordance with the previous system") and BL145 (the applicant for judicial review in this case was a social worker). In *Secretary for Justice v Lau Kwok Fai*,[23] the court reviewed the constitutionality of pay cuts imposed on civil servants in the light of BL100 (on terms of employment that are "no less favourable than before") and BL103 (on the maintenance of the "previous system" of employment and management of civil servants). More recently, in

[21] *See* particularly Section 6 (public servants) of Chapter VI of the Basic Law, and Chapters V and VI of the Basic Law.

[22] (1999) 8 HKPLR 241 (CFI); [2000] 3 HKLRD 255 (CA). The CFI judgment is more relevant for our present purposes.

[23] (2005) 8 HKCFAR 304.

Catholic Diocese of Hong Kong v Secretary for Justice,[24] the court reviewed the constitutionality of a new system of "school-based management" of publicly funded schools with reference to BL136 (which is strikingly similar to BL145 in that it provides for the formulation of "policies on the development and improvement of education" "[o]n the basis of the previous educational system") and BL141 (on freedom of religion and on religious organisations continuing to run schools "according to their previous practice"). It is instructive for our present purposes to examine here how the CFA approached the interpretation of these Basic Law provisions in *Catholic Diocese*.

Catholic Diocese of Hong Kong v Secretary for Justice

In the lead judgment jointly delivered by Ma CJ and Ribeiro PJ in this case, the question was discussed as to how to interpret the phrase "based on the previous educational system" in BL136(1).[25] In this regard, the judgment refers to the CFA's previous decision in *Lau Kwok Fai*[26] on the interpretation of BL103 (which provides that Hong Kong's "previous system of recruitment, employment, … training and management for the public service … shall be maintained"), and points out that the CFA had held in that case that BL103 "was designed to preserve the continuity of the system as a whole and not to prevent changes to elements of the system which could be expected to occur under any system governing public service".[27] The judgment then quotes Sir Anthony Mason:[28]

> "As Sir Anthony Mason NPJ put it, a constitutional provision in such terms would only inhibit a development which was 'such a material change that it resulted in *the abandonment of the previous system*'".[29]

After referring to the CFA's interpretation of BL103 in *Lau Kwok Fai*, the judgment then turns to consider BL136 itself:

> "It is important to note that in authorising the HKSAR government to formulate policies on the 'development and improvement of education', … Art 136(1) similarly accepts that changes may be made to elements of the previously existing system and, in our view, the *Lau Kwok Fai* approach is equally applicable. On that approach, the 2004 amendments [introducing the

[24] (2011) 14 HKCFAR 754.
[25] *Ibid.*, [46].
[26] *See Lau Kwok Fai* (CFA) (n 23 above).
[27] *Catholic Diocese* (n 24 above), [61].
[28] *Ibid.*, [61].
[29] *Lau Kwok Fai* (CFA) (n 23 above), [66] (emphasis supplied).

> new system of 'school-based management'] plainly do not involve *abandonment of the pre-1997 educational system* and do not fall foul of Art 136(1)".[30]

It may therefore be seen that in interpreting BL136(1) which is similarly structured and phrased as BL145 in our present case, the CFA has set a high threshold for what "policies on the development and improvement" of the existing system would be considered unconstitutional on the ground that they cannot be said to be formulated "on the basis of the previous" system. In order to constitute a violation of the Basic Law provision, the change introduced by the impugned policy may have to be so significant as to be tantamount to abandonment of the previous system. This would suggest that it would be very difficult to argue in the present case before the CFA that the introduction of the seven-year rule constitutes a violation of BL145 (assuming that BL36 does not exist), particularly if it is also taken into account that BL145 expressly refers to "economic conditions and social needs" in the light of which social welfare policies are to be formulated.

Let us now turn to examine how Ma CJ and Ribeiro PJ in their joint judgment dealt with BL141 in *Catholic Diocese*, which, in my opinion, also throws light on Ribeiro PJ's approach in *Kong Yunming*. The following passage is particularly instructive:

> "When ... a constitutional challenge is made to a piece of legislation or to certain executive or administrative conduct, the court must generally begin by ascertaining *what, if any, constitutional rights are engaged.* If no such constitutional rights can be identified, the challenge necessarily fails *in limine*. If certain constitutional rights are engaged, the court considers whether the legislation or conduct complained of amount to interference with those rights. If they do, the court has to consider whether those rights are absolute and if not, whether the interference can be justified on a proportionality analysis. ... The principal defect in the appellant's case is that it fails to take the first step of *identifying the protected constitutional right.* Instead, [counsel for the appellant] concentrates on a textual argument and, basing himself on the words 'according to their previous practice' in Art 141(3), asserts that the appellant is entitled to claim constitutional protection for what constituted its 'practice' in the running of its schools as a matter of fact prior to 1 July 1997".[31]

The judgment then proceeded to construe BL141(3) and extract from it the constitutional right that it guarantees:

> "[A]rt. 141(3)'s provision that religious organisations 'may, according to their previous practice, continue to run ... schools ...', read purposively,

[30] *Catholic Diocese* (n 24 above), [62] (emphasis supplied).
[31] *Ibid.*, [65]–[66] (emphasis supplied).

> should be taken to mean that religious organisations 'may, according to their previous practice *in so far as it involves the exercise of their right to freedom of religious belief and religious activity*, continue to run … schools (etc)'. … It is the religious dimension of their previous practice that receives protection as part of the core constitutional right to religious freedom as applicable to religious organisations".[32]

The judgment concluded on this point as follows:

> "When the constitutional right protected by Art 141(3) is correctly identified, it becomes apparent that it is not infringed by the 2004 amendments".[33]

This approach in *Catholic Diocese* of paying attention to and giving priority to the task of identifying and defining the exact content and scope of the protected constitutional right that may be affected by the impugned governmental action in the case was fully followed by Ribeiro PJ in his lead judgment in *Kong Yunming*. In the two lower courts, a main reason why Kong's arguments on the basis of BL36 and BL145 failed was probably that they failed to identify and define precisely the constitutional right that was violated by the introduction of the seven-year rule. Ribeiro PJ's "stroke of genius" was to identify and define it as the right of Hong Kong residents to receive social security benefits in the form of CSSA in accordance with the rules and policies prevailing at the time of the 1997 handover.

A Dose of Judicial Activism

The question arises here of whether the CFA was well justified in finding such a right on the basis of a combined reading of BL36 and BL145. In my opinion, the CFA's decision on this point is an act of judicial creativity, a deliberate policy choice, and a dose of judicial activism. Even if BL36 and BL145 are to be read together, alternative readings, such as those adopted by the two lower courts, are perfectly plausible, and it is by no means obvious and clear that the CFA's reading is best and correct. Ribeiro PJ criticised the approach adopted by Stock VP in the court below as "lay[ing] the emphasis entirely on Article 145 and depriv[ing] Article 36 of any meaningful effect".[34] It is true that Ribeiro PJ's approach turns BL36 from

[32] *Ibid.*, [78] (emphasis in original).
[33] *Ibid.*, [93].
[34] *Kong Yunming* (CFA) (n 1 above), [32].

a provision that is hardly justiciable,[35] and that would otherwise operate no more than as a "directive principle of social policy"[36] which is only morally and politically binding on the government and the legislature, into a justiciable provision with a substantive core content (ie giving constitutional protection – subject to proportionality justifications – to social welfare rights that prevailed at the time of the 1997 handover). However, whether the latter corresponds to the intention of the framers of the Basic Law as evinced in the text of BL36 and BL145 is a different matter. In my opinion, the language of these provisions is by no means conclusive in this regard,[37] nor has the CFA cited any *travaux preparatoires* or other contextual materials in support of its interpretation.[38]

In the above-cited passage in *Catholic Diocese*, it was pointed out that once the protected constitutional right has been identified and has been shown to be interfered with, the next question to be considered

[35] Even where constitutional provisions on social and economic rights are not justiciable or fully enforceable by courts, this does not mean that they are entirely meaningless and insignificant. *See*, eg the discussion in Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008) 238–241; Katharine G Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012) 13, 132.

[36] "Directive principles of social policy" that are non-justiciable are set out in Art 45 of the Irish Constitution of 1937. The Indian Constitution of 1950 also provides for non-justiciable "directive principles of state policy". For the legal status of social and economic rights in Ireland, *see*, eg, Malcolm Langford (ed), *Social Rights Jurisprudence* (Cambridge: Cambridge University Press, 2008), Chapter 16; Paul O'Connell, "The Death of Socio-Economic Rights" (2011) 74 *MLR* 532.

[37] The language of BL36 and BL145 (read together) may be compared and contrasted with BL100, which provides that "[p]ublic servants serving in all Hong Kong government departments … before the establishment of the [HKSAR] may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service *no less favourable than before*" (emphasis supplied). There is however no provision in BL36 or BL145 that after 1997, the social welfare benefits enjoyed by Hong Kong residents shall be *no less favourable than before*. The CFA in *Kong Yunming* effectively decided that this should be so unless the government can provide sufficient justification for a particular cutback in social welfare benefits.

[38] I have consulted the *travaux preparatoires* of the Basic Law Drafting Committee published in Li Haoran (李浩然) (ed), *The Drafting Process of the Hong Kong Basic Law* (香港基本法起草過程概覽) (Hong Kong: Joint Publishing, 2012) (in 3 volumes), and found no evidence suggesting that the intention of BL36 or BL145 was to ensure that the level of social welfare to be provided after 1997 should be no less favourable than before. *See* Vol I, pp 307–327, and Vol III, pp 1107–1111 of this publication. It is interesting to note that in the earlier drafts of the Basic Law, BL36 (or its equivalents in the earlier drafts) only provided that "Hong Kong residents shall have the right to social welfare", and the phrase "in accordance with law" only appeared for the first time in the "9th draft" of February 1989. Some commentators pointed out during the drafting process that there was no existing law (ie legislation enacted by the legislature, as distinguished from government policies) in Hong Kong governing the right to social welfare. It is also noteworthy that in the earlier drafts, BL145 (or its equivalents) provided that "The HKSAR Government shall maintain the previous social welfare system, and shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs". In the "6th draft" of February 1989, this was changed to "On the basis of the previous social welfare system, the Government of the HKSAR shall, on its own, formulate policies …", which is the present version of BL145. Some commentators suggested at the time that the reference to "economic conditions" should be deleted, because this might suggest that social welfare services may be cut if the economic conditions were unfavourable.

is whether the right is absolute or can be limited in accordance with proportionality analysis. After Ribeiro PJ in *Kong Yunming* identified the protected constitutional right to social welfare in this case,[39] he went on to decide that this right is not absolute but may be limited, provided the limitations can sustain a proportionality analysis.[40] He further held that as this right is not a "fundamental right"[41] and involves socio-economic policies and allocation of financial resources,[42] the court in exercising its power of constitutional review and proportionality scrutiny would accord to the government a "wide margin of discretion",[43] and would only strike down the governmental act if it is "manifestly without reasonable foundation",[44] "manifestly unreasonable"[45] or "wholly irrational".[46] The application of this test ultimately resulted in the impugned seven-year rule being struck down.[47] The question arises here as to what is the difference between the CFA's application of the proportionality test to the limitations on the right to social welfare in this case and the lower courts' application of the justification test to the issue of discrimination in the same case. It is noteworthy that the CFA decided this case only on the basis of a violation of the right to social welfare, and did not express any opinion on whether there was also an unconstitutional violation of the right to equality and non-discrimination.

Comparing the Two Approaches

In my opinion, in the circumstances of the present case it would be easier for the government to argue that there is no unconstitutional discrimination than to argue that there is no unconstitutional violation of the right to social welfare that was identified in Ribeiro PJ's judgment. On the question of discrimination, it is by now well established in Hong Kong law[48] that a distinction has to be drawn between two categories of differential treatment – that based on "inherently suspect grounds"[49] such as race, colour, gender, sexual orientation, religious or

[39] *Kong Yunming* (CFA) (n 1 above), [33]–[35].
[40] *Ibid.*, [36], [39].
[41] *Ibid.*, [42].
[42] *Ibid.*, [41].
[43] *Ibid.*, [42], [138].
[44] *Ibid.*, [40], [43], [143].
[45] *Ibid.*, [106].
[46] *Ibid.*, [62]; *see* also [73].
[47] *Ibid.*, [143]–[144].
[48] *See* particularly the CFA's decision in *Fok Chun Wah v Hospital Authority* (2012) 15 HKCFAR 409.
[49] *Kong Yunming* (CFA) (n 1 above), [40].

political beliefs and social origins,[50] and that based on other factors (such as length of residence in the territory or the amount of property possessed) which may be justified as a matter of socio-economic policy, the public interest and allocation of scarce resources. In the latter situation, particularly where the situation involves differential treatment in the domain of "rights associated with purely social and economic policies"[51] (in contradistinction to rights associated with "fundamental concepts … which go to the heart of any society" such as "the right to life, the right not to be tortured, … the freedom of expression and opinion, freedom of religion, … the right to a fair trial", etc.)[52], the application of the justification test (for differential treatment) would be less stringent, or the degree of judicial scrutiny of the impugned governmental measure would be less intense. In these circumstances, the differential treatment would not constitute unconstitutional discrimination if it is intended to achieve a legitimate aim, is rationally connected to that aim and is not "manifestly without reasonable foundation" or "self-evidently unreasonable".[53]

It may first be noted that the structures of, and thresholds involved in, the proportionality or justification tests for limitations on the right to social welfare, particularly CSSA (hereafter called "Situation A") and for differential treatment of residents' right to CSSA on the basis of residential requirements (hereafter called "Situation B") are basically the same: They both involve consideration of legitimate objectives, rational connections and whether the governmental act is manifestly unreasonable. The difference in the application of proportionality analysis to the two situations lies in what exactly is the governmental act that is impugned and that has to be justified.[54]

In Situation A, since the right that is subject to limitations is the right to CSSA in accordance with the rules and policies that were in force in 1997, the impugned act that has to be justified is the relevant change in the rules, ie the substitution of the new seven-year residence rule for

[50] *Fok Chun Wah* (CFA) (n 48 above), [77]. As explained in this CFA judgment, in these cases "the reason for unequal treatment strikes at the heart of core-values relating to personal or human characteristics"; "[t]hese characteristics involve the respect and dignity that society accords to a human being. They are fundamental societal values" [77]. "Where core values relating to personal characteristics are involved, the court will naturally subject the relevant legislation or decision to a particularly severe scrutiny" [78].

[51] *Fok Chun Wah* (CFA) (n 48 above), [79].

[52] *Ibid.*, [79].

[53] *Kong Yunming* (CA) (n 11 above), [99], [111], [190], [194]–[196].

[54] Apart from the difference discussed here, there is apparently also a difference between the degrees of rigour of the application of the proportionality test in this case by the two lower courts on the one hand and the CFA on the other hand, with the CFA applying the test more rigorously.

the old one-year rule. In Situation B, what needs to be justified is the differential treatment of residents, ie treating them differently (in terms of their entitlement to CSSA) depending on whether they have resided in Hong Kong for seven years or not.

In Situation B, the justification may be logically divided into two stages. First, the government would argue that it is justified (given the need to ensure the financial sustainability of Hong Kong's social welfare system in the long term) to give differential treatment (in CSSA) by taking into account the length of the person's residence in Hong Kong, ie it is permissible to draw a line between those who are entitled to CSSA and those who are not eligible for it by reference to length of residence. Second, the government would argue that it is not manifestly unreasonable to draw the line at seven years, rather than, say, nine years, five years, three years, or one year, etc. As is demonstrated by the judgments of the CFI and CA in *Kong Yunming*,[55] it is not difficult for the government to succeed in the first stage, given that resources are scarce and it is not unreasonable to give priority to residents who have more affinity with Hong Kong by reason of their having resided here longer. Once the first stage is passed and it is accepted that the government may legitimately draw a line on the basis of length of residence, it would be difficult for the applicant for judicial review to challenge the act of drawing the line at the point of seven years (rather than another period of time), as the question involves socio-economic policies and the public interest and it may be best for the government rather than the court to determine where exactly the line should be drawn. This is largely why the government won in this second stage too before the two lower courts.[56]

However, the same or a similar justification or proportionality test would operate differently when applied to Situation A. In this situation, what needs to be justified is not the differential treatment of residents on the basis of their length of residence, but the change of policy so as to deny access to CSSA to residents who have resided in Hong Kong for more than one year but less than seven years (even though the policy change of 2003 did not have retroactive effect and was only applicable to those who came to reside in Hong Kong after 1 January 2004).[57]

[55] *Kong Yunming* (CFI) (n 4 above), [116]; *Kong Yunming* (CA) (n 11 above), [109].

[56] *Kong Yunming* (CFI) (n 4 above), [127]–[130]; *Kong Yunming* (CA) (n 11 above), [111], [113].

[57] The non-retroactivity of the new seven-year rule was a factor which the two lower courts apparently took into account: *Kong Yunming* (CFI) (n 4 above), [30], [106]; *Kong Yunming* (CA) (n 11 above), [1]. In assessing the constitutionality of the policy change, the CFA apparently considered the non-retroactivity of the policy change to be immaterial. However, it is at least arguable that BL36 only accords constitutional protection to social welfare rights that existed in Hong Kong (in accordance with relevant policies or laws) in 1997 (in the case of persons who were already Hong Kong residents in 1997) or at the time a person became a Hong Kong

Thus unlike in Situation B, the judicial reasoning process in Situation A would start from the constitutionally protected right (which is not absolute but subject to proportionate restrictions) to qualify for CSSA after one year's residence, and any rule involving a lengthening of the residence requirement would need to be justified. This initial preference for, or presumption in favour of, the one-year residence rule does not exist in Situation B. In the latter situation, one starts by considering the rationality of having a residence requirement (of whatever length), and then proceeds to consider whether the length of residence now required by the government (in this case a seven-year period which coincided with the length of residence required for qualifying as a permanent resident) is manifestly unreasonable. In Situation A, the one-year rule is not only presumed to be reasonable but is given constitutional status – albeit only a presumptive, and not absolute, constitutional status. That is why it is easier for the government to justify the seven-year rule in Situation B than in Situation A.

Comparing with Overseas Jurisprudence

It remains for me to consider the CFA's decision in *Kong* in the light of overseas jurisprudence on the constitutional protection of social and economic rights. Generally speaking, provisions on socio-economic rights in constitutions may or may not be justiciable and enforceable by courts of law. For example, the "directive principles of state policy" in the Indian Constitution of 1950 were expressly made non-justiciable,[58] though the Indian Supreme Court has now rendered socio-economic rights judicially enforceable by incorporating them into the jurisprudence of the enforceable constitutional provision on the fundamental right to life.[59] The post-apartheid Constitution of South Africa enacted in 1996 as interpreted by its Constitutional Court

resident (in the case of persons who became Hong Kong residents after 1997). According to this argument, since Kong arrived in Hong Kong and became a Hong Kong resident only in 2005 (at a time when the relevant policy stipulated a seven-year residence rule for entitlement to CSSA in respect of persons who became Hong Kong residents after 2003), she should not be able to argue that her entitlement to CSSA should be determined in accordance with the policy that existed in 1997.

[58] *See* Art 37 thereof.

[59] Art 21 of the Indian constitution. *See*, eg, Langford (ed) (n 36 above), Chapter 5; Dennis M Davis, "Socio-economic rights: Has the promise of eradicating the divide between first and second generation rights been fulfilled?" in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham, UK: Edward Elgar, 2011) 519, 525–527; Rehan Abeyratne, "Socioeconomic rights and constitutional legitimacy in India", *Int'l Const L Blog* (11 April 2013), available at http://www.iconnectblog.com/2013/04/socioeconomic-rights-and-constitutional-legitimacy-in-india (visited 9 Feb 2014).

provides a well-known model of justiciable socio-economic rights in the contemporary legal world, rendering South Africa "a vanguard of learning about the potentials and challenges of justiciable economic and social rights".[60] In the following, we will examine briefly this South African model and then try to situate *Kong Yunming* from a comparative perspective.

The socio-economic rights provided for in the South African Constitution includes "the right to have access to adequate housing"[61] and the right to have access to "health care services", "sufficient food and water" and "social security, including, if [people] are unable to support themselves and their dependants, appropriate social assistance".[62] It is expressly provided that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of" these rights.[63] These provisions are justiciable in the sense that the South African Constitutional Court has relied on them in reviewing governmental measures, and has made orders and provided remedies in cases where the measures were found wanting.[64]

For example, in *Government of the Republic of South Africa v Grootboom*,[65] the court held that the government's housing policy failed to meet the "reasonableness" standard applied by the court to determine whether there was a violation of the constitutional right to housing or of the government's constitutional duty in this regard. In *Minister of Health v Treatment Action Campaign*,[66] the court, applying the constitutional provision on the right to health care, required the government to make antiretroviral drugs more widely available than under its existing policy. The court's approach to constitutional adjudication of socio-economic rights has been described as "a model of reasonableness review",[67] or an "administrative law model"[68] of evaluating whether, given the constitutional provisions on the relevant socio-economic rights, the government's behaviour under review in the

[60] Young (n 35 above), p 19.
[61] Article 26.
[62] Article 27. Children's rights and the right to education are provided for in Arts 28 and 29 respectively. Article 36 provides for limitations of rights, and Art 39 provides for the interpretation of the constitutional bill of rights.
[63] Articles 26(2) and 27(2).
[64] *See* generally Davis (n 59 above), 521–525; Sandra Liebenberg, "South Africa", in Langford (n 36 above), Chapter 4; Mark Kende, "Three stages of socio-economic rights?", available at http://www.iconnectblog.com/2010/01/three-stages-of-socio-economic-rights/ (visited 9 Feb 2014).
[65] 2001 (1) SA 46.
[66] 2002 (5) SA 721.
[67] Liebenberg (n 64 above), 83, 89.
[68] Davis (n 59 above), 522; Dennis M Davis, "Socio-economic rights: The promise and limitation – The South African experience", in Daphne Barak-Erez and Aeyal M Gross (eds), *Exploring Social Rights* (Oxford: Hart Publishing, 2007), 193, 207; Liebenberg (n 64 above), 90.

particular case is reasonable.[69] This "reasonableness" standard of review is often contrasted with the "minimum core content" or "minimum core obligations" approach,[70] which means the court would enunciate a substantive minimum content of the socio-economic right in question which the government must give effect to or can only depart from with sufficient justification.

The difference between the two approaches can be illustrated with reference to *Mazibuko v City of Johannesburg*[71] which concerns the right to have access to sufficient water. In this case, pre-paid water meters were installed in a poor township in the suburbs of the City of Johannesburg the effect of which was that the residents would only be entitled to 25 litres of water per day free of charge and had to pay for any additional amount of water they used. The "minimum core" approach as advocated by some scholars[72] and as adopted by the Columbian constitutional court[73] would require the court to determine the minimum amount of water which residents are entitled to have per day free of charge. However, the South African constitutional court declined to rule on this question,[74] and instead examined whether the government had taken

[69] The South African Constitutional Court has pointed out (in para 41 of its *Grootboom* judgment) that the "Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether pubic money could have been better spent. The question would be whether the measures that have been adopted are reasonable". (This passage was cited in Liebenberg (n 64 above) at 84 and in Davis (59 above) at 522.) Young points out that this doctrine of reasonableness "uses a form of proportionality reasoning" (Young (n 35 above), 125); Liebenberg agrees that "reasonableness" review incorporates "a proportionality analysis" (Liebenberg (n 64 above), 91), and promotes "a culture of justification" (Liebenberg (n 64 above), 90; Young (n 35 above), 126). "The employment of concepts sourced in administrative law such as rationality review or review for reasonableness could promote a culture of justification in the implementation of public policy. ... the judiciary could compel government to produce evidence to substantiate its claim that policies existed and were being implemented to ensure the fulfillment of socio-economic rights" (Davis (n 68 above), 207).

[70] *See* generally Young (n 35 above), 66–87; Liebenberg (n 64 above), 83.

[71] 2010 (4) SA 1.

[72] There has been some scholarly criticism of the unwillingness of the South African Constitutional Court to adopt the "minimum core" approach to socio-economic rights: *see* Davis (n 59 above), 522–523; Liebenberg (n 64 above), 90.

[73] Adopting the "minimum core" approach, the Columbian Constitutional Court has held in a 2011 case that "the core of the fundamental right to water entitles each person to receive a daily amount of 50 liters": Carlos Bernal, "In search of alternative standards for the adjudication of socioeconomic rights", available at http://www.iconnectblog.com/2012/10/in-search-of-alternative-standards-for-the-adjudication-of-socioeconomic-rights/ (visited 9 Feb 2014). For the Columbian practice, *see* also DM Davis, "Socio-economic rights", in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1020, 1030–32 (describing the Columbian approach as a "strong right/strong remedy approach"); Langford (ed) (n 36 above), 22; Young (n 35 above), 84.

[74] This was despite the fact that the two courts below it – the High Court and the Supreme Court of Appeal – had both held that the daily supply of 25 litres of water free of charge was inadequate, ruling that the constitutional provision should be interpreted to require a daily supply of 50 litres and 42 litres respectively as a minimum level of entitlement: *see* Young (n 35 above), 85; Davis (n 59 above), 524.

reasonable measures in the circumstances to enable residents to enjoy the right to water.[75]

The South African experience demonstrates that in any constitutional system of justiciable socio-economic rights, at least two major issues need to be addressed. The first is how to give meaning and substance to – or how to "concretise" – abstractly formulated rights such as the right to housing, right to health care or right to social security.[76] This problem is particularly relevant to socio-economic rights, because they are "positive" rights, the realisation of which requires positive actions to be taken by the government and financial resources to be devoted to them. These rights may be contrasted with "negative" rights such as the right to freedom of expression or freedom of assembly, which only require the state to abstain from actions that interfere with such rights. The exercise of concretising "positive" rights is a very different one from that of demarcating the boundaries of "negative" rights.

Second, the question also arises as to what standard the court should apply in evaluating whether the government has failed to act in accordance with the constitutional provisions on socio-economic rights. This second issue is to some extent related to the first issue. For example, if the "minimum core" approach is adopted in response to the first issue, then the court may hold that the constitution has been violated where citizens are not able to enjoy the minimum core of a particular socio-economic right as defined by the court, or require the government to provide sufficient justification for its failure to provide such minimum core in order to avoid the court's finding that there is a violation of the constitution.[77] However, the approach of the South African constitutional court suggests that even if one does not adopt

[75] The Constitutional Court said at para 61 of its judgment: "It is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights". (This passage was cited in Davis (n 59 above), 524.)

[76] It has been pointed out that "the perception of *lack of content*, and of nonjusticiability, … have been described as two parts of a negative feedback mechanism that sidelines economic and social rights in international human rights law": Young (n 35 above), 78 (emphasis supplied). Similarly, in domestic law, "the enforcement of social and economic rights was particularly problematic because of a manifest judicial incapacity to enforce social and economic rights, arising particularly, from the *indeterminacy* of these legal guarantees": Davis (n 59 above), 521 (emphasis supplied).

[77] It has been pointed out that "the minimum core" is "a concept which mediates the necessary 'limitations' on rights by requiring a particular level of justification if the minimum of the right is not satisfied, which the state, rather than the claimant, must prove": Young (n 35 above), 81.

the "minimum core" approach, it is possible to enforce constitutional provisions on socio-economic rights, and that is to do so by reviewing the government's behaviour, actions (including omissions) and policies on the basis of the standard of "reasonableness".

How then should we understand or characterise the CFA's approach to the interpretation and enforcement of the social welfare right that BL36 provides for? I would suggest that its approach actually incorporates, though probably without the CFA judges being consciously and deliberately doing so, both the "minimum core content" approach and the "reasonableness" approach in the adjudication of constitutionally enshrined socio-economic rights discussed above. Ruling that BL36 provides constitutional protection for social welfare rights at their 1997 level gives BL36 a minimum core content, and overcomes the problem of the uncertainty of the content of constitutionally declared socio-economic rights which makes them difficult to enforce judicially. And holding that adjustments of the 1997 level of these social welfare rights (ie changes to the relevant rules and policies that prevailed in 1997) are constitutionally permissible provided that they can be justified by proportionality analysis (in which the ultimate test is whether the adjustment is manifestly unreasonable or without any reasonable foundation) enables the court to adjudicate on the reasonableness of the adjustment, and is to this extent similar to the "reasonableness" review conducted in South Africa. Furthermore, setting the baseline for constitutionally protected social welfare rights at their 1997 level and requiring the government to provide justification for any retreat from it is consistent with the following views of the Committee on Economic, Social and Cultural Rights:

> "There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party. The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level

> of social security and (f) whether there was an independent review of the measures at the national level".[78]

As mentioned above, the framers of the Basic Law in enacting BL36 might not have intended to protect any particular social welfare right that existed at the time of the 1997 handover against any subsequent change in the relevant rules or policies, particularly where the change is not retroactive. And in enacting BL145, their intention might have been only to forbid any change that is so substantial as to amount to "the abandonment of the previous system".[79] The "stroke of genius" in the CFA's decision in *Kong Yunming* is to celebrate a happy marriage between BL36 and BL145 so as to give a "minimum core content" to BL36 and thus render it justiciable. Such justiciability of social welfare rights in the Hong Kong Special Administrative Region is perhaps an unintended consequence of the enactment of the Basic Law.

[78] General Comment No. 19, "The right to social security (Art 9)", U.N. Doc. E/C.12/GC/19(2008), para 42. This passage was cited and discussed in Karen Kong, "Right to Social Welfare" in Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (Hong Kong: Sweet & Maxwell, 2011) 787, 801 and 798. The Committee had made a similar point regarding "deliberately retrogressive measures" more briefly earlier in its General Comment No. 3, U.N. Doc. E/11991/23, annex III (1990), para 9. This para 9 was cited in *Kong Yunming* by Stock VP in the Court of Appeal, [80] and by Bokhary NPJ in the CFA, [179]. In South Africa, the Committee's view that "retrogressive measures" requires particularly strong justification has been endorsed by the Constitutional Court, and is said to "[create] the basis for challenging cutbacks in social programmes": Liebenberg (n 64 above), 84. In Hungary, the Constitutional Court has been "willing to strike down cuts in social insurance benefits": Langford (ed) (n 36 above), 23.

[79] *See* n 29 above and the accompanying text.