
Adjudicating social welfare rights in Hong Kong

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Since the inception of the Basic Law of the Hong Kong Special Administrative Region in 1997, the Hong Kong courts have not been short of opportunities to tackle difficult issues concerning civil and political rights. In relation to socioeconomic rights, the common conception that these were aspirational and nonjusticiable rights had made them modest grounds of progress until recent years. However, the Hong Kong Court of First Instance in two recent cases has adjudicated on the constitutional protection of social welfare rights in Hong Kong.

These two cases demonstrated the Court's approach in adjudicating cases that concern social and economic policies, particularly, when the decisions affect the distribution of scarce public expenditure. The intensity of review was at issue, and the Court's view of the justification provided by the government accounts for the difference in results of the two cases. It can be seen clearly that the Court was greatly influenced by the political and economic implications of their decisions. The author argues that the Court's internal restraints on adjudicating socioeconomic rights are misplaced, and that there is room for a more principled approach to dealing with social rights, especially in relation to the decision-making process by the government, while respecting the freedom of the democratic government to determine its own policies.

1. Introduction

Chapter 3 of the Basic Law contains provisions that protect the fundamental rights of residents in Hong Kong.¹ They include both civil-political rights and socioeconomic rights. Since the inception

of the Basic Law in 1997, the Hong Kong courts were not short of opportunities to tackle difficult issues concerning civil and political rights.² In relation to socioeconomic rights, the common conception that they were aspirational and non-justiciable rights had made them

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¹ THE BASIC LAW OF HONG KONG SPECIAL ADMINISTRATIVE REGION, Chapter III.

² See Johannes Chan S.C., *Basic Law and Constitutional Review: The First Decade*, 37 H.K.L.J. 407, 422 (2007).

modest grounds of progress until recent years.³ The difficulty is increased by the strong judicial attitude that the courts should not be used as a forum to discuss socioeconomic policies.⁴ Many of the issues concerning such rights are more comfortably dealt with by the courts when they are posed in terms of traditional civil-political rights, for example, the right to equality before the law under article 25 of the Basic Law.⁵

The Hong Kong Court of First Instance has in two recent cases adjudicated on the constitutional protection of social welfare rights in Hong Kong. Both cases concerned the new residence requirements for the Comprehensive Social Security Assistance (CSSA) scheme effective from January 1, 2004. In *Kong Yunning v. The Director of Social Welfare* (2009),⁶ the applicant challenged the seven-year residence requirement for the eligibility to the CSSA scheme, while in *Yao Man Fai George v. The Director of Social Welfare* (2010)⁷ the issue before the court

was the constitutionality of the one-year “continuous residence in Hong Kong” requirement for application to CSSA. Both requirements were introduced by the Social Welfare Department in light of the Report of the Taskforce on Population Policy in 2003.⁸ The report addressed the growing burden on the social welfare system in Hong Kong as a result of population aging and the continuing influx of new immigrants, and it recommended steps to be taken to ensure the long-term sustainability of public funds. The Court of First Instance upheld the seven-year residence requirement in *Kong Yunning* but declared in *Yao Man Fai George* that the one-year continuous residence requirement was unconstitutional.

The two cases demonstrated the court’s approach in adjudicating cases that concern social and economic policies, particularly when the decisions affect the distribution of scarce public expenditure. The intensity of review was at issue, and the court’s view of the justification provided by the government accounts for the difference in results of the two cases. It can be clearly seen that the court was greatly influenced by considerations regarding the political and economic implications of their decisions. This author argues that the court’s internal restraints on adjudicating socioeconomic rights are misplaced, and that there is room for a more principled approach to deal with social rights, especially in relation to the decision-making process by the government, while respecting the freedom of the democratic government to determine its own policies.

³ In *Chan Mei Yee v. Director of Immigration* [2000] H.K.E.C. 788, Hon Cheung J stated that the International Covenant on Economic Social and Cultural Rights (ICESCR) was “promotional in nature.” In the subsequent case of *Chan To Foon v. Director of Immigration* [2001] 3 H.K.L.R.D. 109, Hartmann J stated that ICESCR was “promotional” and “progressive” in nature: “it was an aspirational covenant, not one that creates absolute obligations.”

⁴ See the chief justice’s speech in the Opening of the Legal Year 2009 and 2010, available at <http://www.info.gov.hk/gia/general/201001/11/P201001110174.htm>

⁵ For example, *Fok Chun Wa v. The Hospital Authority* [2010] H.K.E.C. 713.

⁶ [2009] H.K.L.R.D. 382. This case is currently on appeal to the Court of Appeal.

⁷ [2010] H.K.E.C. 968. This case is currently on appeal to the Court of Appeal.

⁸ Feb. 23, 2003, <http://www.info.gov.hk/info/population/>.

2. The two cases: Facts and decision

In *Kong Yunming v. The Director of Social Welfare*, the applicant was a Chinese mainland woman who came to settle in Hong Kong in 2005. Her husband passed away as soon as she arrived in Hong Kong. She tried to apply for social assistance to the Director of Social Welfare but was refused because she did not satisfy the seven-year residence requirement for entitlement to the CSSA. She challenged the constitutionality of the seven-year residence requirement and argued that, first, the change of the residence requirement from one year to seven years since January 1, 2004, which means that she must be a permanent resident in Hong Kong to be eligible for CSSA, was a breach of article 36 of the Basic Law's right to social welfare for all "Hong Kong residents."⁹ Second, the policy was not one that "developed and improved" the previous welfare system as required by article 145 because of its discriminatory nature.¹⁰ Third, it was discriminating against non-permanent residents and thus in breach of article 25 equality provision of the Basic Law.¹¹

⁹ BASIC LAW art. 36: "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."

¹⁰ BASIC LAW art. 145: "On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs."

¹¹ BASIC LAW art. 25: "All Hong Kong residents shall be equal before the law."

The court based its analysis mainly on discrimination and the justification test. It held that the differential treatment between permanent and non-permanent residents was justified. As a result, the policy was properly formulated under article 145 as a "development and improvement" of the previous social welfare system. The article 36 right of social welfare was not infringed.

In the subsequent case of *Yao Man Fai George v The Director of Social Welfare*, the court held the opposite. This case concerned a Hong Kong permanent resident whose employment in mainland China was terminated. He returned to Hong Kong and tried to apply for CSSA but was rejected because he did not satisfy the one-year continuous residence requirement. Upon challenge by the applicant, the court ruled that the requirement of one-year continuous residence in Hong Kong for the application of CSSA was unconstitutional, as it infringed article 25 (equality before the law) and article 31 (freedom to travel) under the Basic Law.¹² Because the government had failed to provide sufficient evidence to show that there was a genuine need to impose the requirement, in addition to the fact that only a very low number of CSSA applicants fell within this category (4.7 percent of all CSSA applicants), of which the majority obtained a waiver, the court held that the discrimination based on the period of absence in Hong Kong was unjustifiable.¹³ The article 25 equality provision was breached.

On the right to travel, the court ruled that the restriction to travel imposed

¹² *Yao Man Fai George*, at [105], [125].

¹³ *Yao Man Fai George*, at [56].

by the one-year continuous residence requirement failed to satisfy the proportionality test, based on the same analysis as that of discrimination.

3. Analysis

3.1. Social Welfare Rights

In *Kong Yunming v. The Director of Social Welfare*, the court explained in detail the nature and limitation of the article 36 right to social welfare. It pointed out that the right to social welfare under the Basic Law is not an absolute right but is subject to limitation. The social welfare system is not static but is subject to changes, which may lead to a more generous or more restrictive social welfare system.¹⁴ Concerning the test for the legitimacy of a limitation to social welfare rights, the court concluded that¹⁵

...on the proper interpretation of the Basic Law, 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.

Article 145 can be viewed as an internal limitation clause of the right to social welfare in the Basic Law. The government is to formulate policies, on its own, on the “development and improvement” of the “previous social welfare system” and “in the light of the economic conditions and social needs.”¹⁶ The more difficult part lies in how the court adjudicates whether or not a policy is made in light of economic and social needs. The court was

cautious about its own lack of expertise on these issues and preferred to review the socioeconomic conditions only in terms of other existing rights in the Basic Law. Thus, without any breach of other constitutional rights, for example, discrimination, the court will not say that a policy is not made in the light of the economic conditions and social needs.¹⁷

The court has chosen article 145 in place of the general proportionality analysis and the “in accordance with law” concept for scrutinizing article 36. Article 145 is a weak form of review compared to proportionality. Given the high degree of deference the court accords to the government in determining what amounts to “development and improvement” of the previous social welfare system, article 145 will only be breached when another constitutional provision is violated. Article 36 hinges on article 145, and it will only be breached when article 145 is violated. The worry here is that this interpretation effectively diminishes article 36 as a self-standing right. This has actually resulted in article 36 being pushed to the sidelines and was not discussed at all in *Yao Man Fai George v. The Director of Social Welfare*. The court dismissed the argument based on article 145 as it did not add any substantive content to the analysis.¹⁸ The subject of the dispute in *Yao Man Fai George* turned mainly on the article 25 equality provision.

The practical implication in *Kong* and *Yao* is less apparent because the justification test of article 25 is akin to the proportionality analysis. However, it

¹⁴ *Kong Yunming*, at [48].

¹⁵ *Kong Yunming*, at [52].

¹⁶ *Kong Yunming*, at [49].

¹⁷ *Kong Yunming*, at [60–65].

¹⁸ *Yao Man Fai George*, at [130]–[131].

is noteworthy that equality and non-discrimination is only one type of cases within social welfare rights. Not all cases regarding the alleged breach of article 36 involve article 25, for example, where the government removed a whole social assistance program, or where it failed in negative obligations not to interfere with existing access to social welfare for all those eligible without adequate justification. In such cases, the possibility of an alleged breach of article 36 may go unquestioned, as the satisfaction of article 145 will stop the court from further inquiring into the content and limitation of article 36 beyond article 145. However, under international human rights law, it is recognized that socioeconomic rights do have substantive contents.¹⁹ As Basic Law rights need to be interpreted liberally and in line with international human rights standards, the court may wish to establish standards for a more principled form of review than the highly deferential approach to article 145.

Along with other fundamental civil and political rights under the Basic Law, it is important for the court to interpret article 36 liberally by acknowledging that the right to social welfare could only be limited where it is “necessary in a democratic society,” that is, using the proportionality analysis.²⁰ There should not be any exception to the right to social welfare in comparison with other fundamental rights. The court should inquire whether a policy is imposed for a legitimate aim and whether the means

adopted is rationally connected to the aim, and that the policy is no more than necessary to fulfill the stated aim. This is more detailed than merely submitting to the government in determining “social and economic needs” in article 145. Surely, the court should give due deference to the government under the proportionality analysis when considering policy questions. This is to respect the doctrine of separation of powers and the respective roles of the different branches of the government. The practicality of deference will be worked out in the following sections. However, it is important to adopt proportionality as a standardized test for all fundamental rights in the Basic Law to prove that all rights, no matter whether civil-political or socioeconomic, are accorded the same degree of protection under the Basic Law. This is in line with international human rights norms: that all human rights are indivisible, interdependent, and interrelated. Proportionality has been adopted in the first instance judgment of *Fok Chun Wa v. The Hospital Authority* on the right to social welfare.²¹ This inconsistency in approach to social rights adjudication should be removed. This is not to say that article 145 should not be a limitation of article 36, but that, in principle, proportionality should be used in addition to the internal limitation clause in the Basic Law.

It is unclear whether the rejection of the proportionality analysis in *Kong Yun-ming* applies only to article 36 or to all social rights in chapter 3 with an internal limitation clause. It is important that all fundamental rights in chapter 3 should be scrutinized by the proportionality

¹⁹ See, for example, UN Committee on Economic, Social and Cultural Rights, General Comment No. 19, *The Right to Social Security*, U.N.Doc. E/C.12/GC/19 (Feb. 4, 2008).

²⁰ *Leung Kwok Hung v. H.K.S.A.R* [2005] 3 H.K.L.R.D. 164, at 182.

²¹ [2008] H.K.E.C. 2161.

analysis. This is to acknowledge equality in the status of socioeconomic rights with civil-political rights in the Basic Law. Article 145 would serve as an additional criterion for scrutinizing social welfare rights.

3.2. Equality rights

In *Kong* and *Yao*, the central issue concerns whether there is unjustifiable discrimination under article 25 of the Basic Law. Equality and non-discrimination has been commonly used by applicants to challenge alleged infringements of socioeconomic rights. This is because equality is regarded as a civil and political right and has been more commonly dealt with by the court. The United Nations Human Rights Committee and the European Court of Human Rights have also dealt with numerous cases concerning socioeconomic issues under the equality provisions in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention of Human Rights (ECHR), respectively, which concern basically civil-political rights. This seems to be the line taken by the applicants for judicial review in Hong Kong, as principles concerning equality rights are better-established in Hong Kong as compared with the uncertain content of socioeconomic rights, which are yet to be elaborated by courts in case law.

In applying the justification test for differential treatment, the court in both *Kong* and *Yao* relied on *R(Carson) v. Secretary of State for Work and Pension* (2006) concerning the two categories of grounds of discrimination to determine the degree of intensity of review.²² The first category

based on gender, sexual orientation, race, political views, and religion goes to the very make-up of the individual and attracts higher intensity of scrutiny, while differences in treatment in the second category based on ability, education, wealth and occupation, and the like only requires rational justification by the government. In both cases, the difference in treatment based on years of residence was a ground that falls within the second category defined in *Carson*, which merely requires some rational justification and no close scrutiny.

There is more to say about the factors in determining the intensity of review. Apart from the types of grounds for differential treatment, the intensity of review will also be influenced by other factors, including the nature of policy changes and its effects, which will be discussed in the following section.

3.3. Deference and resource allocation

In considering various issues in *Kong Yunming*, the court emphasized that, as a general proposition, socioeconomic policies fall within the “discretionary area of judgment” of the executive, and the court should defer to the decisions of the government (with a high degree of deference when no proscribed ground of discrimination is present).²³ This is because socioeconomic policies often involve balancing general public interests and the allocation of limited resources. Justice A. Cheung J made it clear:²⁴

In short, one is involved in an area of competing interests and competing rights. By definition, a balance has to be struck. And

²² [2006] 1 A.C. 173. See *Kong Yunming*, at [81] and *Yao Man Fai George*, at [44].

²³ *Kong Yunming*, at [127], [129].

²⁴ *Kong Yunming*, at [118].

again by definition, striking that balance is by nature a political job for the government and the legislature with the involvement of public opinion. In matters of the present sort, courts must be very slow to interfere.

According to the judge, questions concerning whether a social policy is no more than necessary to fulfill the policy aim under the justification test of alleged discrimination, or whether a policy is a “development and improvement” of the preexisting social welfare system under article 145, should be left to the wisdom of the executive. The court is unlikely to challenge the legislature or executive’s decision by ruling it unconstitutional. The court does not find itself constitutionally and institutionally well-placed and equipped to deal with these matters.²⁵

This stance of deferring to government in considerations involving social or economic policy was also endorsed in *Yao Man Fai George*.²⁶ Interestingly, even when the court stated that the same degree of deference is to be applied when no proscribed ground of discrimination is present, nonetheless, it spent much more ink on analyzing the policies in *Yao* than in *Kong*. It seems that the court defers not only on the basis of socioeconomic policies as such, but also the financial implications of such policies. The more macro the scale of resource allocation, the less likely the court is willing to interfere with decisions of the government.

This is not novel practice. The courts in common law jurisdictions have all

wrestled with the difficult issues of socio-economic policies and allocation of limited financial resources in recent years.²⁷ Amongst various matters, the financial consequence of the judgment seemed to have a significant impact on the degree of deference the court is willing to give to the executive or legislature in decision making, and thus whether a limitation to a constitutional right is justified. The court is bolder in overturning policies when the financial impact is small.

Examples can be seen in the South African constitutional case of *Khosa v. Minister of Social Development*.²⁸ This case concerned the exclusion of South African permanent residents from certain welfare grants under the Social Assistance Act 59 of 1992. The South African Constitutional Court ruled that the exclusion was discriminatory and stated that the cost of providing social security to permanent residents would be but a small proportion of the total costs of social grants, and that the government was unable to provide sufficient evidence that the grants to permanent residents would impose an excessively high financial burden on the government. The Court emphasized the impact of exclusion on the livelihood and human dignity of the permanent residents when balancing the limitation of social welfare rights. A low degree of deference was given to the government.

Similarly, in the Canadian Supreme Court case of *Eldridge v. British Columbia (Attorney General)*²⁹ the Court ruled that the government had failed to provide a

²⁵ *Kong Yunning*, at [57]. See Cora Chan, *Judicial Deference at Work: Some Reflections on Chan Kin Sum and Kong Yun Ming*, 40 H.K.L.J. 1 (2010).

²⁶ *Yao Man Fai George*, at [45].

²⁷ See, for example, *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* (Varun Gauri & Daniel M. Brinks eds., 2008).

²⁸ 2004 (6) S.A. 505 (C.C.).

²⁹ [1997] 3 S.C.R. 624.

reasonable basis for denying interpretation services to deaf patients in hospitals, which amounted to a breach of equality rights under section 15(1) of the Canadian Charter. The Canadian Supreme Court observed that the estimated cost of providing sign language interpretation for British Columbia was only \$150,000 per year or 0.0025% of the provincial health care budget at the time.³⁰ The government's decision did not support a reasonable balance of the competing social demands of the society.³¹

In contrast, in *Newfoundland (Treasury Board) v. N.A.P.E.*,³² the government of Newfoundland and Labrador introduced the Public Sector Restraint Act deferring the commencement of wage-adjustment payments originally intended to achieve wage equity between male and female. The Canadian Supreme Court ruled that the restriction of the Charter equality right was justifiable in light of the unprecedented financial crisis facing the province and the \$24 million, amounting to more than 10 percent of the projected budgetary deficit, which could be saved because of the Act.

It is apparent that the Court was motivated by the financial implications of the protection of rights in determining the degree of deference due to the executive. Understandably, resource allocation is the duty of the legislature and executive. However, the fact that the guarantee of rights involves socioeconomic rights or significant financial implications, in and of itself, should not be the sole reason for deference. In *Weak Court, Strong Rights*, Mark Tushnet discusses the doctrinal

difficulty that will result when different cases, which are almost the same in principle, are treated differently only because of the financial implication.³³

This is acknowledged in *N.A.P.E.*,³⁴ in which the Canadian Supreme Court emphasized that it would "continue to look with strong skepticism at attempts to justify infringements of Charter rights on the basis of budgetary constraints."³⁵ The reason being that there are always budget constraints, and there are always pressing government priorities. To do otherwise would devalue the Charter. The Court will look for occurrences of financial emergencies in considering whether rights restrictions are justifiable. In that case, the Court reviewed the consultation process and consideration of alternative measures by the government.³⁶

This is a more favorable treatment of the degree of deference. It is submitted that a court should put more emphasis on circumstances such as whether an issue involves retrogressive measures by the government, how serious is the infringement of human rights and human dignity of the individuals, and the impact of the breach on the disadvantaged group in deciding the deference it will give to the government. In this regard, the court is institutionally equipped to look at the human rights principles involved in the decision making. Understandably, it is a difficult issue. Nevertheless, a more doctrinal distinction than mere financial consequence should be considered in this area.

³⁰ *Id.* at [87].

³¹ *Id.* at [93].

³² [2004] 3 S.C.R. 381.

³³ MARK TUSHNET, *WEAK COURT, STRONG RIGHT: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 247 (2008).

³⁴ *See supra* note 32.

³⁵ *Id.* at [72].

³⁶ *Id.* at [89]–[92].

3.4. Justification test applied

The following is a review of the application of the justification test of article 25 discrimination in *Kong* and *Yao* in order to see how the test can be applied in a more principled and doctrinally coherent manner in relation to socioeconomic issues.

3.4.1. Legitimate aim

In *Kong Yunming*, the court held that the seven-year residence requirement satisfied all three limbs of the justification test for differential treatment under article 25 of the Basic Law. The aim, as recommended in the Task Force Report on Population in 2003, was to “adopt a proper basis for allocation of finite public resources in the light of rising social expenditure so as to ensure the long-term sustainability of the provision of social security benefits to the society.”³⁷ It was held to be legitimate. There was ample evidence from the report to support the need for a residence requirement.

In contrast, in *Yao Man Fai George*, the court was unable to find sufficient evidence from the Task Force Report or other government papers to show a “genuine need” to discourage people who had been away from Hong Kong for a long time from relying on CSSA as soon as they returned to Hong Kong.³⁸ The court screened through the Task Force Report, Legislative Council debate materials, and affirmations by the government but did not find any detailed discussion on the circumstances of Hong Kong permanent residents returning to Hong Kong from overseas or the mainland for CSSA.

It is commendable that the court required accountability and transparency in reasoning by the government in policy decisions, and that the policy be justified on an objective basis. However, if the court relied solely on the availability of government data to satisfy itself of the genuineness of the need for a public policy, there is a risk of its merely looking at the *quantitative* instead of *qualitative* aspects of the data, statistics, and analysis. It is understandable that judges may be wary of navigating into fact-finding operations, particular in socioeconomic issues. Indeed, legitimate aim may be proved by constitutional principles alone, with or without the need for factual data. For example, in *Kong*, Justice Cheung stated that:³⁹

I find that this is an aim fully borne out by the materials placed before the court. I also find that it is a legitimate aim. The long-term sustainability of the social welfare system is something that the government must ensure, particularly in the light of its constitutional obligation under article 145 to develop and improve the pre-existing social welfare system.

Nevertheless, in cases where factual analysis is involved, it seems that if the court is merely looking at the availability of evidence in government papers, it may run the risk of becoming the mouthpiece of the government, which will try to justify its policies by providing massive data and research statistics. To opt for a more balanced option, it is submitted that, when the other party presents contradicting expert evidence on the legitimacy of the aim, the court, in giving due deference to the executive, should consider such evidence but intervene only when, in

³⁷ *Kong Yunming*, at [123].

³⁸ *Kong Yunming*, at [47]–[56].

³⁹ *Kong Yunming*, at [124].

light of the materials, it would be unreasonable for the government to disregard such counterevidence as to the genuine need for the policy. This can be done by accepting expert evidence from the applicant as well as from *amicus curiae*, which may be specialized NGOs or academics with detailed analyses of the available social-science data. This approach is in line with the model of deliberative democracy by which stakeholders can voice their concerns and the court can be a forum for deliberation and thus enhance democracy.⁴⁰ It also expands the role of the court to fit the polycentric nature of socioeconomic rights litigation.⁴¹

3.4.2. *Rational connection and “no more than necessary”*

In *Kong Yunming*, the court ruled that the use of a dividing line for the eligibility to CSSA was acceptable.⁴² As to whether the policy was no more than necessary to accomplish the legitimate aim, the court acknowledged that the policy change was “substantial if not drastic”; however, it deferred to the discretionary judgment of the government on this issue.⁴³

In *Yao Man Fai George*, since the policy failed the first limb of the justification test, it was considered unnecessary to deal with the remaining two issues. However, the court went on to discuss the second and the third limbs in *obiter dicta*. It was of the view that the one-year continuous residence requirement failed to con-

nect rationally to the stated aim, since the requirement failed to distinguish between those who were away from Hong Kong for a long time and those who marginally missed the one-year requirement. The court cited examples where absence from Hong Kong would not be objectionable, for example, civil servants who go on a short course of study for several months, voluntary workers who stay overseas for the duration of a natural disaster in another country, students over eighteen who go on an exchange, and patients who seek medical treatment on the mainland for several months, and so forth.⁴⁴ The one-year residence requirement would pose a bar to all these applicants who are only temporarily absent from Hong Kong.

Further, the residual discretion to waive the one-year continuous residence requirement was not able to prevent the policy from going beyond what is necessary to achieve the stated aim, as the guidelines governing the exercise of discretion did not permit the relevant officer to look into the reasons and circumstances of the applicants’ absences, except for genuine hardship.

While in *Yao Man Fai George*, the court looked more closely into the different hypothetical scenarios concerning the one-year continuous residence requirement in its balancing of rights, a more principled set of questions could have been employed by the court by referring to international human rights standards and constitutional and administrative law principles. The United Nations Committee on Economic, Social and Cultural Rights, when considering the obligations of member states to take steps to the maximum of its available resources to

⁴⁰ Sandra Fredman, *Justiciability and the Role of Courts*, in HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 100 (2008).

⁴¹ See Brian Ray, *Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights*, 45 STAN. J. INT’L L. 151 (2001).

⁴² *Kong Yunming*, at [126].

⁴³ *Kong Yunming*, at [129].

⁴⁴ *Yao Man Fai George*, at [79]–[82].

progressively realize economic, social, and cultural rights under the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR),⁴⁵ will inquire into several issues. These include, inter alia, the extent to which the measures taken were deliberate, concrete, and targeted toward the fulfillment of economic, social, and cultural rights; the time frame in which the steps were taken; and whether the state considered alternative options which least restrict covenant rights. The committee will also require special concern for the precarious situations of disadvantaged and marginalized individuals or groups.⁴⁶

Similarly, in *Grootboom v. Government of South Africa* (2000),⁴⁷ the Constitutional Court of South Africa has developed a set of criteria in considering whether a socioeconomic policy satisfies the reasonableness standard under the South African Constitution. These include, for example, whether the program is balanced and flexible and makes appropriate provision for short-, medium-, and long-term needs; whether the program is static or involves continuous review; and whether those whose needs are the most urgent and whose ability to enjoy all rights, therefore, is most in peril are taken into account.⁴⁸

These considerations require the government to mainstream socioeconomic rights in its policy making. The benefit of adopting the above inquiry is that it provides the court with a principled framework for balancing based on human rights and constitutional principles, which the court is well-equipped to do. The criteria do not infringe the freedom of the government to make its policy choice because they focus only on the compliance with socioeconomic rights without requiring the court to override the government on policy options. It respects the democratic legitimacy and institutional competence of the executive branch. It is also in line with the commitment of Hong Kong to protecting rights under ICESCR, enshrined in article 39 of the Basic Law.⁴⁹

The constitutional duty of the judiciary is to uphold the rule of law and constitutional and administrative law principles, including fairness, accountability, equality, and procedural propriety.⁵⁰ In relation to social and economic policies, the review of decisions, based on the above constitutional and human rights principles, should not fall out of the hands of judges. The courts should strive to focus on the rule of law principles that they are accustomed to safeguarding and to review the issues in light

⁴⁵ U.N.Doc. A/RES/63/117 (10 December 2008). The Optional Protocol is not yet in force.

⁴⁶ Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant*, U.N.Doc. E/C.12/2007/1 (May 10, 2007).

⁴⁷ 2001 (1) S.A. 46 (C.C.).

⁴⁸ See, generally, Sandra Liebenberg, *South Africa: Adjudicating Social Rights under a Transformative Constitution*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* 75 (Malcolm Langford ed., 2008).

⁴⁹ BASIC LAW art. 39: "The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

⁵⁰ See Fredman, *supra* note 40.

of these.⁵¹ Deference comes into play by respecting that there is a range of possible options available to the government.

The above analysis for the justification test is equally applicable to the general proportionality review of the limitation of welfare rights, since the tests are very similar. As an example, in both *Kong* and *Yao*, when the court is considering whether the residence requirement is no more than necessary to fulfill the policy objective, it can ask the following questions:

- whether the policy involves retrogressive measures;
- whether the government has made an assessment of the measure's compliance with economic, social, and cultural rights;
- how serious is the limitation of social welfare rights on the dignity and livelihood of the disadvantaged groups;
- whether the government has shown special concern for the precarious situation of those most gravely affected by the policy;
- what is the financial implication of the policy;
- whether the government has considered alternative options, for example, by taking gradual steps as compared with a one-off approach;
- whether there is a mechanism for periodic review and monitoring of the fulfillment of the right; and
- whether there is sufficient public consultation regarding the policy.

This inquiry is similar to administrative law review, which looks at the relevance of considerations and the fairness in decision making by the government. It is a principled form of review and yet gives due

respect to the policy choices of the government. It is a weak form of review in Mark Tushnet's sense, because, upon the failure to consider these questions, the court can make a declaration requiring the government to reconsider the issue, thus handing the initiative back to the government. It also ensures that policies, which have implications for socioeconomic rights, uphold the value of "accountability, equality and deliberative democracy."⁵²

4. Conclusion

Both *Kong* and *Yao* concern the difficult issues of the grassroots of the society challenging existing social inequalities, as the structure of Hong Kong society has become more and more unequal and the gap between the rich and the poor widening. It is expected that more cases pleading for social justice will come as people fail on the legislative and executive fronts. It is a positive sign to see that court is facing up to this challenge and expanding the horizon of our jurisprudential understanding of socioeconomic rights. The court is trying to adopt a more detailed analysis in *Yao* than in *Kong* in order to protect equality and social welfare rights. Yet to continue with this same vigor, it is essential to develop a more principled approach for adjudicating and enforcing these rights. Social welfare rights have long been recognized as human rights since the Universal Declaration of Human Rights.⁵³ With the advancement of our economy and the rising public need to improve the socioeconomic well-being of our society, the court's role in ensuring fairness in social welfare guarantees is indispensable.

⁵¹ T. R. S. Allan, *Human Rights and Judicial Review: A Critique of "Due Deference,"* 65 C.L.J. 671 (2006).

⁵² See Fredman, *supra* note 40, at 115.

⁵³ Universal Declaration of Human Rights art. 2.