Public Welfare and The Judicial Over-Enforcement of Socio-Economic Rights in Hong Kong

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This comment argues that the Court of Final Appeal (CFA) in Kong Yunming has erred insofar as it applied the proportionality analysis vis-à-vis any restriction placed on the Art 36 right to social welfare. Even if the CFA was right to apply the proportionality analysis, it is argued that there is a rational connection between the 7-year residence requirement and the Government's aim of ensuring the sustainability of the welfare system by addressing the problems raised by the following issues: (a) immigration from the Mainland under the One-Way Permit scheme; (b) Hong Kong's ageing population; and (c) the rise in Comprehensive Social Security Assistance Scheme expenditure. Finally, even if the impugned 7-year residence requirement was unconstitutional, the CFA should have issued a temporary suspension order, rather than restore the 1-year residence requirement.

Introduction

Most recently, in *Kong Yunming v Director of Social Welfare*,[1] the Court of Final Appeal (CFA) unanimously invalidated the Hong Kong Government's policy that required all recipients of the Comprehensive Social Security Assistance Scheme (CSSA) to have been a Hong Kong resident for at least 7 years (7-year Rule).

In essence, the CFA held that Art 36[2] of the Basic Law conferred a right to the social welfare benefits under the CSSA as it stood on 1 July 1997, subject to the Government's power to modify those benefits pursuant to Art 145[3] of the Basic Law. Furthermore, any restriction

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1 [2014] 1 HKC 518 (CFA).

2 Article 36 of the Basic Law reads: Hong Kong residents shall have the right to social welfare in accordance with law. The welfare benefits and retirement security of the labor force shall be protected by law.

3 Article 145 of the Basic Law reads: 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.

on the social welfare right conferred by Art 36 must satisfy the proportionality analysis. Although the CFA accepted that the financial sustainability of the social security system would be a legitimate aim of the impugned policy, the Court concluded that there was no rational connection between the 7-year Rule and the three related principal factors that the Government argued had contributed to the need for additional measures to safeguard the system's sustainability: (a) the policy of accepting immigrants from the Mainland under the One-Way Permit (OWP) scheme; (b) Hong Kong's ageing population; and (c) the rise in expenditure on CSSA.[4] Even if such a rational connection could be established, the CFA held that the 7-year Rule was disproportionate and manifestly without reasonable foundation.[5] As a result, the 7-year Rule was declared unconstitutional and the CFA restored the pre-existing residence requirement of 1 year.

The facts and procedural history of the case may be briefly stated. In 2006, the applicant, a Mainland immigrant who was in Hong Kong on an OWP, applied for CSSA but her application was refused because she did not satisfy the 7-year residence requirement in Hong Kong. She subsequently brought judicial review proceedings to challenge the Director of Social Welfare's decision on the ground that the 7-year Rule was inconsistent with, *inter alia*, Arts 36 and 145 of the Basic Law. The Court of First Instance (CFI) dismissed her application for judicial review. The CFI held that the 7-year Rule was a permissible restriction on Art 36 since it was, in accordance with Art 145 of the Basic Law, designed to develop and improve the pre-existing social welfare system in response to the prevailing economic condition and social needs.[6] The Court of Appeal subsequently dismissed the appellant's appeal,[7] but the applicant eventually succeeded before the CFA.

In this Comment, we shall advance the following arguments. First, the CFA has erred insofar as it applied the proportionality analysis vis-à-vis any restriction placed on the Art 36 right to social welfare. Second, even if the CFA was right to apply the proportionality analysis, we would argue that there is a rational connection between the 7-year Rule and the Government's aim of ensuring the sustainability of the welfare system by addressing the problems raised by the following issues: (a) immigration from the Mainland under the OWP scheme; (b) Hong Kong's ageing population; and (c) the rise in expenditure on CSSA.

4 *Kong Yunming* (CFA) (n 1 above), [53].
5 *Ibid.*, [143].
6 [2009] 4 HKLRD 382.
7 [2012] 4 HKC 180 (CA).

Third, even if the impugned 7-year Rule was unconstitutional, the CFA should have issued a temporary suspension order, rather than restore the 1-year residence requirement. These arguments would be examined in turn.

Article 36 and the Proportionality Analysis

The CFA held that any restriction placed on the right to social welfare as protected under Art 36 "is subject to constitutional review by the Courts on the basis of a proportionality analysis".[8] Unfortunately, as Counsel for the Director of Social Welfare had accepted this, the Court did not further explain why this should be so.

As the court of final resort in Hong Kong, the CFA was certainly entitled to decide that the proportionality analysis be used to assess any limitations on Art 36 rights, if it so chooses. But we would like to highlight that it is not self-evident why the proportionality analysis is the applicable legal test for assessing such restrictions.

The Art 36 right to social welfare is an exclusive Basic Law right, ie a right that is only found in the Basic Law and not in the Hong Kong Bill of Rights. For exclusive Basic Law rights, the CFA in *Gurung Kesh Bahadur v Director of Immigration* has so observed:

> "The question of whether rights found only in the Basic Law can be restricted and if so the test for judging permissible restrictions would depend on the nature and subject matter of the rights in issue".[9]

On the facts in *Gurung Kesh Bahadur*, the CFA was careful not to decide explicitly whether the proportionality analysis applied to assessing restrictions on the constitutional right to travel,[10] an exclusive Basic Law right.

Therefore, while it is possible for the CFA to apply the proportionality analysis to restrictions on exclusive Basic Law rights, according to *Gurung Kesh Bahadur*, it does not have to be so. One must also note that, prior to *Kong Yunming*, the CFA has only the applied the proportionality analysis vis-à-vis restrictions on rights that are protected both in the Basic Law

[8] *Kong Yunming* (CFA) (n 1 above), [36].

[9] (2002) 5 HKCFAR 480, [28].

[10] Article 31 of the Basic Law reads: Hong Kong residents shall have freedom of movement within the Hong Kong Special Administrative Region and freedom of emigration to other countries and regions. They shall have freedom to travel and to enter or leave the Region. Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization.

and in the Hong Kong Bill of Rights, and has never done so for exclusive Basic Law rights.[11]

Furthermore, in assessing the "nature and subject matter of the rights in issue"[12] so as to determine the test for judging permissible restrictions, one naturally has to examine the text of Art 36 itself. Article 36 states that Hong Kong residents shall have the right to social welfare "in accordance with law". In particular, the CFA in *Shum Kwok Sher v HKSAR*, observed as follows:

> "[I]t is now widely recognized that the expression 'prescribed by law', when used in a context such as Art 39 of the Basic Law, mandates the principle of legal certainty. This principle is likewise incorporated in the expression 'according to law' in Art 11(1) of the Bill [of Rights Ordinance]".[13]

According to the CFA in *Shum Kwok Sher*, the principle of legal certainty incorporated in the expression "according to law" merely requires the law to be adequately accessible, ie the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case, and that the law be formulated with sufficient precision to enable the citizen to regulate his conduct.[14] If this is the reading the CFA has given to the term "according to law" under the Hong Kong Bill of Rights, surely the same meaning can be given to the term "in accordance with law" under Art 36. If so, any restriction on Art 36 rights need only to satisfy the principle of legal certainty as laid out in *Shum Kwok Sher*, and a proportionality analysis can be avoided altogether.

Rational Connection between the 7-year Rule and the Government's Aims of Addressing Issues Concerning: (a) Mainland Immigration under the OWP Scheme; (b) Hong Kong's Ageing Population; and (c) the Rise in CSSA Expenditure

Nevertheless, even if the CFA was right to apply the proportionality analysis and the concomitant "rational connection test" to assess the

[11] One must note that in *Official Receiver and Trustee in Bankruptcy of Chan Wing Hing v Chan Wing Hing* (2006) 9 HKCFAR 545, the CFA changed its mind about treating Art 31 as an exclusive Basic Law right and applied the proportionality analysis to assess a limitation on the right to travel as protected under Art 31 of the Basic Law and the freedom to leave Hong Kong as protected under Art 8(2) of the Hong Kong Bill of Rights. The CFA, in particular, held that the difference between both terms were "immaterial" and "it will be convenient to refer to the right in both instruments simply as 'the right to travel'".

[12] *Gurung Kesh Bahadur* (n 9 above), [28].

[13] (2002) 5 HKCFAR 381, [60].

[14] *Ibid.*, [63].

constitutionality of the 7-year Rule, we would nevertheless argue that a rational nexus can be established between the 7-year Rule and the Government's avowed legitimate aim of ensuring the sustainability of the welfare system by addressing the problems raised by the following issues: (a) Mainland immigration under the OWP scheme; (b) Hong Kong's ageing population and (c) the rise in CSSA expenditure. These principal justifications would now be examined in turn.

3(a) 7-year Rule and the OWP scheme

The CFA first found that there was no rational connection between the 7-year Rule and the avowed legitimate aim since the 7-year Rule conflicted with the OWP scheme. According to the CFA, the purpose of the OWP scheme is "the promotion of family reunion, respecting the right of abode of children of Hong Kong permanent residents under the Basic Law".[15] Although new Mainland immigrants under 18 years of age are exempted from the 7-year Rule, there was no such exemption for Mainland parents who had come to take care of these minors. As observed by the CFA, the 7-year Rule was thus "counterproductive"[16] as it deterred potential new arrivals who were without sufficient income to meet their basic needs in Hong Kong and this Rule therefore conflicted with the OWP policy of family union.[17]

With respect, the CFA has erred in finding that the OWP scheme provided "no support for the existence of any rational connection"[18] and that the "policies underlying the OWP scheme militate against that restriction".[19] Undeniably, a key purpose of the OWP scheme is the promotion of family reunion. But that is not the *only* purpose of the scheme. If the sole purpose of the OWP scheme was to promote family reunion, there should not be any daily quota of Mainland arrivals at all. After all, any such restriction on the number of daily Mainland arrivals would impede family reunion. But the fact is, since 1995, the OWP scheme has had a daily quota of 150.[20] The existence of the daily quota suggests that the OWP scheme also aims to ensure the orderly admission of new arrivals and to prevent the local infrastructure in Hong Kong from being overburdened by the influx of Mainland immigration. Indeed, according

[15] *Kong Yunming* (CFA) (n 1 above), [61].
[16] *Ibid.*, [64].
[17] *Ibid.*, [62], [63] and [140].
[18] *Ibid.*, [66].
[19] *Ibid.*
[20] *Ibid.*, [57].

to the Task Force on Population Policy, whose Report was cited by the CFA, in implementing the OWP, "a proper balance has to be struck between orderly admission of new arrivals from the Mainland, both children and spouses, and upholding family unity".[21] Therefore, since another central purpose of the OWP was to ensure the "orderly admission of new arrivals" into Hong Kong, it would be perfectly rational for the Government to safeguard the local infrastructure, which includes the welfare system in Hong Kong, from being overburdened, an objective that is wholly consistent with the avowed purpose of the 7-year Rule, namely to ensure the sustainability of the welfare system. Thus, there is no conflict between the 7-year Rule and the OWP scheme.

3(b) 7-year Rule and the governmental policy of responding to Hong Kong's ageing population

The CFA also found that there was no rational connection between the 7-year Rule and the avowed legitimate aim since the 7-year Rule conflicted with the governmental policy of responding to Hong Kong's ageing population problem. According to the CFA, the 7-year Rule "does not affect all elderly CSSA recipients, but only new arrivals who are elderly", and elderly immigrants are allotted a small sub-quota under the OWP scheme.[22] Furthermore, only a small proportion of the elderly persons who entered under the OWP scheme received CSSA. Therefore, according to the CFA, savings to the CSSA expenditure from elderly new arrivals "would be minimal and could hardly qualify as a response to the ageing population problem, aimed at ensuring the sustainability of the welfare system".[23]

Unfortunately, the CFA has failed to fully grasp the Government's argument on Hong Kong's ageing population. The 7-year Rule addressed the problems associated with Hong Kong's ageing population *not* primarily by saving on CSSA benefits that would have been given to *new elderly arrivals*. Instead, this 7-year requirement allowed the Government to save on CSSA benefits that would have been given to all *new adult arrivals* (young or elderly), and to use these savings to support a growing number of local elderly people in Hong Kong. This is evidenced by a passage in the Task Force Report (cited again by the CFA), which states the following:

[21] *Ibid.*, [55].
[22] *Ibid.*, [74].
[23] *Ibid.*, [75].

> "One serious economic problem caused by an accelerated *increase in the number of elderly people in the population* is social security payments. The Government is committed to *providing financial assistance to elderly people in need*".[24]

Thus, in determining whether the 7-year Rule was rationally connected with the Government's aim of addressing the ageing population, the CFA was wrong to have focused only on the savings the Government could gain by excluding the elderly new arrivals from obtaining CSSA. Since the 7-year Rule applied to *all adult new* arrivals, the Government could save on CSSA that would otherwise have been given to *all* eligible adult new arrivals and use the savings to provide for a rapidly growing number of old people in Hong Kong. Thus, it is clear that there is a rational connection between this Rule and the Government's aim of ensuring the sustainability of the welfare system.

3(c) 7-Year Rule and the Rise in CSSA Expenditure

The CFA also held that there was no rational connection between the 7-year Rule and the avowed legitimate aim since the Rule could only achieve modest CSSA savings. While the CFA accepted that the Governmental spending on CSSA had risen sharply in the decade leading up to 2004, the CFA nevertheless concluded that the 7-year restriction was an irrational way of safeguarding the sustainability of the welfare system. Using the statistics for the fiscal year 2001–2002 as an example, the CFA noted that if the 7-year Rule had been in effect then, the Government would have saved less than $764 million out of a total CSSA expenditure of $14.4 billion that year.[25] According to the CFA, such "relatively insignificant level of savings ... severely undermines"[26] the suggestion the 7-year Rule was rationally connected to the avowed legitimate aim of safeguarding the sustainability of the social security aim. To further buttress its conclusion, the CFA pointed to a supposed "smoking gun" found in a Governmental Information Paper dated 2 January 2004:

> "The new residence requirements for CSSA are, however, *not driven by the need to reduce CSSA expenditure on new arrivals*, but by the need to adopt 'the principle of seven-year residence requirement' for providing social

[24] *Ibid.*, [70]. The Task Force Report projected that the elderly dependency ratio in Hong Kong would increase from 158 in 2002 to 380 in 2031.
[25] *Kong Yunming* (CFA) (n 1 above), [94] and [95].
[26] *Ibid.*, [96].

> benefits heavily subsidized by public funds, as recommended by the Task Force on Population Policy, to ensure a rational basis on which our public resources are allocated. The Government remains committed to providing an effective and sustainable safety net for the financially vulnerable".[27] (Italics supplied by the CFA)

The CFA therefore seized upon the phrase "not driven by the need to reduce CSSA expenditure on new arrivals", and concluded triumphantly that that 7-year Rule was not enacted for the purpose that the Government had advanced.

Again, there are several problems with the CFA's arguments herein. First, the Court erred in interpreting the Information Paper (in particular the italicized part) as a concession by the Government that there was no rational connection between the 7-year Rule and the avowed legitimate aim. In fact, the extract, as cited by the CFA, went on to state that the Government was committed to providing a "sustainable safety net for the financially vulnerable". All that the Information Paper reveals is that the *ultimate objective* of the 7-year Rule was not to reduce CSSA expenditure on new arrivals *per se*, but to create a sustainable safety net for the increasing number of financially vulnerable persons in Hong Kong by saving on CSSA expenditures on new arrivals. The extracted part of the Information Paper is thus not a "smoking gun" and the CFA has simply misfired.

Second, the CFA has also misapplied the "rational connection" test in determining whether there is nexus between the 7-year Rule and the governmental aim of "curbing (CSSA) expenditure so as to ensure the sustainability of the social security system".[28] In determining whether there was any rational connection between the 7-year Rule and the avowed legitimate aim, the only question to be asked should be whether the impugned policy furthers the aim of the Government, ie whether the 7-year Rule would actually succeed in curbing any CSSA expenditure. The fact that there was "relatively insignificant amount of savings"[29] suggests that such savings actually occurred and a rational connection can be established. Insofar as the CFA may feel that these savings are insubstantial or insignificant, this would be an issue concerning the "necessity" analysis and this finding would have no bearing on the issue of rational connection. Therefore, by focusing on the quantum of savings achievable by the 7-year Rule, the CFA had in fact engaged in the "necessity" analysis, and the Court was no longer seeking to identify a

[27] *Ibid.*, [97].
[28] *Ibid.*, [140].
[29] *Ibid.*, [96].

rational connection between the 7-year Rule and the avowed legitimate aim.

Third, even if the CFA had intended to engage in the "necessity" analysis, it has failed to apply the correct standard of review. As recognized by the CFA at the outset, the present case involved "the implementation of the Government's socio-economic policy choices regarding the allocation of limited public funds",[30] and a wide margin of appreciation should thus be accorded to the Government.[31] Therefore, the Court would not subject the 7-year Rule to "intense scrutiny" (ie requiring weighty evidence that it goes no further than necessary to achieve the legitimate objective in question) or the "minimal impairment" test (ie requiring the respondent to show that the impugned measure goes no further than necessary to achieve the legitimate objective in question).[32] Instead, the Court would intervene only where the impugned measure is "manifestly without reasonable justification".[33]

Notwithstanding the CFA's laudable rhetoric, the Court has indeed applied intense scrutiny to examine the constitutionality of the 7-year Rule. In the fiscal year 2001–2002, if the 7-year Rule had taken effect then, the CFA noted that the Government could have saved about $764 million.[34] (The total costs of the CSSA expenditure that year amounted to $14.4 billion.)[35] On the assumption that these savings, from excluding affected new arrivals (those that are currently in Hong Kong and also those that would come in the future) under the 7-year Rule, would remain constant every year after that, can one really argue that the impugned governmental policy, which reduces CSSA expenditure by $764 million annually, is a fiscal measure that is manifestly without reasonable foundation?

In support of its conclusion, the CFA also observed as follows:

> "It is true that in subsequent years, the number of recipients who have not resided here for seven years would progressively diminish. It nevertheless remains the case that the actual savings would be proportionately reduced by payments made to residents in that class for each year over the entire seven-year period".[36]

The CFA's abovementioned arguments are somewhat opaque to us but arguably the CFA was making the following point: while the number of welfare recipients, who do not satisfy the 7-year Rule but are still

[30] *Ibid.*, [41].
[31] *Ibid.*
[32] *Ibid.*, [40].
[33] *Ibid.*, [41].
[34] *Ibid.*, [95].
[35] *Ibid.*, [94].
[36] *Ibid.*, [95].

given CSSA grants, would be reduced after the policy takes effect, the government's savings from this would be offset by new payments made to those who have resided beyond the 7-year requirement. If this is indeed what the CFA meant, our judges may have missed the point. The fact is there will be new arrivals coming to Hong Kong *every year* that would over time be eligible for CSSA benefits. The 7-year Rule would have required all these new arrivals to wait for seven years before they are eligible for such benefits. While new arrivals, under the previous system, were eligible for CSSA benefits after residing in Hong Kong for only a year, new arrivals under the impugned policy would have to wait for an additional six years. Where the Government is able to save on six years of CSSA benefits that was previously payable to all new eligible arrivals after one year, surely such cost savings cannot be considered "relatively insignificant".[37] Therefore, so far as the CFA determined that the 7-year Rule was a disproportionate measure, the judges surely must have applied the "intense scrutiny" or "minimal impairment" analysis in *substance*, albeit not endorsed it in *form*.

Restoration of the 1-Year Residence Requirement

Finally, even if the 7-year Rule was unconstitutional, we have grave reservations about whether the 1-year residence requirement should have been restored.

Our critics might argue that it would be logical for the CFA to restore the 1-year residence requirement as the Court had held that Art 36 conferred constitutional protection on the "right defined by the eligibility rules for CSSA derived from the previous system of social welfare and in existence as at 1 July 1997",[38] and the CFA was thus merely restoring the right to its original default position. But as Professor Albert Chen has convincingly argued in his contribution, this interpretation of Art 36 is questionable as "the framers of the Basic Law in enacting [Art 36] 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 [Art 145], their intention might have been only to forbid any change that is so substantial as to amount to 'the abandonment of the previous system'".[39] One must note that the CFA had not cited any *travaux preparatoires* in support of this novel interpretation.

[37] *Ibid.*, [96].
[38] *Ibid.*, [35].
[39] *See* Albert Chen, "A Stroke of Genius in *Kong Yunming*" (2014) 43 *HKLJ* 7.

Moreover, the mere restoration of the 1-year residence rule does not insulate this requirement from another constitutional challenge.[40] In a subsequent constitutional challenge against this 1-year residence requirement, assuming that the CFA is adamant that a 7-year residence requirement would impede the *exclusive* goal of family reunion pursued under the OWP scheme, the 1-year requirement would surely also affect family reunion adversely. If savings to the CSSA expenditure from elderly new arrivals "would be minimal and could hardly qualify as a response to the ageing population problem, aimed at ensuring the sustainability of the welfare system",[41] surely savings gained from the *excluded elderly new arrivals* under a 1-year requirement would be even more minimal. If reductions in the CSSA expenditure, which followed from the 7-year Rule, were deemed "relatively insignificant"[42] to be constitutional, surely the reductions in savings from a 1-year rule would be even more insignificant. If we accept the logic of the CFA's earlier arguments, the 1-year rule must be unconstitutional too, and it would be pointless to restore this residence requirement.

Furthermore, even when courts deem certain governmental actions unconstitutional, judges can still issue a temporary suspension order, instead of specific injunctions, as the constitutional remedy of choice. Professor Kent Roach has observed how the Supreme Court of Canada has increasingly suspended the immediate application of its declarations of invalidity, so that the government is given "an opportunity to engage in policy-making, by deciding which of a range of multiple constitutional options would be implemented in light of the court's ruling".[43] This judicial willingness to sanction delay and allow an unconstitutional state of affairs to persist serves two-fold advantages. First, the suspension avoids any legal uncertainty or chaos that may result in the community, if there is an immediate vacuum or gap in the law, as the unconstitutional statute will remain in place until the suspension order expires or a remedial legislation/policy is put in place. Second, a suspended declaration gives the political branches of government, rather than the courts, the opportunity to make the initial selection on how best to comply with the constitutional mandates among those competing alternatives available,

[40] Our argument in this paragraph is subject to the caveat that the CFA (in paragraph 35 of its judgment) was *not* stating that any eligibility rules for CSSA, which were in existence as at 1 July 1997, would *never* violate Art 36 of the Basic Law. We are of the view that the CFA is unclear about this.

[41] *Kong Yunming* (CFA) (n 1 above), [75].

[42] *Ibid.*, [96].

[43] Kent Roach, "Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed Declarations of Invalidity" (2002) 35 *University of British Columbia Law Review* 211, 212.

such that due deference is paid to the institutional and informational capabilities of the Government.[44]

The Hong Kong courts have indeed issued temporary suspension orders on several occasions.[45] The first of such occasions related to the unconstitutionality of a statutory provision that previously allowed the Chief Executive, whenever he considered that public interest so required, to order the interception or disclosure to the government of any telecommunications, and an accompanying Executive Order that laid out the administrative procedures for the conduct of authorised covert surveillance. In *Koo Sze Yiu v Chief Executive of Hong Kong*,[46] the CFA was concerned that an immediate invalidation of the impugned procedures would unduly hamper legitimate covert surveillance activities, and the Court, inspired by its Canadian counterpart, suspended its declaration of invalidity. Bokhary PJ, on behalf of the CFA, held that this judicial power to suspend the operation of a declaration arose from the inherent jurisdiction of the courts and was "concomitant of the power to make the declaration in the first place".[47] Equally significantly, the CFA refused to compel the government to bring into force a pre-existing but inoperative legislation that sought to regulate the interception of some forms of communications as the judges preferred to "enable the authorities to decide what course they wish to take".[48] Therefore, the suspension order not only provides latitude to the government in deciding how best to respond to the court's decision, it also gives time to the legislature/executive to devise corrective legislation/administrative policy.

The CFA herein should have done the same. In light of the fiscal impact that this decision would have, and the administrative chaos that may follow from a sudden upsurge in eligible CSSA applicants, the CFA should have issued a temporary suspension order. This will give the Government time to assess the range of options it can adopt, in lieu of a 7-year residence requirement, and decide independently on the best way forward to comply with the Court's ruling, instead of being compelled to enforce a 1-year residence rule that is irrational and illogical on the CFA's own terms.

[44] Bruce Ryder, "Suspending the Charter" (2003) 21 *SCLR* (2d) 267, 285.

[45] *W v Registrar of Marriages* (2013) 16 HKCFAR 112; *Chan Kin Sum Simon v Secretary for Justice* (unrep., HCAL 79, 82 and 83/2008, [2009] HKEC 393).

[46] (2006) 9 HKCFAR 441.

[47] *Ibid.*, [35].

[48] *Ibid.*, [59] (concurring opinion by Sir Anthony Mason NPJ).

Conclusion

Socio-economic issues, such as public welfare, present the judiciary with an institutional dilemma; in carrying out its reviewing role, judges usually do not have all the information, expertise and training available to the primary decision makers to assess the proportionality of the impugned socio-economic policy; and deference is thus a rational, consequentialist response to this epistemic uncertainty. So far as the judiciary does not interfere with the government's fiscal solution unless it is "manifestly without reasonable foundation",[49] the courts would be under-enforcing the Constitution against public officials. But we should not equate "the scope of a constitutional norm as coterminous with the scope of its judicial enforcement".[50] The most prominent rationale for the judicial under-enforcement of welfare rights is premised on the belief that the political branches of government are better than judges in weighing costs and benefits in such circumstances.[51] Due to institutional constraints and the informational costs associated with the adjudication of such social welfare rights, judges may not want to exhaust the full content of these constitutional norms so that the political branches of the government can, on their own, flesh out the conceptual boundaries of these implicated rights.

In matters such as public welfare, where resources are limited and there are competing demands from different interest groups, our courts are simply not equipped to make the difficult and agonizing decisions of allocating funds from one segment of society to another. Judges are neither philosopher kings nor economists extraordinaire. Alas, in *Kong Yunming*, our CFA judges have decided that they are both.

[49] *Kong Yunming* (CFA) (n 1 above), [76].

[50] Lawrence G. Sagar, *Justice in Plain Clothes: A Theory of American Constitutional Practice* (New Haven: Yale University Press, 2004) 86.

[51] Kermit Roosevelt III, "Aspiration and Underenforcement" 119 (2006) *Harvard Law Review* 193.

Kong Yunming Manifest Unreasonableness: The Doctrinal Future of Constitutional Review of Welfare Policy in Hong Kong

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It would be easy to overstate the expansive impact of the Court of Final Appeal's controversial decision in Kong Yunming v Director of Social Welfare on the right to social welfare, its effects in removing a significant obstacle for new immigrants seeking social security payments notwithstanding. The new test that the Court deployed for reviewing the constitutionality of welfare policy is narrow and devoid of any commitment whatsoever to abstract societal ideals; it resembled the proportionality doctrine at most in form but definitely not in spirit. This article demonstrates how, properly understood, the three stages of this test boils down to no more than one stage: whether the impugned policy is manifestly unreasonable. This minimalist standard, in many ways similar to Wednesbury irrationality, evidences the Court's entrenchment of judicial deference in welfare policy adjudication and conservative economic philosophy in the constitutional common law of Hong Kong.

Introduction

On 17 December 2013, a unanimous Court of Final Appeal, in *Kong Yunming v Director of Social Welfare*,[1] invalidated part of an Order in Council for unconstitutionally requiring all recipients of social security distributions under the Government's Comprehensive Social Security Assistance (CSSA) scheme to have been Hong Kong residents for no less than seven years. Removing a significant obstacle for new immigrants seeking welfare benefits, this controversial ruling immediately ignited widespread debate that has gone to the very heart of the territory's economic ideology and political identity. Although social rights adjudication of the kind undertaken in the present case can in theory

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1 [2014] 1 HKC 518 (CFA)

provide a forum for judges, politicians and citizens to deliberate over such sweeping and fundamental issues as social equality and integration,[2] it is worth noting that Ribeiro PJ's lead judgment, in which Ma CJ, Tang PJ and Lord Phillips of Worth Matravers NPJ joined, neither promoted nor resulted from any such triadic dialogue.[3] In letter and spirit, the new test that the *Kong Yunming* Court propounded for gauging the constitutionality of limits on the right to social welfare is narrow, deferential, and devoid of any appeal whatsoever to social ideals, its nullification of the restrictions of pre-existing policy notwithstanding.

This note focuses on issues of common law doctrinal design underlying that test – mislabelled "proportionality" in the judgment – which would most accurately be denoted "manifest unreasonableness", and shall not be concerned with how that doctrine was actually deployed in *Kong Yunming*, or whether it is normatively desirable as the dominant standard for welfare rights adjudication. It is organised as follows. Firstly, it will be demonstrated how the three-stage analytic framework in *Kong Yunming*, correctly understood, boils down to just one stage, and how it differs fundamentally from the structured proportionality doctrine, being little more than a permutation of *Wednesbury* irrationality review. Secondly, whatever its potential importance, the lead judgment in *Kong Yunming* evidences the doctrinal entrenchment of judicial deference to government welfare policies and conservative economic philosophy in the constitutional common law of Hong Kong. Thirdly, and perhaps counter-intuitively, *Kong Yunming* confirmed that executive or legislative restrictions on socio-economic rights, which do not simultaneously curb civil and political rights, are permissible so long as they are not excessively irrational.

Kong Yunming Has Only One Step[4]

Kong Yunming arose out of an application for CSSA by one Kong Yunming, a new immigrant from mainland China, one year after she

[2] Karen Kong, "Right to Social Welfare" in Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (Hong Kong: Sweet and Maxwell, 2011) 789. *See* Rosalind Dixon, "Creating Dialogue about Socioeconomic Rights: Strong-form versus Weak-form Judicial Review Revisited" (2007) 5(3) *International Journal of Constitutional Law* 391.

[3] Bokhary NPJ reached the same outcome that the seven-year residence requirement imposed by the impugned Order in Council on CSSA applicants was unconstitutional, albeit on grounds that were very different from and much broader than those relied on by Ribeiro PJ in his lead judgment. As a matter of law, the reasons Bokhary NPJ gave cannot bind the courts below as part of the *ratio decidendi* of the Court of Final Appeal's decision in *Kong Yunming v Director of Social Welfare*. For commentary on Bokhary NPJ's opinion, *see* Karen Kong's contribution to the present issue: Karen Kong, "*Kong Yunming v Director of Social Welfare*: Implications for Law and Policy on Social Welfare" (2014) 43 *HKLJ* 67.

[4] This sub-heading was inspired by Matthew Stephenson and Adrian Vermeule, "*Chevron* has Only One Step" (2009) 95 *Virginia Law Review* 597.

had settled in Hong Kong, that the Director of Social Welfare rejected on the ground that Kong failed to meet the afore-mentioned seven-year residence requirement. The rejection was upheld by the Social Security Appeal Board on the same ground. Kong brought suit for judicial review before the High Court, claiming that the residence requirement breaches Arts 36 and 25 of the Basic Law, which provide for residents' rights to social welfare "in accordance with law" and equality before the law, respectively. Article 36, however, is qualified by Art 145, which empowers the Government "[o]n the basis of the previous social welfare system … on its own, [to] formulate policies on the development and improvement of this system in the light of the economic conditions and social needs".

At first instance, Andrew Cheung J was of the view that the Chief Executive's Order in Council of 2004 lengthening the CSSA residence requirement from one to seven years "is not something that the courts are constitutionally entitled, and institutionally equipped, to interfere with"; [5] for "it is really a matter of politics for Government officials and politicians, not for the courts and judges".[6] An administrative act is unconstitutional as breaching Art 145's "development and improvement" requirement only if it has been shown to have discriminated against "a class of residents of Hong Kong in terms of their entitlement to social welfare".[7] This ruling interpreted Art 36 in a way that diminished the status of its social welfare provision as a stand-alone right: it has not been breached unless Art 145 and ultimately Art 25 have also been breached.[8] Andrew Cheung J applied a version of the proportionality doctrine known as the "justification test" to gauge whether the seven-year residence requirement pursued a legitimate aim, was rationally related to it, and was "no more than necessary" to accomplish it. [9] He concluded that the differential treatment satisfied all three aspects of the test and was thus constitutional. On appeal, this decision was upheld by the Court of Appeal, which agreed "the case boiled down to the question of discrimination".[10] Interrogating the Order in Council, "do the distinctions based on the length of residence pursue a legitimate aim; if so, are the measures adopted rationally connected to that aim; and, if so, has the Director shown that the differences in treatment are no

[5] *Kong Yunming v Director of Social Welfare* [2009] 4 HKLRD 382, 416 (CFI).
[6] *Ibid.*, p 417.
[7] *Ibid.*, p 401.
[8] Karen Kong, "Adjudicating Social Welfare Rights in Hong Kong" (2012) 10(2) *International Journal of Constitutional Law* 588, 591.
[9] *Kong Yunming* (CFI) (n 5 above), pp 415–416.
[10] *Kong Yunming v Director of Social Welfare* [2012] 4 HKC 180 (CA).

more than are necessary to accomplish that aim?", Stock V-P affirmed its constitutionality. [11]

The Court of Final Appeal, however, reframed the issue in terms of the right itself to "social welfare in accordance with law".[12] It is an approach which "has the advantage of dispensing with proof of the element of discrimination".[13] Ribeiro PJ, speaking for the Court, reproved the Court of Appeal for allowing "equality rights entirely to eclipse the welfare right", and for omitting to "attribute any meaning to the first sentence of Article 36".[14] Before *Kong Yunming* it had been unclear whether the structured proportionality doctrine is applicable to judicial review of welfare policy in cases not involving challenges based on discrimination.[15] Ribeiro PJ declared that "any restriction subsequently placed on [the Art 36 right] is subject to constitutional review by the Courts on the basis of a proportionality analysis".[16] The Court accordingly purported to follow the typical proportionality analysis by articulating in three stages its inquiry into the constitutionality of restrictions on Art 36 rights. In Stage One the Court must ask whether the restriction pursues "a legitimate societal aim". If so, it must determine, in Stage Two, whether the restriction is "rationally connected with the achievement of that end". If it is, the Court must ask in Stage Three whether the restriction is "manifestly without reasonable foundation".[17]

Stage Three reaffirmed the Court's earlier ruling in *Fok Chun Wa v Hospital Authority*,[18] in which the policy of denying non-resident spouses of residents' eligibility for subsidised medical services at public hospitals was upheld by Ma CJ on the grounds that, "where limited public funds are involved, the courts have recognized that lines have had to be drawn by the executive or the legislature" which will not be disturbed unless "shown to be manifestly without reasonable foundation".[19] A manifestly disproportionate act is likelier than not to be irrational as well, and has been understood as such by leading common law courts.[20] The manifest unreasonableness doctrine confirmed by the UK Supreme Court in *Humphreys v Revenue and Customs Commissioners* is "little different from

[11] *Ibid.*, [6].
[12] *Kong Yunming* (CFA) (n 1 above), [19].
[13] *Ibid.*, [21].
[14] *Ibid.*, [32].
[15] *See* Kong (n 2 above), p 799.
[16] *Kong Yunming* (CFA) (n 1 above), [36].
[17] *Ibid.*, [43].
[18] (2012) 15 HKCFAR 409.
[19] *Ibid.*, p 438.
[20] *See* Jonathan Auburn *et al.*, *Judicial Review: Principles and Procedure* (New York: Oxford University Press, 2013) 403.

the domestic test of *Wednesbury* unreasonableness".[21] The two standards, according to that Court, are interchangeable.[22] A *Wednesbury* unreasonable or irrational act is one that is "so unreasonable that no reasonable authority could ever have come to it";[23] or "so absurd that no sensible person could ever dream that it lay within the powers of the authority"; or "so unreasonable that it might almost be described as being done in bad faith";[24] or "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".[25] *Wednesbury*'s "built-in respect" [26] for discretionary power renders challenges under it "rarely" successful.[27] In brief, simple unreasonableness is not enough; to be invalidated, an act must be intolerably unreasonable. Unlike judicial review principles typically categorised under the head of "illegality", *Wednesbury* does not require authorities to offer a point estimate of the "correct" decision (which in practice means one they believe will be approved by a court), but affords them a wide "policy space" of permissible discretion. Hence, in the words of Ma CJ, a socio-economic policy is "manifestly without reasonable foundation" only if it is "manifestly beyond the spectrum of reasonableness".[28]

The Court of Final Appeal's express substitution of a "manifest unreasonableness" for the standard "minimal impairment" test (whether the restriction of a right went "no further than necessary to achieve the legitimate objective in question") [29] renders the *Kong Yunming* test categorically distinct from any proportionality doctrine ordinarily understood. As the foundation of such a doctrine,[30] "proportionality" *stricto sensu* requires authorities to act not merely within the gamut of reasonableness, but as far as possible consistently with a "hypothetical alternative",[31] to which the restriction of the protected right would be the least oppressive. It obliges the courts not simply to evaluate whether the act of a public authority is rational or reasonable, but more exactly, to gauge whether its effects on rights have met a "minimum impairment"

[21] [2012] 1 WLR 1545, [27].
[22] *Ibid.*, [26].
[23] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 234.
[24] *Ibid.*, p 229.
[25] *CCSU v Minister for the Civil Service* [1985] AC 374, 410.
[26] James Goodwin, "The Last Defence of *Wednesbury*" [2012] *Public Law* 445.
[27] Lord Irvine of Lairg, *Human Rights, Constitutional Law and the Development of the English Legal System* (Oxford: Hart, 2003) 145.
[28] *Fok Chun Wa* (n 18 above), p 441.
[29] *Kong Yunming* (CFA) (n 1 above), [40].
[30] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (New York: Cambridge University Press, 2012) 458.
[31] *Ibid.*, p 326.

standard.[32] It follows that a proportionate act cannot be manifestly unreasonable, but not necessarily *vice versa*:[33] it is entirely possible for an act that disproportionately impairs a right to pass muster as not manifestly unreasonable. The latter standard implies, after all, that the public acts to which it is applied should be struck down only in the rarest of circumstances.[34]

Recall now that, at Stage One of the *Kong Yunming* manifest unreasonableness, a reviewing court must inquire whether or not the restriction pursues a "legitimate societal aim". The *Kong Yunming* Court articulated such an aim vaguely, as one "which furthers the legitimate interests of society".[35] The reviewing court must bear in mind that an Art 36 right to social welfare is one "which intrinsically involves the Government setting rules determining eligibility and benefit levels" when determining the legitimacy of a conflicting societal aim, "where the Courts acknowledge a wide margin of discretion for the Government".[36] This margin of discretion or appreciation implies that in the instant case the Court was constrained to defer to both the Government and Legislative Council in light of their informational advantages and policy prerogatives.[37] Previously, the Court had acknowledged in *Fok Chun Wa v Hospital Authority* that public authorities, when formulating and implementing social policies and budgets, must take into account multiple factors and interests that "often pull in different directions";[38] remarking *obiter* that "[i]n the area of qualification for social benefits or social welfare, the courts have consistently upheld legislation or acts which have drawn the line at residence status".[39]

It is not difficult to understand why, given the relevance of the margin of appreciation in Stage One, a societal aim must be *Wednesbury* irrational in order to be judicially regarded as illegitimate. To adopt an aim for a policy is to give decisive or overarching weight to one consideration over other considerations. To give decisive or overarching weight to an illegitimate aim must be the same as giving decisive or overarching weight to an irrelevant consideration, for illegitimacy necessarily entails irrelevancy. It is trite law that, in the course of policy formulation, if an authority gives decisive or overarching weight to an irrelevant consideration, it is tantamount to acting

[32] Auburn *et al.* (n 20 above), p 403.
[33] Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (New York: Cambridge University Press 2012), 204.
[34] *Ibid.*, p 181.
[35] *Kong Yunming* (CFA) (n 1 above), [49].
[36] *Ibid.*, [42].
[37] Johannes Chan and CL Lim, "Interpreting Constitutional Rights and Permissible Restrictions" in Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (Hong Kong: Sweet and Maxwell, 2011) 495.
[38] *Fok Chun Wa* (n 18 above), p 436.
[39] *Ibid.*, p 439.

irrationally in the *Wednesbury* sense.[40] Put concretely, like the traditional *Wednesbury* inquiry, the authority is not required to supply a point estimate of the "correct" answer at Stage One, but simply a justification that lies within the gamut of legitimate aims. In fact, the *Kong Yunming* Court had clearly conceded that Stage One and Stage Three inquiries are basically the same: "If the restriction has to rest on such [illegitimate] purposes, it *must be* viewed as a restriction that is manifestly without reasonable foundation."[41] It assumed – without explanation – that the Government's professed aim in requiring seven years' residence to qualify for CSSA, namely "ensuring the financial sustainability of the social security system",[42] was legitimate. Yet in the following words it doubted whether this was the true objective underlying the impugned policy, "perhaps … the seven-year residence requirement originated, not in a specialist social welfare review, but as something of a side-wind deriving from a long-term population policy study …"[43] According to the Court, a population policy premised on a "threat" posed to "fundamental social welfare values – values which have received constitutional acknowledgement in Article 36" must be an illegitimate societal aim.[44]

Much judicial ink has been spilled on the Stage Two question: whether the CSSA seven-year residence requirement was rationally connected to the Government's above-mentioned stated legitimate aim. The Court of Final Appeal concluded that, "far from the seven-year requirement being a rational measure to mitigate the ageing population problem (and thereby contributing to the sustainability of our social security system), it is a counter-productive and *irrational* measure".[45] Unlike Stage One, the question raised by the rational connection test in Stage Two is not whether the means are desirable, or whether there are more desirable means.[46] The means are not required to be efficient;[47] "rationality" is conceived merely as a logical connection of ends to means.[48] Even in the context of positive rights, all that is demanded is that the act has more than a minimal probability of fulfilling legitimate aims, if only partially.[49] It is often "undistinguishable" from *Wednesbury* irrationality.[50]

[40] *Boddington v British Transport Police* [1999] 2 AC 143; Hilaire Barnett, *Constitutional and Administrative Law* (London: Cavendish Publishing, 4th ed, 2002) 869.
[41] *Kong Yunming* (CFA) (n 1 above), [141], emphasis added.
[42] *Ibid.*, [143].
[43] *Ibid.*, [111].
[44] *Ibid.*
[45] *Ibid.*, [73], emphasis added.
[46] Barak (n 30 above), p 305.
[47] *Ibid.*
[48] Henry Woolf et al. *De Smith's Judicial Review* (London: Sweet and Maxwell, 7th ed, 2013) 629.
[49] Barak (n 30 above), p 432.
[50] *Ibid.*, p 376.

It is clear enough by now that Stage One illegitimacy and Stage Two irrationality are no more than two facets of Stage Three manifest unreasonableness. All Stage One and Stage Two determinations may therefore just as well be couched in Stage Three terms.[51] The *Kong Yunming* judgment itself evinces the mutually convertible nature of the three steps. First Ribeiro PJ argued that the:

> "grounds [advanced by the Director of Welfare as separate purposes supplying independent legitimate aims capable of justifying the restriction of the Article 36 right] are, in my view, so lacking in coherence that they cannot properly serve as legitimate aims for the restriction. *Alternatively*, if they do serve as such purposes, they are such insubstantial and socially insignificant aims that the restriction of the Article 36 right is a wholly disproportionate measure to achieve them, making it a measure that is manifestly without reasonable foundation:.[52]

Next he premised that:

> "If the restriction is not rationally connected to the avowed legitimate purpose *or* if the inroads it makes into the protected right are manifestly without reasonable foundation, the Court may declare the measure unconstitutional".[53]

Finally, he concluded that:

> "the Director has not made good the proposition that the seven-year residence requirement was rationally connected to the aforesaid legitimate aim. *If* there was any rational connection, the restriction was wholly disproportionate and manifestly without reasonable foundation, given its contradictory policy consequences and socially insubstantial benefits".[54]

And whilst the lead judgment did not expressly engage with Stage Three analysis, a passage from it suggests that its reasoning did so in fact:

> "There is *no evidence* as to the level of savings actually achieved and achievable as a result of adopting the seven-year rule. On the contrary, everything points to the actual savings being modest and of an order that *cannot sensibly* be described as designed to safeguard the system's sustainability. The Government has indeed admitted that the new residence requirement is not driven by the need to reduce CSSA expenditure on new arrivals".[55]

[51] Stephenson and Vermeule (n 4 above), p 599.
[52] *Kong Yunming* (CFA) (n 1 above), [101], emphasis added.
[53] *Ibid.*, [139], emphasis added.
[54] *Ibid.*, [143], emphasis added.
[55] *Ibid.*, [140], emphasis added.

Likewise, though Ribeiro PJ did not openly attack the legitimacy of the societal aim claimed by the Government, he chided the Government in Stage One terms for "abdicat[ing] responsibility for addressing the right conferred by Article 36 on Hong Kong residents to social welfare in accordance with law".[56]

All in all, the Court's lead judgment can be summarised in these terms: "the impugned portion of the Order in Council was manifestly unreasonable". Artificially decomposing a manifest unreasonableness inquiry into a three-step process, however, suggests what the *Kong Yunming* doctrine is not: it cannot be said to be a structured test of justification, like proportionality applied to restrictions on civil and political rights, which admits varying levels of intensity of review in various types of cases.[57] Manifest unreasonableness review is considerably rigid (and unrigorous, given the margin of appreciation), and a three-stage framework may mislead reviewing courts to believe they must always address the "sub-species" of manifest unreasonableness crystallised in Stage One and Stage Two before determining whether the impugned act is manifestly unreasonable on the whole.[58] At the end of the day, an act impairing rights that is rooted in an illegitimate aim or thoroughly illogical is bound to be manifestly unreasonable; equally, an act manifestly without reasonable foundation cannot be founded on, or logically connected to, a legitimate aim, if legitimacy entails a substantial degree of reasonableness. It is needless to resolve Stages One and Two before Stage Three, despite that the choice to include the heads of illegitimacy and irrational connection as non-exhaustive indicators of manifest unreasonableness does have the potential of rendering the reviewing court's reasoning more transparent. Above all, the inner logic of landmark judicial rulings is often not adequately reflected in their language, the abandonment of which can make things clearer without any loss of substance.[59]

Discussion

The Court of Final Appeal in *Kong Yunming v Director of Social Welfare* established the status of the right to social welfare as self-sufficient, independent of the right of equality for its enforcement. But it also decisively affirmed the acceptance of "the terminology of reasonableness

[56] *Ibid.*, [142].
[57] Woolf *et al.* (n 48 above), p 637.
[58] Stephenson and Vermeule (n 4 above), p 606.
[59] *Ibid.*, p 609.

as the general review standard"[60] in cases involving socio-economic rights. The Court's adoption of the manifest unreasonableness standard amounts to rejection of the more demanding and intrusive doctrine of proportionality in favour of a version of *Wednesbury* irrationality for judicial review of socio-economic policy. Significantly, a reviewing court will not have to ask, as in civil and political rights cases, whether the restriction of a socio-economic entitlement is appropriate and necessary to strike a proper balance and avoid excessive burdens as far as possible.[61]

Doctrinally, *Wednesbury* irrationality in administrative law is distinguishable from manifest unreasonableness in constitutional law only in that this latter places the burden of proof not on the claimant to demonstrate irrationality,[62] but on the public authority to produce a justification – to which the courts are obliged to accord a margin of appreciation – just sufficient to rebut the allegation of manifest unreasonableness.[63] In practice, however, the manifest unreasonableness test must prove more exacting than the traditional *Wednesbury* test,[64] in that the decision-maker's duty to justify its decision will constantly tempt a reviewing court to scrutinise more closely the evidentiary basis of the justification.[65]

Additionally, the *Kong Yunming* Court, by rejecting proportionality of whatever intensity as classically understood as the standard test for reviewing social policy, "hardwired" into Hong Kong constitutional law both judicial deference and conservative principles of law and economics. It did not hesitate to expand on these principles so as to bind lower courts through the doctrine of precedent, opining that "[t]he Article 36 right to social welfare is *not a fundamental right* but a right which intrinsically involves the Government setting rules determining eligibility and benefit levels";[66] that "Article 145 does not preclude the elimination or reduction of particular welfare benefits if that proves necessary to develop, improve or maintain the sustainability of the welfare system as a whole";[67] and that "by reducing standard payments in 1999 in relation to larger households and reducing standard payments across-the-board in 2003 and 2004", the Government had taken "rational measures … genuinely" consistent with a "legitimate aim of curbing expenditure on CSSA with a view

[60] Michael Ramsden, "Using the ICESCR in Hong Kong Courts" (2012) 42(3) *HKLJ* 839, 862.
[61] Michael Fordham, *Judicial Review Handbook* (Oxford: Hart Publishing, 6th ed, 2012) 427.
[62] Daly (n 33 above), p 254.
[63] Andrew Le Sueur, "The Rise and Ruin of Unreasonableness?" (2005) 10 *Judicial Review* 32, 42.
[64] Paul Craig, "The Nature of Reasonableness Review" (2013) 66 *Current Legal Problems* 131, 166.
[65] *Ibid.*, p 165.
[66] *Kong Yunming* (CFA) (n 1 above), [42], emphasis added.
[67] *Ibid.*, [37].

to ensuring the financial sustainability of the social security system".[68] Such conservatism is arguably at odds with Art 4 of the International Covenant on Economic, Social and Cultural Rights, which provides that restrictions on socio-economic rights must be "compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". But it is clearly consistent with the Basic Law, which could not have been intended to transform Hong Kong into a welfare state.[69] The terms "development and improvement" in Art 145, accordingly, must permit both expansion and reduction in the level of social welfare provision.[70] This should surprise no one, for as a "charter of capitalism"[71] the Basic Law embodies a "striking bias in favour of market economics",[72] if not outright hostility towards welfarism.[73] We must never forget that the Basic Law was an endeavour to "freeze" the original constitution of the former British dependent territory as it stood immediately before 4 April 1990,[74] leaving the Hong Kong way of life undisturbed to the farthest extent; not least the free-wheeling non-interventionist nature of the pre-1997 system, which had provided but little social security.[75]

Conclusion

It would be easy to overstate the expansive impact of *Kong Yunming* on the right to social welfare. Ribeiro PJ's lead judgment struck down the CSSA seven-year residence requirement, not on the basis of some abstract social philosophy, but on the much narrower grounds of administrative irrationality and illogicality. The test propounded by the Court resembled the proportionality doctrine at most in form but definitely not in spirit. *Kong Yunming* sealed the doctrinal fate of constitutional judicial review of social welfare policy in Hong Kong. The right to social welfare may

[68] *Ibid.*, [143].

[69] *See* Kong (n 2 above), p 792.

[70] Ramsden (n 60 above), p 842; PY Lo, *The Hong Kong Basic Law* (Hong Kong: LexisNexis, 2011), 237.

[71] Yash Ghai, "The Rule of Law and Capitalism: Reflections on the Basic Law" in Raymond Wacks (ed), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: Hong Kong University Press, 1993) 343–365.

[72] Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 2nd ed, 1999) 241.

[73] Leo F. Goodstadt, *Poverty in the Midst of Affluence: How Hong Kong Mismanaged its Prosperity* (Hong Kong: Hong Kong University Press, 2013) 2.

[74] Raymond Wacks, "One Country, Two Grundnormen? The Basic Law and the Basic Norm" in Raymond Wacks (ed), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: Hong Kong University Press) 169–170.

[75] *See* Ghai (n 72 above), p 437.

have become a constitutional right in its own right, but the substance of any restriction on it can be questioned by a reviewing court only when the decision-maker fails to defend the preceding decision-making process as not being flawed in the *Wednesbury* sense. Genuine proportionality analysis, even one of low intensity, will no longer be appropriate for the scrutiny of limitations to socio-economic rights *per se*. What is more, the Court's justification for restraint in welfare rights adjudication is rooted not merely in traditional concerns about comity with the political branches, but also in a much deeper judicial commitment to conservative economic thinking.

The vantage-point of manifest unreasonableness, nevertheless, lets us see that, whereas a serviceable latitude affords to public authorities that flexibility and responsiveness which is indispensable to modulating public policy in every advantageous and permissible way, untrammelled discretion encourages arbitrary rule, "the antithesis of rationality";[76] the abuse of public power, "with indifference as to whether it will serve the purposes which alone can justify" it,[77] and "unresponsive to reason".[78] This in turn causes an erosion of predictability[79] and, ultimately, undue suppression of individual freedoms.[80] It may be reliably concluded, then, that even CSSA residence requirements considerably lengthier than one year would not be intrinsically unconstitutional, *Kong Yunming* notwithstanding, so long as the relevant public authorities did not reach the decision arbitrarily,[81] as in the present case. And the same principle applies to limitations on other forms of welfare provision, as distinct from fundamental civil and political rights, like equal justice under law. In any event, the Court of Final Appeal's doctrinal insistence on administrative acts, even popular ones, to be minimally rational, must be applauded for living out the common law maxim "*fiat justitia, ruat caelum*".[82]

[76] Denis Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Oxford University Press, 1986) 143.

[77] Joseph Raz, *The Authority of Law* (New York: Oxford University Press, 2nd ed, 2009) 219.

[78] Timothy Endicott, *Administrative Law* (New York: Oxford University Press, 2nd ed, 2011) 625.

[79] Raz (n 77 above), p 220.

[80] *Richard Bellamy, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (New York: Cambridge University Press, 2007) 58–59.

[81] *Kong Yunming* manifest unreasonableness is not dissimilar to the test of arbitrariness deployed by the Court of Final Appeal for reviewing the constitutionality of statutory criminal punishments, *see Lau Cheong v HKSAR* (2002) 5 HKCFAR 415.

[82] *See R v Wilkes* (1770) 4 Burr 2527, 2561–2562 (Lord Mansfield CJ).