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**Subcommittee to Study Issues Relating to the  
Comprehensive Social Security Assistance and  
Social Security Allowance Schemes**

**Paper from the Legal Service Division on the  
meaning of "in accordance with law"**

At its meeting on 2 February 2004, the Subcommittee discussed the meaning of "in accordance with law" in Article 36 and asked the Legal Service Division provide a paper on the subject.

**The wording in Article 36**

2. Article 36 of the Basic Law provides : -

"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."

3. Article 36 is a general statement of principle which guarantees the right of Hong Kong residents to social welfare and the welfare benefits of the labour force in Hong Kong. Certain other rights and the continuity of certain acts are also guaranteed in the Basic Law by the same "in accordance with law" formula. Examples are : -

**Article 26**

Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law.

**Article 41**

Persons .... other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents ....

**Article 136**

.... Community organizations and individuals may, in accordance with law, run educational undertakings of various kinds ....

**Article 138**

.... Community organizations and individuals may provide various medical and health services in accordance with law.

**Article 141**

.... Religious organizations shall, in accordance with law, enjoy the rights to acquire, use, dispose of and inherit property ....

**Article 143**

.... Non-governmental sports organizations may continue to exist and develop in accordance with law.

4. The Basic Law also contains phrases of similar meaning, such as "prescribed by law", "according to law", "in accordance with the laws of the Region" and "in accordance with the laws applicable in the Region".

**Whether "in accordance with law" means legislation is required**

5. At the last meeting of the Subcommittee, members discussed if "right to social welfare in accordance with law" meant legislation would have to be introduced. Perhaps some assistance could be drawn from what the Court of First Instance said in *The Association of Expatriate Civil Servants of Hong Kong v The Chief Executive of HKSAR* [1998] 1 HKLRD 615. Article 48(7) provides for the Chief Executive's power "to appoint or remove holders of public office in accordance with legal procedures". The Association of Expatriate Civil Servants of Hong Kong ("AECS") argued that the reference to "legal" procedures in Article 48(7) meant that such procedures required legislative approval. Keith J (as he then was) said : -

"[counsel] took me through the various provisions in the Basic Law in which the phrase "in accordance with legal procedures" appears (arts. 30, 48(6), 73(1) and 74), as well as other provisions in the Basic Law in which similar phrases appear ("in accordance with law", "according to law", "in accordance with the laws of the Region" and "in accordance with the laws applicable in the Region"). On the whole, I have not been assisted by these provisions. The meaning of a particular provision, whether in an ordinance or in a constitutional document such as the Basic Law, depends very much on its context, and I have not discerned a clear pattern as to the rationale behind the use of one phrase and not another in the Basic Law.

However, since the AECS contends that the word "legal" in art. 48(7) means "prescribed by law", it is important to note that the phrase "prescribed by law" is itself used in a number of provisions in the Basic Law (arts. 39, 83, 98, 99, 110 and 111). Accordingly, when the Basic Law contemplates that a particular course of action has to be prescribed by law, the Basic Law says so. The fact that art. 48(7) speaks of "legal" procedures, rather than of procedures "prescribed by law", is some indication that a meaning other than "prescribed by law" was intended.

I should add that even if a course of action must be prescribed by law, that does not mean that it has to be sanctioned by legislation. Article 39, for instance, provides that the rights and freedoms enjoyed by Hong Kong residents "shall not be restricted unless as prescribed by law". The right of freedom of expression is, of course, restricted by laws other than legislation - for example, by the common law of defamation. Moreover, art. 8 provides that the laws of Hong Kong include the common law, rules of equity and customary law as well."

6. If the same logic is applied to the interpretation of the phrase "in accordance with law" in Article 36, the result would be the phrase would not mean legislation has to be introduced, since if the Basic Law intends social welfare to be "prescribed by law", it would have said so.

### **What is "law" in Hong Kong**

7. Article 18 of the Basic Law provides that -

"The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region."

Article 8 of the Basic Law provides that : -

"The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

Reading the two articles together, the laws in Hong Kong are the Basic Law, the common law, rules of equity, ordinances, subordinate legislation, customary law, and the laws enacted by the legislature of Hong Kong. Unlike some other common law jurisdictions, social welfare or social security in Hong Kong are not provided under legislation.

### **What is "social welfare"**

8. The general principles on the interpretation of the Basic Law stated by the Court of Final Appeal in *Ng Ka Ling and Others v Director of Immigration (1999) 2 HKCFAR 4* would be an authoritative guidance : -

It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.

Article 36 does not contain specifics of what "social welfare" embraces. Under the said approach reference has to be made to other parts of the Basic Law and other extrinsic material to ascertain the meaning of social welfare.

9. Two other articles in the Basic Law relate to social welfare -

**Article 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.

**Article 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.

10. Also, the approach of the court in considering similar wording in the Basic Law could be useful reference. In *Chan Wah and Another v Hang Hau Rural Committee and Others* [2000] 1 HKLRD 411, the Court of Appeal considered what were the elections referred to in Article 26 of the Basic Law. Article 26 provides for "the right to vote and the right to stand for election in accordance with law". The Court held that the right has to be considered in the light of other articles of the Basic Law and statutory provisions which relate to public elections.

11. Adopting the same approach, "social welfare" would have to be considered in the light of other articles in the Basic Law and statutory provisions which relate to social welfare. It would then be reasonable to conclude that "social welfare" would include what was provided to Hong Kong residents under the previous social welfare system, and what was contained in provisions relevant to social welfare in international covenants and conventions as applied to Hong Kong and implemented through the laws.

12. In the last meeting members referred to Article 9 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") in relation to the right to social security. While the ICESCR has not been implemented in Hong Kong through the laws of Hong Kong, the commonly accepted branches of "social security" in the context of ICESCR would be useful reference. They are -

1. medical care;
2. sickness benefit;
3. unemployment benefit;

4. old-age benefit;
5. employment injury benefit;
6. family benefit;
7. maternity benefit;
8. invalidity benefit; and
9. survivors' benefit.<sup>1</sup>

13. Members may note from the above list that the scope of "social security" in the context of international covenants and conventions are much wider in scope than what it is commonly understood in Hong Kong. By the same token, social welfare would include a much wider context than the Comprehensive Social Security Assistance and Social Security Allowance Schemes.

### **Difference in treatment**

14. In the last meeting, members questioned if the difference in treatment according to length of residence would be in conflict with Article 26 of the International Covenant on Civil and Political Rights. The article is identical in terms with Article 22 of the Hong Kong Bill of Rights contained in the Hong Kong Bill of Rights Ordinance (Cap, 383). The question was considered by the Court of Appeal in *The Association of Expatriate Civil Servants of Hong Kong v The Secretary for the Civil Service* (1996) HKPLR 333. In that case, the Court had to decide whether a difference in treatment was lawful in the light of Articles 21 and 22 of the Bill of Rights. The principle enunciated by Bokhary JA (as he then was) is extracted below for members' reference -

It boils down to this in the present case. A category of persons, namely officers being considered for transfer from overseas terms to local terms, are being treated differently depending on whether or not they can communicate in Chinese. So a language distinction is being made. Is it a fair distinction or a discriminatory one?

It may be discrimination even though the decision-maker acted in perfect good faith, as I do not doubt the [Secretary for the Civil Service] had.

Whenever there is a distinction, the question under article 21 of the Bill of Rights is whether that distinction is fair and therefore lawful or discriminatory and therefore unlawful. In short, can the distinction be justified?

To justify the distinction it must be shown : one, that sensible and fair-minded people would recognize a genuine need for some such distinction; two, that the particular distinction made to meet that need is itself rational; and, three, that such distinction is proportionate to such need.

That is the test as to justification, being one of fairness, genuine need, rationality and proportionality: designed to answer the question whether a distinction is fair and therefore lawful or discriminatory and therefore unlawful.

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<sup>1</sup> Janusz Symonides, "Human Rights: Concepts and Standards", UNESCO Publishing, p. 146

Its application in any given case calls for a careful assessment of the circumstances of that case. If it is contended that a distinction is needed because problems would otherwise arise, then that contention must be scrutinized. And it will not be accepted unless it is clear that there really would be serious problems which would be very difficult even if not impossible to overcome. Human rights are involved here. And courts and tribunals must guard such rights by guarding themselves against being persuaded to make too much of problems put forward with a view to justifying distinctions in the way people are treated.

15. Applying the above test to entitlement under the Comprehensive Social Security Assistance and Social Security Allowance Schemes, the difference in treatment would be lawful if sensible and fair-minded people would recognize a genuine need for difference in treatment; if the difference in treatment made to meet that need is itself rational; and if the difference in treatment is proportionate to such need. The difference in treatment would be considered discriminatory and therefore unlawful unless it is clear that there really would be serious problems which would be very difficult even if not impossible to overcome. In the end the decision would depend on the evidence.<sup>2</sup>

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<sup>2</sup> In the Association of Expatriate Civil Servants case the Court of Appeal found there was no evidence to warrant the view that the civil service would be unable to operate efficiently just because some of the agreement officers were unable or limited in their ability to stand in for some of their colleagues in the same rank. The distinction was therefore held to be unlawful.