The Uphill Battle for Sustainable Development: Can the Use of Public Interest Litigation Protect the Natural Environment in Hong Kong?

Karen Kong*

Abstract

This article reviews the development of recent environmental public interest litigation in Hong Kong. Despite substantive time and efforts spent on the litigation, the judicial challenges so far had limited success in yielding the desired outcome that environmental concern groups had hoped for. The reasons behind this are complex, which include litigation strategies, the state of Hong Kong law on environmental protection and sustainable development and the courts' attitude towards public interest cases. This article studies the courts' reasoning and decisions, with a view to evaluating the use of public interest litigation as a tool of environmental advocacy under the current constitutional and administrative regime in Hong Kong. It argues that, despite its constraints, public interest litigation is an important tool to channel the public's views on the protection of the environment. It also recommends principles to be used in future environmental judicial review, including a purposive approach to interpreting environmental legislation and the reference to human rights in environmental issues. Finally, litigation is not the sole solution and it needs to be complemented with more up-to-date legislation and environmental standards.

* Assistant Professor, Faculty of Law, The University of Hong Kong.
I. Introduction

Hong Kong is developing at a faster pace than it has ever before. With infrastructure and construction projects continually launched the economy keeps progressing on its path of vibrancy and prosperity. Yet, the capacity of the tiny space of Hong Kong to maintain an ecological balance and a quality environment for residents is becoming very limited. The general public has strongly felt the adverse impact of pollution and other environmental problems caused by development projects and has called for greater regard to sustainable development. However, striking a balance between economic growth and environmental conservation is a huge challenge and a constant battle between different stakeholders.

As the general population is increasingly dissatisfied with the failure of the government to engage their views and concerns, environmental rights advocates have in recent years resorted to the judicial process to challenge against development projects of the government. Yet, the flurry of judicial review applications initiated by them was controversial and was met with varying degrees of success.

In light of this growing trend, the present article attempts to argue that, first, despite its constraints and limitations, environmental public interest litigation (‘EPIL’) still has an important role to play in environmental issues and disputes, particularly in a political system that fails to adequately channel the views of the public to the government. Second, based on the chequered experience of EPIL decisions in Hong Kong, it can be observed that EPIL often focuses on narrow and technical legal issues due to the constraints of the judicial mechanism. The court, as an impartial adjudicator free from the influence of the political process, needs to adopt a purposive approach to interpreting environmental statutes, in order to give effect to the objects of these statutes and to maintain a proper balance between economic development and environmental conservation as envisaged in our constitution and legislation. Third, a human rights-based analysis to environmental issues is an important step towards balancing economic development and protection of the environment, and should be adopted. Finally, litigation is not the sole solution and it needs to be complemented with more up-to-date environmental legislation, policies and standards.

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II. Evaluating the Use of Environmental Public Interest Litigation

A. Factors affecting the effectiveness of environmental public interest litigation

From the experience of recent EPIL, it can be observed that applicants have achieved limited success in the outcome of the litigation. Several factors affecting the success of environmental judicial review include: (1) the formulation of the case; (2) the legislative framework in place; and (3) judicial attitude to EPIL and the degree of judicial deference to government environmental decisions.

The following is an evaluation of some recent EPIL decisions to see how the above factors affected the outcome of the cases. These cases can be broadly classified into air pollution cases, harbour protection cases and environmental impact assessment cases, which are analysed in the ensuing paragraphs.

1. Air pollution cases

a. Ng Ngau Chai v The Town Planning Board (2007)

The air pollution cases saw the explorative efforts of environmental activists to hold the government accountable for environmental protection using loose legal obligations or standards, and the corresponding high degree of deference by the courts in adjudicating environmental policy matters. They also illustrate the importance of the proper formulation of cases. One example is Ng Ngau Chai v The Town Planning Board.\(^2\) This case concerned a challenge by the applicant, a Sham Shui Po resident, against the decision by the Town Planning Board and the Planning Department to sell land at the West Kowloon site for residential use without height restriction, with the result that ‘wall-like’ structures of luxurious residential apartments and commercial complexes would be built along the Tai Kok Tsui waterfront (near Sham Shui Po), blocking air and ventilation in the inner city area.\(^3\) The judicial review application was mounted one day before the auction sale of a plot in West Kowloon.

The applicant claimed that the decision to sell land was in breach of the Urban Design Guidelines issued by the Planning Department, which, without specificity as to provision, ‘articulate the idea that the building being erected along the seaside shall be lower than the building inland and make special preservation for breezeways and view corridors’.\(^4\)

\(^2\) [2007] HKEC 1207.
\(^3\) Ibid, paras 3, 8.
\(^4\) Ibid, para 7.
The application did not pass the leave stage. The court held that the formulation of the judicial review application was too vague. It did not specify clearly which decision of the Town Planning Board was challenged, or which provision of the regulations had been violated.\(^5\) Reyes J commented that the role of the Judiciary was not to ‘manage the environment’ but only to ‘apply law’, despite his sympathy with the applicant’s concerns about the deteriorating quality of the environment around Tai Kok Tsui.\(^6\)

This case failed partly because of the vague formulation of the argument. Mr Ng needed to identify the specific provision in the Urban Design Guidelines, and perhaps to use more specific administrative law grounds such as failure to take into account relevant considerations. The litigant did not have a sufficient strategy in formulating a proper legal challenge before the court. This case also marked the conservative attitude of the court towards EPIL.\(^7\) The judge was concerned about the limitation of his role under the separation of powers principle and the need to defer to the Executive on questions of policy.


Another case related to air quality in Hong Kong is *Clean Air Foundation Ltd v Government of HKSAR*.\(^8\) This was a judicial review application made by Clean Air Foundation, a non-governmental organisation (‘NGO’) aiming to protect the right to clean air of the residents of Hong Kong, against the government for its failure to take action to alleviate the problem of air pollution in the city. The applicant argued on the grounds that, first, the government had a positive duty to protect the ‘right to life’ of residents of Hong Kong from the known harmful effects of air pollution, under article 28 of the Basic Law and/or article 2 of the Hong Kong Bill of Rights Ordinance (‘HKBORO’), and the ‘right to health’ of residents under article 12 of the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’).\(^9\) Second, the Air Pollution Control Ordinance

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\(^{5}\) *Ibid*, para 16.


\(^{7}\) See Kong (note 1 above).

\(^{8}\) [2007] HKEC 1356.

\(^{9}\) Article 28 of the Basic Law: ‘The freedom of the person of Hong Kong residents shall be inviolable. No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.’ Article 2(1) of the HKBORO: ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’ Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR): ‘The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’
(Cap 311) (‘APCO’), by failing to meet the duties imposed by the above instruments, was inconsistent with them and therefore legally invalid.\textsuperscript{10}

Hartmann J ruled that the first ground was ‘at least \textit{prima facie} arguable’.\textsuperscript{11} However, the second ground was regarded as too broad in scope and thus materially erroneous, because it suggested that the whole APCO was invalid for failing to comply with the law. The second ground was subsequently amended. The applicant contended that, first, the government had failed to adopt up-to-date air quality objectives (‘AQOs’) pursuant to section 7 of the APCO; and second, the government had failed to prohibit the use of pre-Euro and Euro I diesel in Hong Kong by revising the Air Pollution Control (Motor Vehicle Fuel) Regulations.\textsuperscript{12} Hartmann J ruled that the application was inadmissible. The real issues here were not issues of legality but went to the merits of the policies adopted by the government.\textsuperscript{13}

The lesson learnt from the case is that, in terms of litigation strategy, the framing of issues cannot be too wide and indeterminate. It needs to be rightly framed in legal terms, as the court will not hear questions of merits of the policies. As Rohan Price and John Ho had suggested, it would have been more fruitful for the applicants to challenge the government decision to apply the out-of-date World Health Organization (‘WHO’) air quality standards to the modern pollution problem in Hong Kong, the ground of review being factual mismevaluation of air quality.\textsuperscript{14} The government should have adopted up-to-date international standards in measuring air quality and making decisions concerning the protection of air quality in Hong Kong. On the other hand, the court did not make a sufficient analysis of the ‘\textit{prima facie}-arguable’ grounds on the right to life and the right to health, as it had defined the issue of the case as one of policy choice of the government instead of a question of legality. However, this is indeed a constitutional law question. The applicability of the ‘right to life’ under the Basic Law, the Bill of Rights and the ‘right to health’ under the ICESCR to the problem of air pollution leading to deterioration to health should be examined, and the proper tests to review the government decisions clarified. This will be further discussed in the Environment and Human Rights section of this article.

\textsuperscript{10} [2007] HKEC 1356 at paras 20-21.
\textsuperscript{11} \textit{Ibid}, paras 17-19.
\textsuperscript{12} \textit{Ibid}, para 23.
\textsuperscript{13} \textit{Ibid}, para 41.
2. Harbour protection cases


The importance of the legislative framework in place can be demonstrated in the harbour protection cases, one of which is the case of *Society for Protection of the Harbour v Town Planning Board*. This decision marked the triumph of the civil society’s campaign to protect the special heritage of the Victoria Harbour from excessive reclamation. The Protection of the Harbour Ordinance (‘the Harbour Ordinance’) is a special legislation that accords heavy weight to the preservation of the environment *vis-à-vis* economic development in government planning decisions. It limits the scope of developing the waterfront for commercial interests at the expense of wider social and environmental concerns. The idea is similar to the public trust doctrine. This case demonstrated the importance of consolidating societal consensus to environmental protection through the enactment of specific legislation and to ensure implementation by the government, though this kind of legislation is an exception rather than the norm for environmental protection in Hong Kong.

The landmark case was brought by the Society for Protection of the Harbour, a public interest organisation aimed at preventing excessive and/or unlawful reclamation of the Victoria Harbour, against the decisions of the government to reclaim the Wanchai and Central waterfront of the Harbour. Under the Harbour Ordinance, there is a presumption against reclamation in the Harbour. The applicant argued that the Town Planning Board adopted an insufficiently vigorous test in rebutting the presumption and thus was unlawful and/or unreasonable in approving the draft plans for reclamation.

The Court of Final Appeal recognised that the purpose of the Harbour Ordinance was ‘to ensure that the harbour will be protected against excessive reclamation’, and that the need to protect and preserve the Victoria Harbour was important and compelling, since considerable reclamation had already taken place. It stated that, because of the unique legal status of the Harbour, it was not sufficient for the Board to interpret the presumption against reclamation of the Harbour as merely a ‘compulsory material consideration’, meaning that ‘a decision-maker must pay due regard in undertaking a weighing exercise for the

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16 Protection of the Harbour Ordinance (Cap 531).
18 Section 3(1) of the Protection of the Harbour Ordinance: ‘The harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour.’
purpose of deciding whether the public benefits of the proposed reclamation would outweigh the need to preserve the harbour.\textsuperscript{20} The proper test should be one of ‘overriding public need’ for reclamation, which means ‘irreversible loss to the extent of the reclamation would only be justified where there is a much stronger public need to override the statutory principle of protection and preservation.’\textsuperscript{21} If there were reasonable alternatives to reclamation, there would not be an overriding need for reclamation.\textsuperscript{22} The Court stated that the Town Planning Board had erred in law by adopting an insufficient test. The decision of the Board was quashed and remitted to the Board for reconsideration applying the overriding public need test.\textsuperscript{23}

It is worthwhile pointing out that the Harbour Ordinance came into force before the handover of Hong Kong to China and resulted from a private member’s bill proposed by the Society for Protection of the Harbour through its Deputy Chairman (who was also a member of the Legislative Council).\textsuperscript{24} With the specific private members bill, the court had been able to utilise the presumption against reclamation to develop a stringent test to protect the precious Victoria Harbour.\textsuperscript{25} This is an example of the successful use of EPIL to protect the environment. However, the main pre-requisites of such a success were specific legislation for the protection of the natural environment that was valued by Hong Kong people, and a liberal court that adopted a purposive approach to statutory interpretation.

3. Environmental impact assessment (‘EIA’) cases

\textit{a. Chu Yee Wah v Director of Environmental Protection (2011)}

The EIA cases demonstrate how the attitude of the court and the degree of judicial deference affect the outcome of decisions. The EIA process is based on the Environmental Impact Assessment Ordinance (‘EIAO’),\textsuperscript{26} and the technical documents issued thereunder. Therefore, in an EPIL, the wording of the relevant provisions and the interpretative approaches of the courts become crucial in the determination of the outcome of these cases.

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\textsuperscript{20} Ibid, para 43.
\textsuperscript{21} Ibid, para 44.
\textsuperscript{22} Ibid, para 48.
\textsuperscript{23} Ibid, para 62.
\textsuperscript{24} Ibid, paras 5-6. The Deputy Chairman of the Society for Protection of the Harbour was Ms Christine Loh.
\textsuperscript{25} Chan (note 1 above), at 161.
\textsuperscript{26} Environmental Impact Assessment Ordinance (Cap 499), s 6(1): ‘(1) An applicant shall prepare an environmental impact assessment report in accordance with: (a) the requirements of the environmental impact assessment study brief; and (b) the technical memorandum applicable to the assessment.’
The landmark decision of *Chu Yee Wah v Director of Environmental Protection* is a good example. This case involved the review of the EIA process of the proposed government project of Hong Kong section of the Hong Kong-Zhuhai-Macau Bridge (‘the HKZM Bridge’) project. Under the EIAO, the project proponent would have to submit an EIA report of the project pursuant to statutory requirements, and apply for an environmental permit from the Environmental Protection Department (‘EPD’).

The applicant of the case was a resident of Fu Tung Estate in Tung Chung. She was concerned with the air quality impact of the project on the environment and her health. One of the issues of the case was whether the Director of Environmental Protection (‘the Director’) should have approved the EIA report of the project under the EIAO, which failed to provide a quantitative ‘stand-alone’ analysis of the projected environmental conditions without the project (‘the baseline’). The baseline was said to be required to estimate the air pollution caused by the project itself (‘environmental footprints’) for the purpose of mitigation measures.

The crux of the argument was which of the two possible approaches to environmental protection under the EIAO should be adopted by the Director in the EIA report. The first approach was to oblige the Director to measure the cumulative impact of a particular project against benchmarks of environmental objectives (‘the Director’s position’). The second, more stringent, approach was to adopt a scheme whereby any change which has an environmental impact was to be identified and measured, and then an assessment made as to whether that change was adverse so that measures for mitigation should be drawn up (‘the applicant’s position’). The analogy was whether ‘the environment [is] to be treated like a bucket into which pollutants may be introduced so long as there is still space within the bucket to accommodate them? Or, is it the case that any pollutant introduced into the bucket must be identified and measured and then, if possible, mitigated?’ For the latter, the baseline condition would be required.

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30 *Ibid*, para 73.
31 *Ibid*.
32 *Ibid*. 
The attitude and approach of the judges is the key reason that explains the difference in decisions at the Court of First Instance and the Court of Appeal. At the Court of First Instance, Fok JA, in applying a purposive interpretation of the EIAO, decided that both approaches were incorporated by the EIAO, including the second, more stringent approach. However, the first approach was contrary to the purpose of the EIAO as it did not help to minimise environmental impacts of the proposed project. Thus, a stand-alone analysis was required in the EIA report. However, the Court of Appeal overruled the decision of the lower court and upheld the Director’s decision to approve the EIA report. It stated that the project proponent had a duty to minimise pollution under both the Technical Memorandum (‘TM’) and Study Brief (‘SB’); however, the duty did not depend on the extent of the pollution footprint of the designated project.

There was no express requirement of a stand-alone analysis in the TM and SBs. What was specifically required was an assessment of the cumulative impacts only. The Court of Appeal did not agree that one should read in a specific requirement into the SB and TM in order that the Director could decide what mitigation measures should be adopted. In this case, it was not Wednesbury unreasonable for the Director not to require a baseline analysis, as what was required by the Director to make an informed decision was a matter of professional judgment.

The issue in the case was narrowly framed as an assessment methodology in order to meet the judicial review requirements; however, the real concern of the environmental group – the construction of the HZM Bridge itself – was hidden. Given the conservative and narrow judicial attitude, the court would feel more comfortable to deal only with the narrow legal questions of statutory interpretation of the EIAO, the TM and SB.

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33 Ibid, para 75.
34 [2011] 5 HKLRD 469 (CA) at para 55.
36 Ibid, para 96.
37 Under the EIAO, the project proponent is required to prepare an EIA report in accordance with the TM and SB. TM is a document issued under s 16 of the EIAO which sets out the principles, procedures, guidelines, requirements and criteria for all EIA reports. So far only one TM has been issued under the EIAO. SB, on the other hand, is project-specific. It is issued by the Director pursuant to s 5(7) of the EIAO setting out particular requirements of the EIA report to be complied with by the project proponent.
However, from the perspective of environmental groups, the stand-alone analysis is useful and important for the government to reduce residual environmental impact in development projects.\(^\text{38}\) Even though the appellate court said it was a matter of professional judgment whether a stand-alone analysis was required,\(^\text{39}\) it was also a matter of judicial attitude because it was possible to liberally interpret the SB and TM to require a stand-alone analysis if the legislative intent of protecting the environment and minimizing pollution was given full effect to, as was done by Fok JA at the Court of First Instance. If guided by the precautionary principle, the EIAO and technical documents should be interpreted by adopting the more environmentally-friendly version of the construction of the relevant provisions out of the different alternatives and, in this case, requiring the use of a stand-alone analysis to establish the baseline for the assessment of air pollution caused by the project. The Court stated that it would not intervene unless the professional judgment of the Director was Wednesbury unreasonable.\(^\text{40}\) However, the professional judgment of the Director should be guided by the legislative intent of minimizing pollution, which the court could scrutinise. Stephen Tromans QC had rightly pointed out that the Chu Yee Wah case demonstrated ‘the reluctance in the Court of Appeal to adopt a purposive and creative approach to promote environmental protection over the specific requirements of the study brief.’\(^\text{41}\)

**b. Leung Hon Wai v Director of Environmental Protection (2013)**

A similar judicial approach can be found in the more recent decision of *Leung Hon Wai v Director of Environmental Protection*,\(^\text{42}\) which concerned the proposed project to construct and operate the municipal wastes incinerator at Shek Kwu Chau site or at Tsang Tsui Ash Lagoon site in Tun Mun.\(^\text{43}\) Both the Court of First Instance and the Court of Appeal rejected the claims of the applicant that the EIA report had failed to comply with requirements of the TM and SB and that there was a breach of procedural fairness in the EIA process.\(^\text{44}\)

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39 [2011] 5 HKLRD 469 (CA) at para 84.

40 Ibid.


42 [2013] HKEC 1166 (CFI); [2014] HKEC 1459 (CA).

43 [2014] HKEC 1459 (CA) at para 1.

44 Ibid, para 6.
the grounds of appeal, the applicant argued that the content of the EIA report on the off-site mitigation of a marine park to mitigate the significant ecological impact of the incinerator was far too uncertain, because it had to be further subject to the study process stipulated in the Marine Park Ordinance. The Court of Appeal disagreed. It ruled that the EIA report requiring further study to be carried out did not affect the confirmation of the proposed mitigation measure’s feasibility, but only provided fine tuning. Further, the applicant argued that the EIA report failed to comply with the requirements for health impact assessments, as it failed to properly particularise the ‘other potential accidental events’ mentioned in the SB. The Court held that the lack of specific examples of potential accidental events in the EIA report did not breach the SB requirement, as there was no such specific requirement in the SB.

Leung Hon Wai illustrates similar factors that contributed to the failure of the case of Chu Yee Wah. The reasoning of the court was very technical because of the inherent limits of judicial review. Issues boiled down to the interpretation of relevant provisions of the TM and SB, which were drafted and were to be complied with by environmental experts. The court followed the rule laid down in Shiu Wing Steel Ltd v Director of Environmental Protection & Airport Authority (No 2), in which the Court of Final Appeal ruled that questions of interpretation of the TM and SB were questions of law to be decided by judges; however, the TM and SB were to be interpreted in a practical, down-to-earth way and as they would be understood by an expert risk assessor. Judges give deference to the professional judgment of environmental experts and exercise judicial restraint in interfering with the Director’s decisions. They will not seek to impose higher standards of environmental protection than what is already laid down clearly in the provisions. The court tends to interpret ambiguity in favour of the government, and will not intervene with the decision unless it is blatantly unreasonable. However, if the objective of the EIA process is environmental protection, then the court should give more weight to sustainable development and the precautionary principle in interpreting environmental standards and requirements and could adopt the more environmentally-friendly construction of the statute when choosing between alternative interpretations.

46 Ibid, paras 49-53.
47 Ibid, para 60.
48 Ibid, paras 70-72.
The more favourable approach would be one that demands greater accountability in the decision-making process of the government, as demonstrated by Fok JA’s approach in the Court of First Instance in *Chu Yee Wah*, \(^1\) in which the more vigorous baseline assessment was required. Chung-Lin Chen argued that the courts should play a more active role in the context of EIA and adopt a heightened standard of judicial review in cases where there is bias in favour of vested interests, and where mechanisms other than judicial review are not functioning properly. \(^2\)

In summary, several observations have been made from the above cases. First, the court is only concerned with the legality of the decisions of the public authority, not the merits or wisdom of government policies on the environment. All claims must be formulated in established administrative law grounds. Cases that go beyond the law to policy will very likely be struck out by the court. Second, the court will only decide cases based on strict interpretation of existing laws and will not read in up-to-date international environmental standards in the interpretation of existing legislative requirements. Therefore it is necessary to have specific and up-to-date environmental protection legislation for the court to enforce. Third, the conservative judicial attitude towards EPIL has limited the chance of success of EPIL applicants.

**III. Why Should EPIL be Pursued in Hong Kong?**

Despite its mixed degrees of success, EPIL should still be pursued in Hong Kong. Public interest litigation has been widely used in other jurisdictions as a way to advance the rights and interests of the marginalised and underprivileged population. This is part of the growing trend of judicialisation of administrative policies which can be seen across Asia and other common law countries. \(^3\) In deciding public interest cases, the common law courts often have to deal with the challenges of balancing between judicial activism and taking an overly

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\(^1\) Price and Ho (note 14 above); see also note 27 above.


\(^3\) Albert Chen, ‘Reflections on Administrative Law and Judicialized Governance in East and Southeast Asia’ in Ginsburg and Chen (eds.), (note 1 above), 359 at 362.
deferential approach to the Administration. In the environmental sphere, EPIL has been used by citizens and environmental groups to challenge government development projects which have a serious impact on human health and ecology, and to demand greater accountability and transparency from the government.

Traditionally, there has been a judicial culture of hostility against public interest litigation. This tool was generally regarded as unwise, and that political controversies were regarded as best to be dealt with in the Legislature, not the courtroom. However, this is a simplistic view of the nature of courts’ decisions, as such decisions are inherently political. As Michael Kirby had argued, ‘[t]he contention that all political decisions have to be made by the legislative and by elected politicians is simply not the way any modern government operates.’ He contended that resistance to public interest litigation is due to the old-fashioned view that conflict and challenges against the government is bad. Instead of being shunned, public interest litigation should be accepted by judges and be viewed as an external stimulus for change. Comparing the political process with the legal process, the court has an ability to reverse the potential structural bias in favour of developers and major businesses in political decisions because of its independence and impartiality. Also, political processes are often short-sighted and limited to the term of the office of the head of the government, but since the judiciary is immune from political influences, it is in a much better position to balance competing long-term interests. The court is seen as an impartial adjudicator, a role which the government cannot play in terms of attributing rights and responsibilities of different parties.

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59 Ibid (note 52 above), pp 50, 56.
60 *Ibid*, p 57.
On the competence of judges, it is often argued that judges lack the expertise to hear science and environmental issues and so should not hear EPIL. However, the court is accustomed to dealing with technical issues in many other types of cases – for example, taxation and construction – so the difficulty with expertise may be overstated. What the court should do is to strike a balance between deferring too much to the professional judgment of environmental agencies and expert bodies, on the one hand, and adopting an overly-activist approach of making decisions on merits, on the other. In so doing, it should take up the constitutional judicial role in determining the intertwined issues of law and upholding fairness of the environmental decision making process by the government. The continuing use of EPIL by green activists also demonstrates their trust in the legal system and the capability of judges to adjudicate on complicated environmental issues.

Admittedly, judicial review is costly, and there will be additional and unexpected costs in delaying development projects because of litigation. However, this is an externality as a result of the inefficient political system and the EIA system which fails to adequately channel the views of the public. Therefore, costs should not be regarded as a justification for removing from the general public the legal right to challenge the legality of development projects in the public interest. The use of litigation is an important channel of public participation to complement the political process, in light of the impact of a court decision on the government’s environmental policies as well as social norms.

Indeed, the objectives of EPIL are wider than merely obtaining a decision in the courtroom. Siri Sloppen argued that it is important to look at three dynamics: the judgment’s direct influence on political actors, the relationship between litigation and social mobilisation, and the role of litigation in shaping public discourse. Success in the court is of course the aim but may not be the sole aim of EPIL. The litigants may use EPIL as an effective voice to influence social perception and mobilise the public, and also as a way to persuade and gradually change judicial and governmental attitude to environmental issues in the long run.

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62 Kirby (note 56 above), p 561.
64 Gloppen ibid.
65 Ibid.
In view of the failure of the Executive and the Legislature to provide a genuine response to environmental advocacy in Hong Kong, it is small wonder that the NGOs have invoked the judicial process as an additional political measure. Compared to the Legislature and the Executive, the Judiciary receives the utmost respect and confidence by the public. It is believed that judicial review will continue to be used as a tool to pursue environmental justice, to demand greater accountability and to guard against government abuse of power. From a wider perspective of pursuing social change, the media attention and the social effects caused by the recent environmental litigation are significant. More people are aware of the concerns of environmental groups in Hong Kong. There are also more corresponding political actions. The government has become more responsive to revisiting the environmental issues in litigation whether or not the applicants succeed in the courtroom. Therefore, EPIL and other advocacy campaigns should play important dynamics in enhancing public participation and government policy making. As such, there is a case for the continuing use of EPIL in environmental advocacy.

IV. Recommendations for Development of EPIL

Having affirmed that judicial review has a positive role to play, and based on the case law previously reviewed, the followings are some recommendations for the more effective and justified use of EPIL in the future.

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68 This includes the forming of formal and informal environmental groups, protests, awareness-raising campaigns and environmental protection programmes by environmental activists. See Eliza W Y Lee et al, Public Policy Making in Hong Kong: Civic Engagement and State-society Relations in a Semi-democracy (Routledge, Oxford, 2013).
69 For example, subsequent to the Clean Air Foundation case, the government had reviewed policies and evaluated whether higher standards of air quality objectives should be met. In 2012, the government announced the adoption of new air quality objectives with reference to the recommendation by the WHO which was subsequently implemented in 2014. See EPD, Review of Air Quality Objectives and Development of a Long Term Air Quality Strategy for Hong Kong (July 2009); EPD, Progress Report (July 2012), para 13.
A. Litigation strategy

To begin with, there are various considerations for environmental litigants before deciding to start an EPIL. First, since the costs involved in the litigation can be a big challenge for litigants, environmentalists should carefully consider how to finance the litigation before starting the procedure. They may consider private financing, donation, or rely on pro bono legal services. Even if environmental groups put forward a person with a sufficient interest and who is financially eligible for legal aid to be the applicant, he will have to be prepared to finance the case partly out of his own pockets. Second, the litigants will also have to determine the timing of the application carefully. Judicial review may induce high social costs, arouse public dissatisfaction for causing unexpected delay in the development project, increase the economic costs of the project and loss of jobs of workers, and thus make it more difficult to obtain support from the public for social mobilisation on environmental issues in the long run. Therefore, environmental groups should actively make use of other political channels, use EPIL only where other political channels are ineffective, and raise public awareness and support before launching the judicial review. Third, standard procedural hurdles including standing, time limits and leave must be overcome before environmentalists could utilise the judicial review process.

Environmental problems are very complex. But in judicial review, all challenges must be framed in terms of the constitutional grounds or administrative law grounds of illegality, irrationality or procedural impropriety. Litigants will have to frame the questions clearly and in detail in terms of the legality of decisions, instead of merits. It is because judges are very reluctant to engage with issues perceived to be policy choices rather than law. Their role is to review questions of law only by overseeing the legality of government decisions.

B. Judicial attitude towards EPIL

In terms of judicial attitude towards EPIL, Hong Kong courts, as can be seen from the above cases, are generally cautious and deferential. The trend has moved from a blanket refusal to adjudicate on environmental policies to the current conservative approach in reviewing environmental issues and a

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72 Rules of the High Court (Cap 4A), O 53 r 3(1), (7); O 53 r 4.
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preference to defer to the expertise of the government, with the exception of the protection of the Victoria Harbour. In light of the analysis in previous sections, the courts’ current approach may have tilted, whether intentionally or not, the balance between competing interests of the environment and economic well-being in favour of economic development.

To adjust the imbalance, the courts should adopt a liberal and purposive approach to statutory interpretation to give effect to the object of environmental protection in the relevant environmental ordinances. This can be done by using environmental principles including sustainable development and precautionary principles which are present in the ordinances and policies as a basis of opting for the more environmentally-friendly version of the construction of the statutes in case of competing ambiguous interpretations. For example, in *Chu Yee Wah*, the court could have interpreted the EIAO together with the TM and SB to require the use of a stand-alone analysis to allow the Director to have sufficient information on the baseline and environmental footprint to make an informed decision on the environmental impact of the bridge project, as Fok JA did in the Court of First Instance. Similarly in *Leung Hon Wai*, applying the precautionary principle, the court could have required a feasibility study of the off-site mitigation marine park to be conducted pursuant to Annex 16 of the TM and the SB, so that the effectiveness of the mitigation measure could be evaluated by the Director at the point when the EIA report was assessed.

C. Environment and human rights

Under the existing constitutional framework in Hong Kong, it is worthwhile to explore the use of a human rights approach to analyse environmental issues, particularly in cases of serious harm to human health and the environment. Such an approach is grounded in the Basic Law and is in line with international and comparative human rights jurisprudence. Human rights give the imperative of urgency and raise the importance of the principles of equality and human

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74 Paragraph 4.4.3(a)(x) of the TM: ‘If the adverse environmental impacts are uncertain, they shall be treated more cautiously than impacts for which the effects are certain and the precautionary principle shall apply.’

dignity in advocacy for the protection of the environment. As Conor Gearty has suggested, human rights and environmental protection have a mutually reciprocal and beneficial relationship, as the human rights approach can give special protection to the poor and the vulnerable, while environmental law provides the foundation of the subject. Further, a human rights approach can provide additional guarantee of substantive outcome, as it can develop a minimum substantive threshold of rights entitlement of individuals from international law and local standards.

In particular, litigants can make use of the entrenched civil and political rights to seek enforcement of environmental protection. In the European Court of Human Rights, for example, a number of cases related to damage to the environment and consequential personal harm had been litigated from the perspective of breaching civil and political rights. In *Lopez Ostra v Spain*, it was held that nuisance caused by a waste treatment plant located close to the applicant’s house amounted to a violation of the right to private and family life under article 8 of the European Convention on Human Rights. The European Court stated that, ‘[s]evere environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.’ It was of the view that the State ‘did not succeed in striking a fair balance between the interest of the town’s economic well-being – that of having a waste-treatment plant – and the applicant’s effective enjoyment of her right to respect for her home and her private and family life.’ Where human rights violations are alleged, the court would have to adopt a proportionality analysis to decide whether the government is justified in causing harm to the victims. This can be a strong form of review when applied vigorously, as the proportionality review provides a substantive protection of Convention rights, requiring the harm done to the victims to be no more than necessary to achieve the government’s legitimate development goals, rather than being a mere procedural guarantee of a fair decision-making process by the government. It is a principled approach and the intensity of review can be adjusted depending on the subject matter of the case.

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80 *Ibid*, para 58.
Note, however, that the European Court is usually more sympathetic to the applicants only when they could demonstrate the seriousness of the environmental damage and human harm compared to the economic interests involved. An example of an unsuccessful case is *Hatton v United Kingdom*, in which the European Court held that there was no breach of the article 8 right to private and family life for the UK government’s failure to reduce the number of overnight flights in order to reduce nuisance caused to residents near the vicinity of Heathrow Airport. There was a margin of appreciation to the national authority, and the European Court was of the view that the UK government had not failed to strike a fair balance between the competing interests of the residents affected by aircraft noise and the wider economic interests of the community as a whole.

From the experience of the European Court of Human Rights, it can be seen that cases that are more likely to succeed are those that involved serious and measurable harm that had been done to individuals, and where applicants could establish a manifest error in the government’s decisions, rather than cases involving a mere legitimate difference in opinion between the government and the applicants on policy options.

It can be argued that similar approaches should be extended to Hong Kong, and Hong Kong courts should interpret and develop the substantive content and scope of human rights under the Basic Law and Bill of Rights in the context of environmental protection when the opportunity arises. They should oblige the government to justify its policy by a proportionality analysis of the harm to human rights in achieving the policy or development objectives. The adjudication of constitutional rights requires courts to make an expansive and purposive interpretation of rights entitlement and a narrow interpretation of limitations.

The use of the proportionality analysis for civil and political rights is well-established in Hong Kong. In the context of the environment, the harm to human rights should be no more than necessary to achieve the policy or development objectives. The government should set its mind on this balancing exercise in a principled manner when formulating policies. It will have to take

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83 Ng Ka Ling v Director of Immigration (1999) 2 HKCFAR 4 at 28I-29A.
into account the impact of the policy on vulnerable groups and human dignity. The courts should review the decision with available evidence based on the proportionality approach. It is not to say that judges should become pseudo-policy makers, but they have an important role to play in protecting the human rights and constitutional rights of individuals, while respecting the government as the primary decision maker. This principled approach, if properly exercised, should be a useful check of, but not a threat to, government powers.

For example, the applicant in Clean Air Foundation had sought to rely on the constitutional right to life in its claim, though the argument had not been reviewed in depth by the court. Barry Hsu argued that the right to life under article 28 of the Basic Law imposes both a negative obligation on the government to refrain from activities that may jeopardise the physical well-being of residents, and a positive obligation to take appropriate actions to protect life. Further, article 119 of the Basic Law requires the government to ‘pay regard to the protection of the environment’ with respect to all matters within its jurisdiction. Therefore, he stated that, read together, article 28 and article 119 impose a duty on the government to ensure a healthy environment. Such a constitutional human rights approach to the environment should be tested in the Hong Kong courts. Since article 119 obliges the government to formulate appropriate policies to promote and co-ordinate the development of various trades, and also to pay regard to the environment, the general principle of sustainable development is obvious: the Basic Law requires the government to weigh competing interests of trade and the environment. The provision does not value one aspect over the other. However, where human rights are involved, it is not sufficient to adopt a low intensity of review by merely requiring the environment to be taken into account in the decision. Wang Shuwen, stated that article 119 imposed a duty on the government to protect the environment, albeit with flexibility; the extent of the attention on the environment and the measures to be adopted would be case-specific. The most principled test to evaluate

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88 Ibid.
whether environmental consideration has been duly taken into account where human rights are involved is the proportionality analysis. The court, in reading article 28 and article 119 together, should evaluate whether the government’s decision that resulted in harm to the human right to life was to pursue other legitimate objectives of development, and whether the harm was proportionate to achieving the stated objective.

Further, in Leung Hon Wai, one can look at the impact on the right to life, health and livelihood of the residents in Cheung Chau affected by the project vis-à-vis the benefits of the project to construct and operate the incinerator at the Shek Kwu Chau site or Tsang Tsui Ash Lagoon site. Where human rights are involved, the government should carefully weigh alternative policies and give due regard to the environment and impact on rights. The court will exercise supervisory jurisdiction over the decision making process of the government, to ensure that the proportionality analysis is adopted in weighing between competing options that impact on human rights.

D. Legislative reform

From a wider perspective, litigation is not the sole solution and there needs to be up-to-date legislation and environmental standards to protect the environment. Legislative reform is much needed. This can be seen in the Chu Yee Wah litigation. It must be acknowledged that the core problem lies in the deficiencies in the EIA mechanism and the insufficient legal protection of the environment. There is not enough time for public participation and submission in the consultation process of the EIA. The public only have 14 days to comment on the project profile and 30 days to submit comments on the EIA report. Hence, many of the complaints and concerns only arise at a very late stage – when the projects actually begin. There is no appeal process for third parties. Further, there are inadequate environmental protection standards to ensure the EIA process can lead to adequate protection of the environment. Some argue that environmentalists should choose to object to the HKZM Bridge development project earlier during the EIA process, but not at the last minute by using litigation. The delay in the project has led to an increase of HK$6.5 billion in construction costs and the implementation of additional

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90 Kong (note 1 above).
91 See note 42 above.
92 See note 27 above.
93 Tromans (note 41 above).
mitigation measures. However, litigation is a constitutional right, and judicial review is a long-established mechanism under the common law system to check and balance government actions by the judiciary. Instead of blaming the litigants for initiating a legitimate legal process, the government should address the deficiencies in the current system. Environmentalists have used public interest litigation because alternative means of voicing their opinions have been ineffective. This points to a real and urgent need to reform the EIA process by enhancing and facilitating public participation.

Ultimately, as discussed earlier, there needs to be a frequent review of environmental standards and improvements in the law to protect the environment. This includes the TM, the AQOs, and the pollution ordinances, with references to up-to-date international standards. However, as Rohan Price and John Ho have commented, ‘[t]here has always been a lack of political will to implement environmental policy and law in Hong Kong’, as legislators were concerned more with the negative impact of environmental protection on economic growth. Jolene Lin also acknowledged this political reality: ‘... it is seen as almost impossible to amend the TM in the present political climate. The need to subject revisions to the TM to negative vetting by the Legislative Council condemns the process to a lengthy political battle which the current Executive is unlikely to have appetite for.’ For future improvement, the Executive must weigh the costs and benefits by looking at the long-term picture, including the voices for enhancing environmental protection. If the Legislature fails to take proper and prompt action, higher social costs of ecological and health damages may be incurred, and present and future generations will have a heavier burden to clean up the polluted environment to restore the population’s general health.

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94 Cheung Chi-fai, ‘Bridge cost could rise by HK$6.5b’, South China Morning Post, 28 September 2011.
95 See Jolene Lin, ‘Treating our Environment Like a Waste Bucket: Chu Yee Wah v Director of Environmental Protection’ (2011) 41 Hong Kong Law Journal 318; Price and Ho, (note 14 above), at 188: ‘The major problems of environmental laws in Hong Kong … is the fragmentation of different environmental problems under different environmental statutes and an over-reliance on these outdated legislations … A major overhaul of environmental laws is needed in Hong Kong.’
96 Price and Ho, (note 14 above), at 186.
97 Jolene Lin, ‘Judicial In-activism in an Age of Discontent: Chu Yee Wah v Director of Environmental Protection’, paper presented at the First Workshop on Comparative Administrative Law in Asia, Academia Sinica, Taiwan, 9-10 August 2012.
V. Conclusion

Hong Kong courts have taken a cautious approach in reviewing the environmental policies of the government, tilting the balance towards economic development. Limited by the formulation of constitutional rights and inadequate legislative requirements, EPIL is often framed in narrow issues of legal technicality. Judges are cautious to adopt a purposive approach or to apply the principle of sustainable development to interpret statutes or regulations to enhance environmental protection. Despite limited success in the outcome, environmental litigation is still useful as a channel to voice opinions on environmental advocacy. The litigation experience in Hong Kong has also shed light on the need for wider legal reforms for the protection of the environment. It is important for the government to place sustainable development higher on the agenda for real change in people’s quality of life and the environment.