Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?

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Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?

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Abstract: Public interest litigation is an important tool for social transformation in many developed and developing countries. It is often used by the underprivileged or the oppressed, whose voices are otherwise under-represented in the democratic process, to vindicate their legal rights and to push for social change through the judicial mechanism. The success of public interest litigation requires a liberal court and activist judges who are willing to loosen traditional adversarial procedural rules in litigation and to allow non-governmental organisations and individuals to bring the often controversial and political public interest issues to the court.

In Hong Kong, we see a surge of judicial review cases relating to issues of wide public interest in recent years that are similar to public interest litigation in other jurisdictions. Yet many of these cases are constrained by legal obstacles under existing judicial review rules and the resistance from the court in adjudicating on essentially political questions. This article examines some of the recent public interest judicial review cases in Hong Kong in light of her unique legal and political environment. It analyses the judicial attitude towards public interest cases, and the challenges and opportunities in the development of public interest litigation in Hong Kong.

Introduction

Public interest litigation is an important tool for social transformation in many developed and developing countries. It is a type of legal action in which the claimant has no private interest in the subject matter of the case. Rather, the claimant is bringing the claim on behalf of the community at large or a sector of the community against the government or public authorities, on a matter that has wide impact on the society. The claim usually concerns a wrongful act or omission by a public authority that violates the constitution,

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1 For example, USA, Australia, New Zealand, India, and Pakistan. Generally, see for example Sangeeta Ahuja, *People, Law and Justice: Casebook on Public Interest Litigation* (India: Orient Longman Ltd, 1997); Rick Bigwood (ed.), *Public Interest Litigation: New Zealand Experience in International Perspective* (Wellington: LexisNexis NZ Ltd, 2006).
legislation or an international treaty, or a legislation that is incompatible with certain rights protected by the constitution, in a wide variety of subject matters including the environment, education, health, and development, etc. The aim of the claim is for the court to uphold certain rights guaranteed under the law and to issue declarations or orders to bind the government in policies and actions to safeguard those rights. Public interest litigation is often used by the underprivileged or the oppressed, whose voices are otherwise under-represented in the democratic process, to vindicate their legal rights and to push for social change through the judicial mechanism.\(^2\)

Public interest litigation is commonly said to have originated from the United States since the landmark case *Brown v Board of Education of Topeka*\(^3\) in 1954, in which the US Supreme Court abolished the segregation of public schools by race, though some scholars believed it to have an earlier origin.\(^4\) Public interest litigation is a departure from the traditional adversarial court system which was designed as a forum for dispute resolution concerning private rights where the claimant seeks compensation (often in monetary terms) from the defendant for a specific breach of the law. Public interest litigants in the common law system have to overcome two major obstacles: first, the traditional boundary between matters of law which are justiciable and matters of politics which are not; and secondly, the various procedural hurdles such as standing and evidential rules.\(^5\)

The success of public interest litigation requires a liberal court and activist judges who are willing to loosen traditional adversarial procedural rules in litigation and to allow non-governmental organisations (NGOs) and individuals to bring public interest issues to the court, such issues are often political.

In Hong Kong, we see a surge of judicial review cases relating to matters of wide public interest in recent years. They are similar to public interest litigation in other jurisdictions, yet constrained by legal obstacles under existing judicial review rules. On the one hand, there has been resistance from the court in adjudicating on issues that are intertwined with politics in these public interest judicial review cases, for fear that judges may take over the roles of the legislature and the executive. On the other hand, despite the conservative views of some judges, there is a growing trend in the use of judicial review applications by NGOs and political activists as a means of raising public concern and framing political issues in terms of legal entitlements.

This article will be divided into five parts. Part one is the introduction. Part two examines the theoretical basis for public interest litigation. Part three considers the political context in which public interest litigation has arisen in Hong Kong. Part four reviews some of the recent public interest case law and evaluates the mixed success by public interest litigants in challenging governmental decisions within the traditional adjudication model. Part five

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\(^3\) *Brown v Board of Education of Topeka* 347 US 483 (1954).


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considers some of the future challenges of public interest litigation in Hong Kong. This article will seek to argue that the judiciary overstated the strictness of the doctrine of the separation of powers currently applying in Hong Kong in some cases. The blanket refusal to adjudicate on some public interest matters on such ground is an over-zealous adherence to the doctrine in its pure form. The broader notion of fairness as equality and participation requires judges to look into public interest matters which involve valid legal claims. The test of proportionality should be used as the general principle by which decisions of public authorities are adjudicated in public interest litigation.

Theoretical basis for public interest litigation

The notion of separation of powers is commonly put forward by judges to demarcate the boundary of judicial review. They opine that the proper role of judges is to decide on the legality of administrative decisions. It is not within their power to adjudicate on matters of public policy, as it involves balancing between various interests instead of adjudicating on the legality of administrative decisions, which judges are ill-equipped to perform and is not within their constitutional duty. Under the doctrine of separation of powers, the legislature is the proper branch of the government to engage in such balancing exercise and to make laws that carry out their intention. The court’s role is to interpret the legislation and to safeguard its implementation in a way that is within the limits of power authorised by the legislation. No branch of the government should step over into the constitutional function of the other, lest the balance of power between different branches of the government be upset. Therefore courts have declared that political matters are “non-justiciable” and should be left for the democratic process.

In reality, courts do in certain cases adjudicate on issues concerning public policies by using various common law principles of judicial review. The justification of these judicial review cases lies in the wider principles of fairness and good administration. A decision which is unfair can be regarded as amounting to an abuse of power and is therefore illegal. An administrative body has a duty to act fairly to the person whose right is affected by its decision, otherwise it is acting outside of its powers. Fairness broadly interpreted includes the right to be heard and to be consulted in the decision making process. It also embraces the principle of equality in participation. The legitimisation of government decisions requires decisions to be fair. In this regard, public interest litigation can serve the purpose, as it provides a channel for the under-represented parties in the political process to voice their concerns.

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7 HK (An Infant), Re [1967] 2 Q.B. 617 at 630.
in the court room and to have their rights enforced. For the concern of the judiciary that it would step into the shoes of the executive and the legislature, David Feldman pointed out that, under the civic republican tradition, citizens are expected or permitted to represent public interests and to participate in political decision-making, and public interest litigation is one of the means. So long as judges do not act as surrogate legislature, but take merely a secondary role to oversee the reasoning of the primary actors, public interest litigation could actually help to promote participatory democracy and public scrutiny of the government.10

Further, the court has the constitutional role of protecting the rights of the people guaranteed under the constitution and other laws through adjudication. It also has the paramount duty to uphold the rule of law. As Craig and Deshpande observed, the rationale behind many leading public interest cases in the Supreme Court of India, one of the common law courts where public interest litigation flourished, is the respect for constitutional legality and the rule of law.11 The following section will endeavour to show that Hong Kong has a similarly favourable context for the development of public interest litigation.

Political context and public interest litigation in Hong Kong

Hong Kong has an executive-led government. The Chief Executive is elected by an 800-member election committee appointed by the Central People’s Government.12 Currently the seats in the Legislative Council are divided into geographical and functional constituencies.13 Geographical constituency elections are held on the basis of one person one vote according to the area of constituency, while functional constituency elections are based on membership of pre-defined professions. Checks and balances are part of the constitutional design of the Hong Kong government under the Basic Law. The courts have acknowledged that the doctrine of separation of powers is incorporated into the Basic Law.14

Despite the lack of full democracy, Hong Kong has active party politics. There is a strong civil society who is concerned with the protection of rights and welfare of residents. Since the resumption of sovereignty over Hong Kong by China, political parties have been increasingly active in fighting for the interests of different groups of people in Hong Kong through various means, including the political process, media and judicial system.

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12 The Basic Law of the HKSAR Annex I.
13 The Basic Law of the HKSAR Annex II.
14 See Peter Wesley-Smith, “The Hong Kong Constitutional System: The Separation of Powers, Executive-led Government and Political Accountability” in Johannes Chan SC and Lison Harris (eds), Hong Kong Constitutional Debates (Hong Kong: Hong Kong Law Journal Ltd, 2005).
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Hong Kong’s political context favours the growth of public interest litigation. Hong Kong people have become more conscious of their rights protected by the Basic Law, which incorporated the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).15 As pointed out by Professor Albert Chen, Hong Kong has, “a population that is sensitive to legal issues and interested in discussing and debating them”, and, “a government committed to rule of law and respect of judicial decisions”.16 The use of courts as a forum to voice political concerns is a recognition of the trust of Hong Kong people in the independence of the judiciary and the rule of law. In addition, the general trend of judicialisation in the common law courts explains the surge of public interest cases in Hong Kong.

It has been explained by Professor Johannes Chan that the proliferation of judicial review in Hong Kong is a result of democratic deficit. The ineffectiveness of the political forum and the lack of progress in democratisation pushes people to go to the court instead to pursue social changes.17 Nonetheless, looking at examples from other jurisdictions including America and Australia, public interest litigation does not seem to diminish in countries with full democracy. Rather, it is an additional forum for protest for public interest groups in democratic societies which value the freedom of speech.18 As suggested by Anthony Cheung and Max Wong, “the politicization of the judiciary through judicial review is unlikely to halt with the democratization of the political system”, since judicial review has become “a new arena of political bargaining”.19 The aggrieved will continue to go to the court to generate public attention and debate even with a more democratic and participative political system, as judicial review has become a “final opportunity” for those who are agitated in the political bargaining process.20 Surely, only meritorious public interest litigation supported by valid legal arguments will succeed in court, but judicial review has become a “final opportunity” for those who are agitated in the political bargaining process.20 Public interest litigation is necessary to safeguard against the guaranteed rights and interests of the under-represented in the democratic process. So long as the court does not stifle public interest litigation by stringent civil procedural rules, civil society in Hong Kong will continue to put forward public interest challenges before the court. This is a process of social change in line with deliberative politics.

15 Basic Law art.39.
Judicial attitudes to public interest litigation in Hong Kong

Compared to jurisdictions with a longer history of public interest litigation, Hong Kong is in the early stage and many of the characteristics of public interest litigation are still underdeveloped. Many of the cases are filed by private applicants with some personal interests in the subject matter instead of by NGOs on behalf of the aggrieved; judges maintain a strict adversarial role rather than taking up more inquisitive responsibilities to organise and shape the litigation.

A number of recent public interest cases in Hong Kong are concentrated on environmental issues. They have been met with mixed success and ambivalent judicial attitudes, but these cases marked some important aspects of the development of public interest litigation in Hong Kong.

**Ng Ngau Chai v The Town Planning Board**

This case concerns a challenge 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 would be built along the Tai Kok Tsui waterfront, blocking air and ventilation in the inner city area. The application was made by a resident of Sham Shui Po (near Tai Kok Tsui) in person though he was assisted by the environmental concern group Green Sense. The applicant claimed that the decision breached the Urban Design Guidelines issued by the Planning Department which,

> “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”.

The Tai Kok Tsui and Sham Shui Po areas are densely populated. These are some of the older districts in Hong Kong where the poorer strata of the population reside, while West Kowloon is a newly reclaimed area where residential buildings, mainly luxurious ones, and commercial complexes, are erected. The application was mounted one day before the auction sale of a plot in West Kowloon. This is a clear case of the underprivileged using the court as a forum to voice their concerns.

The application failed at the leave stage. The judge ruled that the drafting of the application was too vague. There was no specific decision being challenged, nor was there any specific provision of regulations alleged to be violated by the Town Planning Board.

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21 *Ng Ngau Chai v The Town Planning Board* [2007] HKEC 1207.
22 *Ng Ngau Chai* [2007] HKEC 1207 at [7].
23 “Lone Challenger to West Kowloon Sale” in *South China Morning Post*, June 12, 2007, p.2.
24 *Ng Ngau Chai* [2007] HKEC 1207 at [19].
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Refusal to adjudicate

It is noteworthy that Reyes J.’s attitude towards public interest environmental litigation was restrictive:

“I fully sympathise with Mr Ng’s concerns about the deteriorating quality of the environment around Tai Kok Tsui, where he lives. But the court can only apply law. The Judiciary cannot manage the environment. That is the role of the Executive. There is a limit to what can be done through the Court by way of judicial review.”

To adjudicate on environmental matters does not necessarily mean that judges are “managing the environment” on behalf of the executive. The line between deciding legal issues involved in the subject matter of environment and deciding environmental policies is fine but the two can be demarcated. In the former, judges review the legality of administrative decisions based on common law judicial review principles while in the latter, judges are making their own political choices. The principles of fairness and good administration require government decisions to be made with due regard to legislation, policy guidelines and a careful balance of relevant interests. It is not unjustifiable for judges to look into the matter if the applicant could make an arguable case of breach of judicial review principles. However, judges should be careful not to overstate the doctrine of separation of powers and use it as a blanket refusal to adjudicate legal issues involved in controversial public policies. Certainly the principle of separation of powers is embedded in the Basic Law and is the foundation of the political structure of Hong Kong, yet the doctrine is not applied in Hong Kong in a literal and restrictive manner. Judges should be aware not to avoid difficult public law issues lest they sway away from the constitutional duty to check against the legality of governmental decisions. Common law principles in judicial review have been developed along the line of using judicial means to uphold the fairness and accountability of administrative decisions, in procedural aspects and increasingly in substantive aspects, as the demand of the society for substantive fairness increases. As Hartmann J. in Society for Protection of the Harbour stated:

“The greater the degree of interference with a fundamental right, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the public law sense.”

The preservation of the Victoria Harbour in Hong Kong, though it did not involve a fundamental human right, concerns a matter of wide public importance. It would require a more rigorous scrutiny than irrationality under

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25 Ng Ngau Chai [2007] HKEC 1207 at [28].
26 Wesley-Smith, “The Hong Kong Constitutional System” in Chan SC and Harris (eds), Hong Kong Constitutional Debates, 2008.
27 Under art.35 of the Basic Law: “Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.”
the standard Wednesbury test. Thus there is no bar for the court to review the merits of administrative decisions to ensure that they comply with the constitution and the principles of administrative law.

Particularly in the recent development of the concept of proportionality in constitutional review concerning human rights in Hong Kong, the court should not abstained from navigating through the balancing exercise by administrative bodies, to ensure that in reaching their decisions administrative bodies have made a proportionate balance between the means and the ends achieved and that the means do not impose excessive burden on the individual affected. The UK court in Alconbury has called for the application of the proportionality principle to both human rights and non-human rights cases. This case has also been referred to in Capital Rich Development Ltd v Town Planning Board. The difference in treatment between human rights and non-human rights cases is sometimes hard to sustain if non-human rights cases also involve issues of wide public interest. In Ng Ngau Chai, it is arguable that the matter should be amenable to judicial review, as it involved wide public concern including air quality. The court should see whether the government has considered the proportionate impact of the planning decision on public health, which falls within the right to life and the right to health protected under the Basic Law.

**Procedural restrictions**

Admittedly, the judicial review application lacked specificity, as the applicant was restricted by the adversarial procedural rules from obtaining more substantive evidence from the government, including a copy of the Urban Design Guidelines. This is unfortunate because the precise purpose of public interest litigation is for the underprivileged, who most likely will not be able to afford legal representation, to bring their cases before the court to vindicate their rights, and it is inevitable that these people, without access to legal advice, may not be able to produce enough material by their own effort to satisfy the adversarial procedural requirements. They also face difficulties in access to information from the government which would enable them to better formulate their case before the court. It has been argued that the court is failing to discharge its constitutional duty of enforcing fundamental rights if it declines to intervene in such a situation and remains passive.

Judges could have taken a more inquisitorial approach in collecting evidence, including social and scientific data and expert opinions, in public interest

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35 Basic Law art 28, art 39 of which incorporated art 12 of the ICESCR.
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litigation, as demonstrated by the Indian Supreme Court. The Court can establish commissions and appoint experts for fact-finding purposes. For example, in *M.C. Mehta v Union of India*, the Supreme Court has called for the establishment of a committee to investigate the problem of vehicular pollution in Delhi. The Supreme Court has in other cases relied upon the Central Pollution Control Board and the National Environmental Engineering Research Institute to provide studies on the subject matter of public interest. Judges would not be bothered by the failure of the applicant to pinpoint a specific administration decision. Public interest litigation can be filed by letters and telegrams to the judge, it can even be taken *suo motu* by the Court based on media reports. This may be far-fetched for the Hong Kong court, but surely there is room for procedural rules to be relaxed in public interest judicial review cases. Amicus curie and expert evidence should be more readily admissible to assist the court so as to bring in the society’s resources in resolving legal disputes with wide public significance. The costs of fact-finding are justifiable as they are incidental to good administration of the government.

**Clean Air Foundation Ltd v The Government of the HKSAR**

The next case concerns a judicial review application made by the Clean Air Foundation, an NGO aiming at protecting the right to clean air of the residents of Hong Kong, against the Government for its failure to take action to alleviate air pollution in Hong Kong. The inaction of the Government that the applicant complained of includes the failure to, inter alia: rationalise bus routes and service scheduling to facilitate higher occupancy; impose mandatory requirements for all diesel vehicles to change to Euro IV and Euro V standards; and reconsider urban design to facilitate air circulation and protecting people from transport pollution.

The applicant sought two declarations from the court. First, the government has an affirmative duty to protect the residents and the economy of Hong Kong SAR from the known harmful effects of air pollution, under art.28 of the Basic Law and/or art.2 of the Hong Kong Bill of Rights Ordinance which provide for the protection of a “right to life”; and under art.12 of the ICESCR (incorporated into the Basic Law by way of art.39) which provides for the protection of the “right to health”; and secondly, the Air Pollution Control Ordinance (APCO) (Cap.311) and its subsidiary legislation were inconsistent

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38 *M.C. Mehta v Union of India* [1991] INSC 75.


42 *Clean Air Foundation Ltd v The Government of the HKSAR* [2007] HKEC 1356.

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with the Government’s commitment under art.28 of the Basic Law, art.2 of
the Hong Kong Bill of Rights Ordinance and various international covenants.

On the first declaration, Hartmann J. accepted that it was at least prima
facie arguable that a constitutional right to life under art.28 of the Basic Law
and/or art.2 of the Hong Kong Bill of Rights Ordinance may be applicable
to the current case. Further, although art.12 of the ICESCR only looked to
the “progressive achievement” of the right to health, there was a prima facie
arguable case that a duty to combat air pollution was imposed.

Nonetheless, the second declaration was rejected on the ground that it
requires “an examination of Government policy”.

Note that the second declaration was materially amended in the course of the argument. The
original version—which sought a declaration to the effect that the whole
APCO was invalid for its failure to satisfy the requirements of the Basic Law
and the international covenants—was regarded by the court as “simply too
broad in scope” and “materiually erroneous”. The amended version was
worded to include two specific decisions by the Government, first, that the
Government had failed to adopt up-to-date air quality objectives under s.7
of the APCO, and secondly, that it had failed to revise the law to prohibit
the use of pre-Euro and Euro 1 diesel in Hong Kong. Hartmann J. was
of the view that the second declaration demanded the court to examine
the merits of government policy rather than its legality which were not
matters for the court to decide. He therefore refused to grant leave to the
application.

Law versus policy

Hartmann J. stated that, according to arts 62 and 48 of the Basic Law, it was for
the Government to formulate and implement policies. The Chief Executive
of the Hong Kong SAR had discretion to decide whether and to what degree
such policy should be executed. He held that the government’s inaction did
not go to the legality of the decision but was a pure policy choice. It is
unfortunate that Hartmann J. was making a blanket refusal to adjudicate the
case based solely on the separation of powers ideology. Even though the Basic
Law grants powers to the government to formulate policies, the court has the
duty to ensure that such policies do not unjustifiably restrict constitutional
rights and are not in breach of administrative law principles. Surely the court
will have to give margin of appreciation to the government as it possesses
technical knowledge and expertise in the subject matter, but it does not mean
that the court cannot have substantive review of these administrative decisions
based on judicial review principles.

The court should be bold to establish tests to adjudicate on the fairness and
reasonableness of administrative decisions and on whether the government is
justified in departing from its constitutional duty. In the human rights context,

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43 Clean Air Foundation Ltd [2007] HKEC 1356 at [28].
44 Clean Air Foundation Ltd [2007] HKEC 1356 at [22].
the necessity test has been adopted as the test concerning the infringement of
the right to free speech under the Basic Law in Hong Kong." In the European
Court of Human Rights, the principle of proportionality serves as a judicial
tool to ensure that, in achieving their objectives, public policies do not infringe
more than necessary the rights guaranteed under the European Convention of
Human Rights. The Indian Supreme Court has been active in adopting the
"polluters pay principle" and the "precautionary principle" from international
law to adjudicate on environmental matters in public interest litigation. In
A.P. State Pollution Control Board v M.V. Nayudu, it was stated that:

"Environmental concerns . . . are, in our view, of equal importance as
human rights. In fact both are to be traced to Article 21 which deals
with fundamental rights to life and liberty. While environmental aspects
concern life, human rights aspects concern liberty."

While this may be a very activist approach and expansive interpretation of the
constitution by the court of India, it does demonstrate the possibility of a very
different judicial attitude in approaching similar issues.

Even if the local court is not as robust as the above foreign courts, the
court should at least be willing to look at the decision-making process of the
government, and see if it has taken into account relevant considerations and
has not taken into account irrelevant considerations in dealing with the issues
of air pollution under the APCO. If the government failed to do so, it had
acted outside the scope of its powers.

APCO

The obligation by the government under the relevant legislation is not
mandatory: the Secretary for the Environment "may" amend the air quality
objective from time to time. It is up to the Secretary to decide whether and
when to update the objective to meet the present state of air quality. However,
if the Secretary for the Environment simply neglected or ignored the matter
and failed to exercise his discretion to update the objective, he is acting illegally
and the court should be entitled to intervene. Further, given that the purpose
of the APCO is to abate, prohibit and control pollution of the atmosphere, and
that governmental inaction potentially restricts the right to life and health of
residents of Hong Kong enshrined in the Basic Law and various international
documents, the government should give due weight to this objective before
exercising its discretion in favour of inaction, and that the failure to consider
such element should be regarded as illegal. There are ample legal issues which
the court should look at in this case, instead of simply shutting the door against
the applicant.

48 A.P. State Pollution Control Board v M.V. Nayudu AIR 1999 SC 812.
49 APCO s.7.
Protection of the Harbour cases

In the past few years there were a series of cases concerning the reclamation of the Victoria Harbour. These challenges were brought by the Society for Protection of the Harbour, a public interest organisation aiming 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 Protection of the Harbour Ordinance (Cap.531), the harbour is recognised as a special public asset and natural heritage of Hong Kong people, and there is a “presumption against reclamation” in the harbour.

Previous case history

Concerning the Wanchai phase of the reclamation work, the Court of Final Appeal adopted the “overriding public need” test in reviewing whether the presumption against reclamation has been rebutted. “Overriding” was interpreted as “compelling and present”, and “public needs” included “economic, environmental and social needs of the community”. There must be cogent and convincing materials before the public officer to satisfy him that the overriding public need for reclamation has rebutted the presumption against reclamation. The Court ruled that the Town Planning Board erred in law in failing to adopt such a test in reaching its decision to refuse to reduce the extent of the proposed reclamation of Wan Chai North. The Town Planning Board’s decision was quashed and remitted for reconsideration.

The Central phase litigation came after the judgment of the Wan Chai phase litigation was delivered at the First Instance, when the Chief Executive in Council decided not to revoke the approved zoning plan for Central reclamation or to remit it to the Board for reconsideration despite the Court of Final Appeal judgment. It was held that the Chief Executive in Council was lawfully exercising his discretion under s.12 of the Town Planning Ordinance. He did not act unreasonably by deciding that the reclamation met the constraints of the judgment despite an error of approach by the Town Planning Board. Nor did he fail to consider relevant matters or adhere to the principle of good administration in making the decision.

Temporary reclamation

The latest of the series of protection of the harbour cases concerns the proposed temporary reclamation of the Causeway Bay foreshore of the

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51 Protection of the Harbour Ordinance (Cap.531) s.3(1).
52 Society for Protection of the Harbour Ltd [2004] 1 H.K.L.R.D. 396 CFA.
54 Society for Protection of the Harbour Ltd [2004] 1 H.K.L.R.D. 396 at [50], [51].
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The temporary reclamation was part of the Government’s project to build a trunk road along much of the north shore of the Hong Kong Island. Where the Wan Chai and Causeway Bay foreshore meets the harbour, the trunk road would take the form of a tunnel running beneath the sea-bed of the harbour. The method of construction was first, to form land from the foreshore and the sea-bed, and second, to use that land as working platform for the construction of the tunnel. This method was intended to minimise the need for permanent reclamation of the foreshore if trunk road was built on reclaimed land.

The Government was of the view that, since the reclamation works were temporary and would be removed after the tunnel was built, the areas affected by the temporary reclamation were not considered to be areas affecting the harbour under the Protection of the Harbour Ordinance. Hence the Government did not consider itself to be constrained by the presumption against reclamation under the Ordinance, which could only be rebutted by establishing an overriding public need. The Society for Protection of the Harbour sought judicial review against the Government. It challenged the decision of the Government for being wrong in law. The Society alleged that any works of reclamation, whether intended to be permanent or temporary, fell under the constraints of the Ordinance.

The court agreed with the Society. The intention of the legislature was to include any works of reclamation, whether permanent or temporary, to be under the constraints of the Ordinance. Though the end result of the proposed works was to construct a tunnel but not to form land, the Ordinance did not permit the end result to be divorced from the means. Thus the temporary reclamation works constituted works which were subject to the provisions of the Ordinance. The court made a declaration to this effect.

This was a pre-emptive strike by the Society against the temporary reclamation by the Government. The Government will now have to have a second-thought on its method of construction and if it sticks to the original method, it will have to justify the reclamation works by satisfying the “overriding public need” test before commencement of the construction work. Since the Society did not challenge the decision of the Government for failing to satisfy the overriding public need test, the court found it outside the ambit of this judicial review to consider the question. But it is likely that the Society, in order to protect the precious public asset of all Hong Kong people—the Victoria Harbour—will mount another judicial review against the Government if the Government continues with its original temporary reclamation plan.

Reasons for success

Public interest environmental litigation seems to have developed faster in relation to the protection of the harbour. There are two main reasons for this. First, the Protection of the Harbour Ordinance originated from a private

57 Society for Protection of the Harbour Ltd v Secretary for Justice (On Behalf of Secretary for Transport and Housing) [2008] 4 H.K.L.R.D. 417.
member bill proposed by the Society for Protection of the Harbour through its then deputy Chairperson and Legislative Councillor Ms Christine Loh and was passed just before the change of sovereignty in 1997. The wordings are clear with the specific purpose of protecting the Victoria Harbour as "a special public asset and a natural heritage" of all Hong Kong people.\textsuperscript{58} Judges are more willing to give effect to the special protection of the harbour enshrined in specific provisions in the legislation, compared to other cases. Secondly, the harbour case was brought by an environmental interest group with the support of prominent public interest lawyers in town and engineering experts whose advice was crucial to exploring the technical issues of the reclamation work involved in the litigation.

\textit{International and comparative jurisprudence}

In the First Instance of the Wan Chai phase Harbour litigation, the court has considered some more liberal approaches to adjudication on public interest issues, including the consultation of international and comparative jurisprudence and the recognition of the concept of people's rights. However, these approaches had not been adopted.\textsuperscript{59} The Court of Final Appeal had also given up the valuable opportunity to develop public interest jurisprudence in Hong Kong by adopting these approaches, instead it had chosen to base its decision solely on the literal interpretation of the Protection of the Harbour Ordinance.\textsuperscript{60} The partial success of the harbour case should not be overstated as a victory by public interest litigants in Hong Kong to push for social transformation, as the results of the cases may not be easily generalised to other public interest issues. Unless there are ordinances which are drafted in such a way as to provide clear and specific protection to a public interest matter, cases with a fate similar to \textit{Ng Ngau Chai} and \textit{Clean Air Foundation} are more likely than not to be the norm. The underprivileged or minorities are tied up by the unwillingness of judges to liberally interpret statutes and also the inability of the democratic legislative process to protect their rights. The future of public interest litigation will depend very much on the development of case law by a liberal interpretation of the constitution, existing legislation and common law principles to give effect to both individual and collective rights of the people.

\textbf{The need for a paradigm shift}

For judges to become more receptive to public interest litigation in Hong Kong, they need to overstep the traditional boundary of adversarial litigation and be willing to take up a more inquisitorial role in adjudication. The nature of facts in public interest litigation requires judges to rely not only on the litigants to develop and produce evidential materials but also to actively

\textsuperscript{58} Protection of the Harbour Ordinance s.3(1).
\textsuperscript{60} \textit{Leung Kwok Hung v HKSAR} [2005] 3 H.K.L.R.D. 164.
organise and facilitate the fact-finding. In addition, it is necessary to rethink
the proper boundary between different governmental bodies by considering
the constitutional role of judges in modern democracies. Surely judges should
not engage in policy-weighing exercises as this is the primary responsibility of
policy-makers, but they should check whether the administration has given
effect to the rights guaranteed under the Basic Law, and if not, whether the
restriction is justifiable. The court should also look into administrative decisions
based on modern common law principles of judicial review to see whether
the administration was acting within its lawful discretion. As P.N. Bhagwati
argued, judges in public interest litigation are not taking up the role of the
government, they are only giving effect to the constitutional and legal rights
of the underprivileged and holding the government responsible to carry out its
duties under the law. If judges act over-cautiously by shielding themselves
away from public policy, they will lose their capacity to achieve social justice,
promote equality and fairness and vindicate the right of the disadvantaged.
Their legitimacy will also be undermined in this regard.

Public interest litigation: Future challenges

From the recent development of public interest litigation in Hong Kong,
several aspects which shed light on potential challenges are worth noting.

Standing

In practice, the standing requirement does not seem to be too high a hurdle for
public interest litigants in Hong Kong, as many are able to satisfy the "sufficient
interest" test. The court in Society for Protection of the Harbour and Clean Air
Foundation seemed to have no issue as to the standing of the applicants. In Ng Ngau Chai, the court also assumed that the applicant in person had standing
to bring his application. This is a welcome approach. It is necessary for the
court to relax the requirement as to what amounts to "sufficient interest" to
bring a public interest judicial review case in order to enable public interest
advocacy groups or individual applicants to speak on behalf of the aggrieved.

63 Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281, 1316.
64 See the High Court Ordinance (Cap.4) s.21K(3) and Rules of the High Court Ord.53 r.37.
66 Clean Air Foundation Ltd [2007] HKEC 1356 at [2], [3].
67 Ng Ngau Chai [2007] HKEC 1207 at [2].
Remedies

The local court adheres to traditional remedies in judicial review. There is room for debate about whether more flexible and prospective judicial remedies should be developed. This may require the amendment of civil procedural rules. As Judge P.N. Bhagwati put it,

“the suffering of the disadvantaged could not be relieved by mere issuance of prerogative writs of certiorari, prohibition or mandamus, or by making orders granting damages or injunctive relief, where such suffering was the result of continuous repression and denial of rights. The Supreme Court [of India], therefore, explored new remedies which would ensure distributive justice to the deprived sections of the community.”

These include various directions to government bodies to take action.

Costs

In Society for Protection of the Harbour Ltd, the applicant who succeeded in the claim secured an order of costs to be taxed on indemnity basis. Concerning cost orders in successful judicial review challenges, the court will consider factors including whether the proceedings are commenced to vindicate public interest, whether but for the commencement of the proceedings, the public interest in securing compliance with the law would not have prevailed and resulted in the resolution of fundamental legal issues, the manifest public importance in the case, and whether the applicant’s finances depend on public donation.

In Leung Kwok Hung, though the judicial challenge failed, the court granted no cost order against the party who lost in an application for judicial review against the government. It was of the view that, if the public-law litigation is not for the private gain of the applicant, but to clarify the law in respect of a matter of public importance, then the court may exercise its discretion by not ordering the unsuccessful applicant to pay the legal costs of the respondent. This had been regarded as costs incidental to good administration. However, the court toughened its stance in Chu Hoi Dick v Secretary for Home Affairs (No. 2). The failed applicant was ordered to pay the Government’s costs of judicial review. The court made it clear that public interest could not be used as a blanket immunity to cost liability in judicial review cases. It formulated three criteria to determine whether the usual order of costs-follow-the-event should be departed from in the public interest: first, whether the applicant properly brought proceedings to seek guidance from the court on a point of general public importance so that the litigation benefited the community as a whole; secondly, whether the judicial decision had contributed to the proper

71 Chu Hoi Dick v Secretary for Home Affairs (No.2) [2007] 4 H.K.C. 428.

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understanding of the law in question; and third, whether the litigant had no private gain in the outcome. The court will also look at other relevant factors such as the conduct of the litigants in the proceedings. On the facts of the case, the criteria were not satisfied and the applicant had to pay the Government’s costs for judicial review.

Public interest litigants in Hong Kong face a high risk of having to bear the costs of litigation if they fail in the case. It poses a big challenge for them in terms of financial resources to put forward legal claims. Many will need to depend on legal aid or pro bono work of public interest lawyers.

Social transformation

One encouraging sign in the recent public interest judicial review cases is the wide media coverage that these cases have brought. Even though some applicants did not win in the court room, they had secured public awareness and had used the courts as forums for protest. This is an important step for their continuous battle to pursue the public interest.

Conclusion

To have a meaningful development of public interest litigation, the Hong Kong court should adopt proportionality as a general ground of judicial review, and be willing to consider legal issues arising from political questions and public policies. The development of collective rights in legislation will help to better define and vindicate these rights. Judges in Hong Kong should, instead of closing the door to public interest cases as if it is a roaring tiger, be open and willing to take a liberal approach to develop this area of law when opportunity arises, so as to foster fairness and equality in the society, to give access to justice to the public for the pursuance of genuine public interest, and to enhance participation in the democratic process. As our society has more demand for social justice, the responsiveness and liberal approach of our judges is crucial to the upholding of the rule of law—a truly inherent treasure of our community.