

# Judicial Review of EIA Decision-making in Hong Kong

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## I. Introduction

This paper examines the extent to which the past judicial review cases on EIA decisions have reflected the deficiencies of the current EIA process in Hong Kong. It begins by an overview of the trend of judicial review since 2002. Major controversial issues aroused from four judicial review cases on EIA decisions since the enforcement of Environmental Impact Assessment Ordinance (EIAO) in 1998, including Permanent Aviation Fuel Facility for Hong Kong International Airport (2002), Hong Kong-Zhuhai-Macau Bridge (2010), Integrated Waste Management Facilities (2012) and the recent Development of a Bathing Beach at Lung Mei, Tai Po (2013), will be drawn. This paper ends with a discussion of the social and environmental implications of the use of judicial review in resolving conflicts between the authority and the public.

## II. Judicial Review in Hong Kong

Inherited from its former colonial practices, Hong Kong adopts British administrative law system and continues the use of common law after the handover of sovereignty to China in 1997. Judicial review is known as a core procedure in British administrative law system to limits executive power through judicial power and allows opportunities for third party to challenge any wrongdoing of the government. (Chen & Cheung, 2004). Article 35 (2) of the Basic Law states that citizens in Hong Kong are given the right to challenge decisions of executive authorities through legal means:

### Article 35 (2)

*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 right as guaranteed by the Basic Law has been crucial in maintaining the rule of law in Hong Kong. Rule of law protects citizens' right and prevents excessive use of power though the application of legal proceedings against government decisions which may be legally unjustified. Persons, including citizens, government officials or the Chief Executive, are all equal before the law. If the government decision is found to be illegal, the court shall rule the decision to be invalid, and with redress, if necessary (Department of Justice, 2013).

One of the most commonly-used ways for members of the community to challenge decisions of the government in Hong Kong is to lodge judicial review. Often reflected in the court judgments, judicial

review is used to review the decision-making process rather than effects of the decision itself. Being known as the “last resort” in citizen’s plans of opposition, judicial review deals with whether the decision concerned breaches the constitution and whether it involves administrative flaws, namely illegality, irrationality and procedural impropriety (Department of Justice, 2006). Regarding past judicial review cases on EIA decisions, judges often exercise a role to review only the decision-making process and examine whether executive authorities have appropriately exercised the power in accordance to the relevant ordinances. The judge also concerns whether the arguments put forward by the applicant are valid in view of the current practice and legislation of EIA.

### **III. The Trend of Judicial Review in Hong Kong**

It has been widely recognised in the academia that there is a significant growth of the number of judicial review in the recent years (Chan, 2009; Gittings, 2013; Kong, 2009; Tai, 2012). The trend of growth started in 2002 from 102 and the number reached 149 in 2005. Although the CFA decided to raise the barrier for the application of judicial review from requiring a potentially arguable case to a reasonably arguable one in 2007, the trend kept on a level with around 139 cases annually from 2008-2012 (Chiu, 2012). A record-high was reached with 159 applications in 2012.

**Number of applications for judicial review in Hong Kong**

2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
102	125	146	149	132	138	151	144	132	109	159

**Source: Tai (2013)**

### **IV. Major Controversial Issues Aroused from Four Judicial Review Cases on EIA Decisions since 1998**

#### **A. Quantitative Risk Assessment**

In the case of Permanent Aviation Fuel Facility for Hong Kong International Airport (2002), a debate lied in whether the EIA report should contain a quantitative risk assessment (QRA), which was an evaluation of the catastrophic situation where the fuel storage tank lost almost all the tank’s contents. Shiu Wing Steel Limited initiated a judicial review against the decision of approval by Director of Environmental Protection (DEP) on the grounds that the EIA report failed to evaluate the potential safety issues and threats imposed by the project. After rounds of judicial review, the judgment of CFA agreed that the catastrophic situation, although it could have happened once in 150 thousand years, shall be included in the EIA report in order to comprehensively evaluate the potential impacts brought by the project (*Shiu Wing Steel Ltd v Director of Environmental Protection (2006)*, HKCFAR 303). The case has set an example for future EIA study that environmental impacts shall be critically assessed if it poses hazardous impacts on human health.

### *B. Air Quality Impact and Health Impact Assessment*

Health impact imposed by development projects has constantly been an issue when it comes to an EIA study. Citizens in Hong Kong realise the deteriorating air quality especially when the development project has put in place and the construction has commenced. They thus bring their opposition to the court hoping to protect both their health and the environment. In the judicial review on Hong Kong-Zhuhai-Macau Bridge (2010), a 66-year-old Tung Chung resident Yee Wah CHU challenged the EIA report of being misleading to ascertain that “there will not be any residual air quality impacts for the operational phase of the projects” (*Chu Yee Wah v Director of Environmental Protection*, HCAL 9/2010, para 59). CHU also challenged the EIA report for the absence of the appropriate use of methodology in evaluating the future source of air pollutants and this failure would result in the inability to project the level of air quality in 2031. Moreover, CHU questioned the way in which the risks of health were to be evaluated in the air quality assessment. While the judge in the CFI ruled in favour of CHU, the government lodged an appeal to the Court of Appeal and it reaffirmed that the project proponent had followed the guidelines set down by the Technical Memorandum (TM) and the Study Brief (SB) to minimise the environmental impact brought by the project. No additional assessments, such as stand-alone baseline study as contended by CHU, were needed.

### *C. Conflicting Role of EPD*

Judicial review on Integrated Waste Management Facilities (2012) also highlighted the controversial issue of whether the role of EPD was inappropriate as it served as both the project proponent and the decision-making authority at the same time. The applicant, Hon Wai LEUNG, perceived this issue as breach of natural justice. The judge in the CFI, however, was of the view that DEP’s power had been delegated to her colleagues in the Environmental Assessment Division and DEP was not the actual one to make the EIA decisions. Owing to the fact that she only played a “nominal” role in the decision-making process, the role of DEP, as elaborated in the judgment, is neutral and unbiased (*Leung Hon Wai v. Director of Environmental Protection and Town Planning Board*, HCAL 49/2012).

### *D. Ecological Assessment*

Organised by a group of local activists, series of protests took place against government’s decision to develop an artificial beach in Lung Mei. Loy HO, a social activist who successfully obtained legal aid from the government, applied for leave in the CFI to review EPD’s decisions on the approval of the EIA report which is based on misleading results of ecological assessment conducted by the EIA consultant. She also challenged the Director’s decision for not exercising her power under s.14 (1) of the Ordinance to vary, suspend or cancel the environmental permit. The report failed to assess rarely-found marine species, including the *Hippocampus Kuda* spotted seahorse, during the compilation of the report between 2007 and 2008. The misleading results thus led to flawed conclusions of EIA. Results from self-initiated ecological assessments also proved the flaw (Lau, 2013). The CFI accepted HO’s application for judicial review and was preceded to a hearing on 18 February 2014.

## **V. Social and Political Implications**

### *A. Rise of Public Expectation*

Scholars and people in law professions have generally regarded the increase of judicial review cases as an indicator of the rise of public expectation towards the governance in Hong Kong (Chan, 2009; Kong, 2009; Tai, 2012). Former Chief Justice Andrew Li (2006) believed that, together with the fact that citizens become more educated and resourceful, the high level of public expectation is a result of the rising self-conciseness of their civil and political rights and individual freedom in society. The situation has been exemplified in the field of EIA where most of the judicial review cases on EIA decisions were brought by citizens. The trend also implies that citizens become more aware of the environment and are willing to protect it through legal means. The social awakening on the rights and freedom in society and the increase of environmental consciousness, coupled with the enhancement of information technology and a higher level of transparency on EIA, would lead to more judicial review cases in the future.

### *B. Proactive Public Engagement*

Public engagement has always been an effective tool of conflict resolution between the public and project proponent. By incorporating comments from the public into the EIA process, concerns towards the impacts of development project would be minimised. Conflicts would arise if the public is being engaged after decision or approval has been made or seemingly been endorsed by the authority. In the above judicial review cases, not only would placing public's concerns as a consideration of, and a criterion in, an EIA study show the respect towards the public, it would also result in a more comprehensive analysis on the impact of development project on both the environment and the community, contributing to a better relationship among the stakeholders concerned.

### *C. The Absence of Statutory Mechanism within the EIA Process for Challenging EIA decision*

Without doubt, judicial review cases have imposed pressure towards the authority on making decisions that involve the welfare of citizens. The realm of environment is a newly-emerged policy area that has been challenged by the public. Although citizens who are aggravated by the decisions of DEP on EIA might have voiced out their opposition, it is often conceived that their comments were not being recorded, or considered, by the authority during the statutory period of public participation. As the public demand not being addressed, and their comments not being responded during the one-way public participation process, it has been understandable that aggravated citizens will challenge the assessment findings, the conclusions of EIA report and thus the EIA decisions concerned. The situation is compounded by the fact that there is no statutory channel under the EIAO for members of the public to lodge appeal on decisions on EIA. The absence of third party appeal encourages citizens to institute legal proceedings for opposition, and judicial review is believed to be the easiest way to overturn the decisions on EIA concerned by the power of courts. It therefore highlights the essential need of an official and effective mechanism to handle challenges from the public on EIA decisions and the relevant decision-making process.

#### *D. Politicization of Judicial Review on EIA Process*

Past experiences have shown that judicial review in Hong Kong has to frequently deal with issues concerning public policy. The increasing overlap between politics and judicial system, as suggested by Cheung and Wong (2006), results in “the politicization of judiciary” and “the judicialization of politics and public policy”. While there is a lack of political mandate and democracy in the governance system of Hong Kong, citizens are deprived of the right to express their grievance on public policy through ballot (Sing, 2006). They therefore bring public grievance to courts in order to change, or overturn, decision of the executive authorities through legal means.

In the context of EIA in Hong Kong, as there is no third party appeal under the EIAO, decision of DEP on EIA process is not subjected to be challenged by the public. Courts are hence being used to quash EIA decisions. However, the overlap of judicial power and EIA process provides little evidence on the notion that judicial review could overturn the relevant EIA decisions. While the court would give clarification on issues concerned during the process of judicial review, it, however, also results in the costly delay of development project. This is also attributable to the fact that judicial review only concerns the legality and validity of the decision-making process rather than the decisions itself. The resulted delay and the use of judicial review thus turn to be a costly objection towards the government. It is also observed that some members of the public, however, conceive the judiciary as a powerful way to magnify opposition towards the government and, hence, to gain political money. While judicial review is employed as a tool for the opposition of decisions of government authorities, it is expected that there will be more judicial review on EIA decisions, and the judiciary will receive more judicial review cases on political grievance or public policy issues in the future.

#### **VI. Conclusion**

Past judicial review cases on EIA decisions have shown the rise of expectation and public conciseness on the environment. It is understood that members of the public do have concerns, or oppositions, towards the EIA process in Hong Kong. These concerns, however, could not be adequately expressed in the statutory timeframe for public opinion under the EIAO, and the situation gives rise to the use of legal means to challenge EIA decisions concerned. Facing the fact that the EIA process lacks third party appeal and at the same time the rise of public expectation towards the performance of the government on the environment, the genuine will of both the authority and project proponent on proactive public engagement and the commitment to a constructive dialogue with the members of the community have a crucial role to play in constructing a better relationship between the authority and the public.

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