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AIR POLLUTION IN HONG KONG: THE FAILURE OF JUDICIAL REVIEW AND THE SLIGHT PROMISE OF RECENT CASES

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Public bodies are endowed with far-reaching administrative powers to formulate and implement policy. Administrative law focuses upon the extent of these powers, the way in which they are exercised and controlled, and on the relationship between public bodies and those who are affected by decision-making. With the growth of executive power, judicial review has emerged as a necessary counterweight to assure accountability in the decision-making of government authorities. Against such a background, this article evaluates the contribution which judicial review has made to combating air pollution in Hong Kong to date. It essays a variety of reasons to do with Hong Kong's colonial past as to why judicial review has, in general, been a dilute force for accountability of administrators and especially so when a decision has environmental implications.

I. INTRODUCTION

In Hong Kong there is a steadily growing tide of public resentment against the government about the quality of the air and the failure of its regulation to address it.[1] Each year, air pollution in Hong Kong causes at least 1,600 deaths, 64,000 hospital bed days and US$ 2.6 billion dollars in economic loss.[2] The recent government-proposed Air Quality Objectives (AQOs) set limits which it claims comply with the World Health Organisation 2005 standards. However, this is not the case, as they are compromised by a large number of permitted "exceedances" for polluters.[3] In response to the new limits, the Hong Kong University Faculty of Medicine said "all of the government's new proposed AQO limits will not provide protection to public health" and that "pollutant levels resulting from the new AQO limits may be even

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1 Nearly 8 out of 10 people in Hong Kong are dissatisfied with the government's response to air pollution, online: Air Pollution Hong Kong—Help Us Clear The Air <http://www.cleartheair.org.hk/quick-stats.php> (last accessed: 6 October 2011).

2 "Pollution causes 1600 deaths per year" *Asia News* (6 September 2006), online: Asia News <http://www.asianews.it/news-en/Pollution-causes-1,600-deaths-per-year-6399.html>.

3 Hong Kong University (HKU), Li Ka Shing Faculty of Medicine, "HKU Study demonstrates that the government's proposed Air Quality Objectives won't protect health", online: The University of Hong Kong, Li Ka Shing Faculty of Medicine <http://www.med.hku.hk/hkumed/news_list.php?year=2011&month=Feb>.

worse than Hong Kong's existing levels in 2010 if the new legal limits are exploited under the Environmental Impact Assessment Ordinance."[4]

This article is written against such a background and is divided into five main sections. Section II introduces the case law on judicial review of pollution standards. Section III assesses the historical reasons why judicial review has been such an anemic force in the region until recent times and why it continues to have a poor track record in environmental cases. Section IV considers institutional defects in air pollution control and Section V discusses the issues of governance roles and the proper scope of judicial review. The conclusion, Section VI, provides an assessment of the importance of pleadings for judicial review to be invoked with good effect. It is contended here that there has been a failure of governance regarding air pollution which implicates every organ of Government in Hong Kong but that the record of the courts in judicial review of environmental decisions is so implicitly compromised by the precedence of economic considerations that the law is made all but useless and public health continues to suffer as a result.

II. Grounds of Review and Recent Hong Kong Cases Reviewing Air Pollution Standards

The basis of judicial review in Hong Kong is said to be art. 35 of the *Basic Law of the Hong Kong Special Administrative Region* ("*Basic Law*"), which reads: "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 in art. 35 is fortified by Practice Direction 26.1 which specifies that a range of cases are assigned to the Constitutional and Administrative Law List, including "(a) applications for judicial review" and "(e) such other civil cases which raise an issue under the *Basic Law* or the *Hong Kong Bill of Rights Ordinance* (Cap. 383) for determination and which a judge of the Court of First Instance or a judge of the District Court certifies as suitable for transfer to the List". Thus, environmental advocates need to seek judicial review of permits given to polluters and achieve a listing via PD 26.1(a) or by framing a much stronger right to life argument via PD 26.1(e). Under the path set down by PD 26.1(e), a judge makes a threshold assessment as to whether or not the case should be listed as a matter of review on *Basic Law* grounds. It is the more prosaic form of review referred to in PD 26.1(a) which takes our attention here. In a preliminary hearing of *Chu Yee Wah v. Director of Environmental Protection* ("*Zuhai Bridge Case*")[5] Lam J. in chambers gave a helpful summary of the practical steps in the process of seeking judicial review of an administrative decision:[6]

> In an application for judicial review, the Form 86A identifies the grounds of the challenge. The court decides whether to grant leave based on those grounds and, if leave is granted, the respondent decides how much evidence need to be put forward in answer to the challenge by reference to that as well. Thus, it is of fundamental importance that each ground of challenge should be clearly and specifically set out in the Form 86A. To permit new grounds to be slipped in by

4 *Ibid.*
5 [2010] Hong Kong Court of First Instance 985 (4 November 2010).
6 *Ibid.* at 3.

> way of submissions is unfair to the respondent and bad case management not consistent with the underlying objectives in Order 1A. Further, if a ground is not contained in the Form 86A, it means that the court has not granted leave for an application for judicial review based on that ground.

Pleadings in support of this form of review have generally not been up to the mark. One happy exception was the case of *Shiu Wing Steel Ltd. v. Director of Environmental Protection & Anor (No. 2)*.[7] In it, the proprietors of a steel mill asked for a PD 26.1(a) judicial review of the Director of the Environment's decision to approve construction of an aviation fuel depot next to his steel mill in the New Territories. The mill owner argued that the Director of Environment Protection (DEP) had failed to follow the procedures set down for an environmental permit and was in breach of a general duty to protect of the environment and the safety of Hong Kong residents. The Hong Kong Court of Final Appeal (HKCFA) upheld the mill owner's appeal and quashed the Director's permits for the fuel depot.[8] Using projected business losses as a reason letting a development proceed can be presumed safely to be quite common in Hong Kong. The HKCFA saw through such an argument when it was used in *Shiu Wing Steel* and the following suggests that the environmental lobby can, like the steel mill owner, use expedition in proceedings to undermine pro-business arguments:[9]

> Delay in construction of the PAFF [the fuel depot] is said to have dire effects on the capacity of HKIA [Hong Kong International Airport] to meet the fuel demands of aircraft in the coming years. Inability to satisfy that demand would necessitate fuel rationing with an adverse effect on international air traffic through Hong Kong and serious economic consequences for the Region. If this be so, it is surprising that when SWS [Shiu Wing Steel], by its solicitors, suggested for the sake of expedition an appeal from the Court of First Instance direct to this Court under s.27C of the Hong Kong Court of Final Appeal Ordinance, Cap. 484, the Director did not consent and HKAA [Hong Kong Airport Authority] did not even respond to the suggestion.

The above view indicates that the HKCFA can and will see through a business-based argument if it is not, on a basic level, a truthful representation of the outcome of a permit not being granted.

Until Fok J.'s ruling in the *Zuhai Bridge Case*,[10] the 2007 case of *Clean Air Foundation v. The Government of the Hong Kong Special Administrative Region (HKSAR)*[11] has been the only public interest litigation to attempt to bring the air pollution problem before the courts.[12] In it, Hartmann J. characterised the action brought by Clean Air Foundation (CAF) as "a broad, frontal attack on what is asserted to be a failure of Government to tackle the problems presented by air pollution."[13]

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7 [2006] 9 Hong Kong Court of Final Appeal Reports 478; [2006] 3 Hong Kong Law Reports & Digest 478 (17 July 2006) [*Shiu Wing Steel*].

8 *Ibid.* at 95.

9 *Ibid.* at 95.

10 [2011] Hong Kong Court of First Instance 259; [2011] 3 Hong Kong Cases 227; HCAL 9/2010 (18 April 2011).

11 [2007] Hong Kong Unreported Judgments 1265; HCAL 35/2007 (26 July 2007) [*Clean Air Foundation*].

12 For a fuller discussion of *Clean Air Foundation* and of the legislative settings of air pollution regulation of Hong Kong see Rohan Price & John Ho, "Judicialising Environment: A Role for the Courts in Combating Air Pollution in Hong Kong?" Public Law [forthcoming in 2012].

13 *Supra* note 11 at 1.

It was argued by the CAF that there was a range of policy measures available to the government to improve Hong Kong's air but which it had failed to take. Such failures included the government not rationalising bus routes and service scheduling to increase passenger occupancy and its failure to provide better ventilation for bus termini (which are often in under-storey locations in Hong Kong).[14] It was also argued by the CAF that all trucks in Hong Kong, including ones coming from over the border should move to *Euro IV* and *Euro V* standards.[15] The Foundation also made pleadings on the government's failure to impose a moratorium on the use of sulphur-rich fuels in coal-fired power generation or to coordinate improvements on the rail network to meet an environmental objective of reducing road traffic and concomitant pollution.[16]

The CAF sought leave to appeal to the HKCFA on the argument that art. 28 of the *Basic Law* and/or art. 2 of the Hong Kong Bill of Rights, in providing a right to life, imposed on the government a positive duty to protect the residents of Hong Kong from the deleterious effects of air pollution. It was asserted by counsel for the applicant, Mr. John Scott SC, that public authorities were required by international jurisprudence to protect the right to life in circumstances other than crime and punishment and that it had been found that the obligation of a state extended to the provision of vaccines during an epidemic and protecting the populace from the effects of nuclear waste.[17]

A declaration was also sought by the CAF in the case it brought that the *Air Pollution Ordinance* (Cap. 311) and its subsidiary legislation was inconsistent with not only art. 28 of the *Basic Law* but also a host of other international laws including art. 6 of the *International Covenant on Civil and Political Rights*[18] and art. 12 of the *International Covenant on Economic, Social and Cultural Rights*.[19] In particular, it was argued that while the government prohibits the sale of diesel fuel in Hong Kong which does not meet specified levels of purity, it does not specifically prohibit the importation or use of such diesel (and that it was its responsibility to ensure that trucks from the Mainland did not impinge on the right to life of Hong Kong residents). Hartmann J. accepted that there may be a *prima facie* case that the *Basic Law* right to life may be argued to extend to air pollution[20] but reasoned that unless a policy of the government could be demonstrated to be unlawful there was no jurisdiction to review its policy decisions even if they "could be considered to be unwise, short-sighted or retrogressive."[21] Moreover, his Honour ruled that policy is for policy-makers and the courts will not interfere in their lawful discretion to make policy.[22]

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14 *Supra* note 11 at 7.

15 *Ibid.*

16 *Ibid.* Also see *HKSAR v. Ip Chi Keung* [1999] Hong Kong Court of First Instance 164. Detreated marked oil contains several times higher than permissible levels of sulphur and is known to be smuggled into Hong Kong.

17 *Supra* note 11 at 17.

18 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, art. 6, *Basic Law* art. 39 (entered into force 23 March 1976, accession by Hong Kong 20 May 1976).

19 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, art. 12, *Basic Law* art. 39 (entered into force 3 January 1976, accession by Hong Kong 20 May 1976).

20 *Supra* note 11 at 17.

21 Supra note 11 at 32.

22 *Ibid.*

Although CAF was unsuccessful in its challenge against the government, it nevertheless had ripple effects on the environmental debate as many have started to question whether the judiciary should have a greater role in combating air pollution in the longer term. It seems that *Clean Air Foundation* has at least inspired others to be more pro-active in challenging government's decisions with impact on the environment. The more recent decision made by the High Court of Hong Kong in April 2011 in the *Zuhai Bridge Case* showed signs of a tentative change in the attitude of the judiciary. The applicant, Chu Yee Wah, a local resident of the Tung Chung area, where the Link Road of the Hong Kong-Zhuhai-Macau bridge (Zhuhai bridge) is to be located, launched a judicial review challenge directed at the DEP decisions to approve the Environmental Impact Assessment (EIA) Report pursuant to s. 8(3) of the *Environment Impact Assessment Ordinance* (Cap. 499).[23] The challenge also encompasses subsequent decisions, based on the earlier approval of the EIA Reports, to issue environmental permits for the bridge project pursuant to s. 10 of the *EIAO*. The applicant's complaints relate to the adequacy of the air quality assessment of the operational phases of the project in the EIA Reports. His Honour Joseph Fok J. considered seven main issues before coming to his judgment, ruling in favour of the applicant by quashing the Director's approval of the EIA Reports and the environmental permits. Interestingly, the applicant only succeeded on the first of the seven issues but that was sufficient to bring the bridge project to a halt (at least temporarily). It is to this single issue that we now consider.

The first argument proposed by the applicant was that the EIA Reports should have provided a quantitative "stand-alone" analysis of the projected environmental conditions without the bridge and Link Road projects but the EIA Reports failed to do so and erroneously concluded that these projects would have no cumulative residual air quality impact.[24] Mr. Philip Dykes SC, who argued on behalf of the applicant, submitted that the failure to present a separate stand-alone analysis of the projected environmental conditions without the projects in place is in breach of the *EIAO* which provides that an EIA Report:[25]

> "…shall comprise a document or series of documents providing a detailed assessment in quantitative terms, wherever possible, and in qualitative terms of the likely environmental impacts and environmental benefits of the project…"

Mr. Dykes further submitted that the absence of an analysis of the conditions without the projects in place meant that it was not possible to ascertain the environmental footprint of the projects. Hence, it was not possible to ascertain the residual impacts of the projects and without knowing this, it was impossible to know what mitigation measures ought to be required.[26]

In coming to the decision, Fok J. referred to the HKCFA's judgment on *Shiu Wing Steel* and a number of decisions made by the English courts. It held that the purpose of the *EIAO* is "to provide for assessing the impact on the environment of certain projects" and that one of the means by which the Ordinance seeks to achieve this purpose is by assessing the extent to which a project will have an environmental

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[23] Hereafter known as [*EIAO*].

[24] *Supra* note 10 at 33.

[25] See s. 4.1.1 of the EIA Report for details.

[26] *Supra* note 10 at 56.

impact. That adverse impact is the change in the environment from the position that would have prevailed if the project were not implemented.[27] Further, Fok J. also referred to the English case of *R (on the application of Edwards) v. Environment Agency (Cemex UK Cement Ltd, intervening)*,[28] where Lord Hoffmann, by referring to EC Council Directive 96/92 held that in granting relevant environmental permits, the Environment Agency (equivalent to the Environmental Protection Department in Hong Kong) must use the best available techniques calculated to prevent, or at least to minimise, the emission of polluting matter irrespective of whether the emission would cause a breach of an overall pollution limit. The judge at first instance in the *Zuhai Bridge Case* used a "bucket" metaphor and asked "if the environment is to be treated like a bucket, does it mean 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?"[29] The Court of First Instance agreed with the approach laid down in *Edwards* and held that:[30]

> "…[I]f environment protection is to be meaningful, it seems to me that it must aim to minimise the environmental impact of any project and in the case of air quality, by minimizing the amount of pollutants released into the atmosphere. It would be contrary to the purpose of EIAO, which recognizes that the environment is worthy of protection, if the statutory scheme in this jurisdiction were to be construed as if it treated the environment like a bucket into which waste may be deposited until it is full. That approach does not protect the environment…"

Furthermore, the judge in the *Chu Yee Wah* held that satisfying the criteria under the AQOs "cannot be the sole determining factor in a decision whether to grant an environmental permit".[31] What is required in an EIA Report is a "baseline or stand-alone position" where the environmental footprint of a project can be measured.

The ruling indicates a threshold role for judicial oversight of environmental issues in Hong Kong. The judge in the case stressed that this judicial review does not concern a debate about the wisdom of the decision to construct the bridge and the related projects and nor is it a debate about the adequacy of the criteria laid down in the *EIAO* to protect public health.[32] The case also agreed with Justice Hartmann's ruling in *Clean Air Foundation* that the establishment of the AQOs is a matter of policy which is for the government to determine.[33] On the face of it, one may still see that the balance of favour is very much tilted towards the need for economic development of a given project rather than the environmental aspect. Yet it nevertheless illustrates a change in attitude of the Hong Kong Judiciary since *Clean Air Foundation* that it no longer simply allows the government to use economic development as a trump card to negate the importance of environmental protection. In the past, the government's consultation or the EIA Report of a construction project was merely perceived as a

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27 *Supra* note 10 at 70.
28 [2009] 1 All E.R. 57 [*Edwards*].
29 *Supra* note 10 at 73.
30 *Ibid.* at 75.
31 *Ibid.* at 80.
32 *Ibid.* at 30.
33 *Ibid.* at 171.

routine box-ticking exercise and the adequacy of the content was rarely questioned. The ruling of the *Zhuhai Bridge* case sets a new benchmark for public consultation by the government and that environmental protection can no longer be a "secondary" consideration. It would seem that judicial review has emerged partially to be a counterweight in Hong Kong and courts are more willing to act as guardian when the need to protect the environment occurs. The Court of Appeal has recently upheld the Director's appeal against Fok J.'s ruling and The Hon. Tang VP repeated a familiar refrain by observing that, "it is not for the court to decide matters of policy".[34] The next section shows why the result of the appeal should come as no surprise.

III. Historical Reasons for the Failure of Hong Kong to Absorb Key Concepts of Judicial Review

In recent times there has been a welter of writing on judicial review[35] but the contribution of Hong Kong to its development relies more on the Region's post-1997 track record than it does its colonial history. In 1999 in *Ng Ka Ling and Others v. Director of Immigration*[36] the HKCFA observed boldly that the courts of Hong Kong "undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the *Basic Law* and, if inconsistent to hold them to be invalid" and the Court ruled this process of review to be an "obligation".[37] This boisterous approach to the review of government decisions is both a modern development and one which has only partially extended to decision-making about the environment. Chan notes that before 1997 cases of judicial review were rare in Hong Kong because "parties and their lawyers seldom raised constitutional issues during proceedings."[38] However, the failure of judicial review to leave a mark on environmental decision-making processes has its roots deeply in Hong Kong's colonial past and the relegation of courts to a place beneath the Governor and his Mandarinate. The reason why judicial review of government decision-making on the environment in Hong Kong has such an anemic character relates, in large part, to how and to what extent the transplant of the common law occurred on this "barren island" on the North West edge of the South China Sea which was ceded to and garrisoned by the British under Chinese umbrage in the early 1840s.[39] The individual human rights discourse has been purposefully advanced by

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34 [2011] Hong Kong Court of Appeal 217; [2011] CACV 84/2011 (27 September 2011).

35 Christopher F. Forsyth *et al.*, *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: Oxford University Press, 2010); Thomas E. Kellogg, "Excessive Deference or Strategic Retreat? Basic Law Article 158 and Constitutional Development in Hong Kong", online: Hong Kong Journal January 2008, Issue 9 <http://www.hkjournal.org/PDF/2008_spring/5.pdf>; Tahirih V. Lee, "'*Apres Moi Le Deluge*'? Judicial Review in Hong Kong Since Britain Relinquished Sovereignty" (2001) 11:2 Ind. Int'l & Comp. L. Rev. 319-376.

36 [1999] 1 Hong Kong Law Reports & Digest 315.

37 *Ibid.* at 337.

38 Ming K. Chan, *China's Hong Kong Transformed: Retrospect and Prospects Beyond the First Decade* (Hong Kong: City University of Hong Kong Press, 2008) at 158.

39 Alain Le Pichon, *China Trade and Empire* (Oxford: Oxford University Press, 2006) at 40. In 1841, Lord Palmerston—when foreign secretary—wrote that Hong Kong was "nothing but a barren island without a house upon it".

the HKCFA in number of decisions on the *Basic Law*. However, the review of government decisions which have environmental implications has been lacking because of a perspective in courts that environmental review forestalls economic progress and that it is in the province of unreviewable government policy.

The Supreme Court Ordinances[40] confirmed that English law as it was in 1843 was the general law of the colony.[41] The confinement of the colony's Legislative Council to a select group of non-Chinese official members and a sprinkling of Chinese non-officials for several decades into the 20th century[42] indicate that racial exclusion, disciplined British self-interest and a policy of stemming all discord in formulation of public policy were the hallmarks of British rule in Hong Kong.[43] For many years, the colonial administration had the dubious distinction of usually conducting government within the law only because it could change it expeditiously through its hand-picked confidants on the Legislative Council.[44] As an example of the lack of constitutional constraint on colonial authorities, Chan gives the example of the *Emergency Regulations Ordinance* passed in 1922 which made legal the imprisonment of a person without trial.[45] This was illegal in England at the time but since 1845 Hong Kong followed the laws of England "except as inapplicable to local circumstances of the colony"[46] and this clause gave the Governor considerable power to decide what parts of the English law and constitutional tradition did or did not have force in the colony. Thus the Governor decided which parts of the law were available to the judiciary to rule on.

Almost from the very outset, and continuing on throughout the last quarter of the 19th century, the Supreme Court of Hong Kong played a role which was firmly under the supervision of the Governor. The Governor and Executive Council constituted a Court of Error and Appeal from the Supreme Court in matters of major commercial importance under the Supreme Court Ordinance of 1845.[47] As was usual, the Governor appointed the Chief Justice and Puisne Judges in accordance with the instructions of the Secretary of State but they did not have tenure—as they held office only at the Pleasure of Her Majesty and could be suspended by the Governor in the same manner "as other officers of the Crown".[48] As time went by the position of the Governor in relation to the court grew stronger, if anything. Under the *Supreme Court Ordinance* (No. of 1873) the Chief Justice of the Court could make rules and orders of the court but these were always to be with the approval of the Legislative Council[49] and the

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40 *Supreme Court Ordinance* No. 15 of 1844 and *Supreme Court Ordinance* No. 12 of 1873.

41 M. B. Hooker, "The Relationship Between Chinese Law and the Common Law in Malaysia, Singapore and Hong Kong" (1969) 28:4 Journal of Asian Studies 723-742 at 727.

42 T. C. Cheng, "Chinese Unofficial Members of the Legislative and Executive Councils in Hong Kong up to 1941" (1969) 9 Journal of the Hong Kong Branch of the Royal Asiatic Society 7-30.

43 Jermain T. M. Lam, "From a Submissive to an Adversarial Legislature: The Changing Role of the Hong Kong Legislative Council in the Political Transition" (1994) 22:1 Asian Profile 21-32.

44 Ming K. Chan, "The Legacy of the British Administration of Hong Kong: A View From Hong Kong" (1997) 151 China Quarterly 567-582 at 568.

45 *Ibid.*

46 S. 7 *Supreme Court Ordinance* No. 4 of 1845.

47 S. 29 *Supreme Court Ordinance* No. 4 of 1845.

48 S. 9 *Supreme Court Ordinance* No. 6 of 1845; s. 11 *Supreme Court Ordinance* No. 12 of 1873.

49 S. 24 *Supreme Court Ordinance* No. 12 of 1873 (but under s. 23 of the *Supreme Court Ordinance* No. 4 of 1845 the Chief Justice did not need approval of the Legislative Council).

Chief Justice had the power to strike a lawyer off the Rolls of the Court but this could not be exercised against the Attorney General or the Crown Solicitor.[50]

Wong notes that the common law system established by the British in Hong Kong has survived and thrived before and after the handover but that there has been hardly any scholarly discourse or public debate on the proper jurisprudence standards to be applied in the making and evaluation of Hong Kong legislation.[51] He argues that a primary question has been ignored, that is, whether Hong Kong law should be formulated, applied or evaluated with local jurisprudence principles and based on Asian values, or rather, whether the British legacy continues to have utility.[52] The question answered here is perhaps a more limited one and certainly more concerned with the past's effect on the present, namely, why is the British common law legacy of judicial review of legislation—particularly in the area of environmental standards—been until recently such an underwhelming force in Hong Kong? The answers lie not only in the role of the courts within the tradition of Hong Kong's Governor-dominated constitutional arrangements, but also in the filter placed on the jurisprudence of judicial review by the territory's governance structures and in the ways individuals were blocked from questioning government actions. Most Chinese of Hong Kong, in British eyes, simply lacked the legal personhood required to ask for judicial review.

A. *The Jurisprudence Problem*

Hulsebosh argues that the jurisprudence of Sir Edward Coke provided real answers to dilemmas faced by English subjects who went out to the colonies.[53] Not the least of these was a need for a modicum of legal protection from the arbitrariness of the local administration, if not the benefit of the whole panoply of English constitutional governance.[54] Coke's views were frequently cited by colonists and selectively applied in the late 18th century whenever their liberty seemed at risk from an incursion by *perfidious albion*. For instance, Coke's finding in *Calvin's case* (1608) that a Scot could hold land in England as well as in Scotland after the accession of James VI to the throne (as a Scot and an Englishman thereafter served the same king) was relied on subsequently by English settlers in the North American colonies to claim that the same principle extended to them.[55] In this way, the common law could be viewed as a force of reckoning in overseas colonies because of its strong affinities with reason and personal liberty and its claims to provide a sense commonality to all residing in British Empire possessions.

Understandably, many pioneers in the American colonies saw value in arguing that at least a minimalist imperial constitution had been brought by the English settlers to Virginia (or the "Old Dominion") when they landed there in 1607.[56] As

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50 *Ibid.*, s. 25.

51 Kam C. Wong, "Chinese Jurisprudence and Hong Kong Law" (2009) 45:3 China Report 213-239.

52 *Ibid.*

53 Daniel J. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence" (2003) 21:3 L.H.R. 439-482.

54 *Ibid.*

55 Jenny Wormald, "James VI and I: Two Kings or One?" (1983) 68:223 History 187-209.

56 Antoinette Sutto, "The Borders of Absolutism: William Penn, Charles Calvert and the Limits of Royal Authority" (2009) 76:3 Pennsylvania History 276-300.

the American colonies matured and began actively to express their independence, the common law of England and its proponents became potent antidotes to royal absolutism. Hulsebosh makes the normative point that, "in American legal culture, Coke is a champion of the common law, constitutional liberty, and judicial review".[57] In addition to *Calvin's Case* (1608), Hulsebosh notes that some colonists cited Coke's opinion in *Bonham's Case* (1610) for the proposition that parliamentary statutes violating fundamental law had no effect, and many legal scholars, if not without controversy, still trace the doctrine of judicial review back to Coke's claim that courts can declare legislation that violates fundamental law to be void.[58]

That the courts in colonial lands should act as robust and independent defenders of individuals against tyrannical promulgations of the Governor would seem to be encouraged by Coke's Second Part of the Institutes. Expounding as it does the supremacy of the Magna Carta over both contrary judicial and ministerial edicts, its pre-eminence in the canon of Whig jurisprudence is unassailable. However, Coke *did not* conceive of the common law as a means of preserving the rights of colonists against incursion by royal administration or its representatives. Hulsebosch contends that:[59]

> The medieval map of courts and dominion borders that Coke sketched in Calvin's Case and the Fourth Institute [the jurisdiction of the courts] was not internalized abroad; powerful statements of the liberties of Englishmen and judicial "controul" over parliamentary statutes were.

The selective reading of Coke may have served American colonists well in the late 18th century but Hong Kong's situation in the mid-19th century—as a tightly held funnel of opium profits on the doorstep of hundreds of millions of potential Chinese customers—made the development of a judiciary which second-guessed the Governor quite unlikely and the constraints place on the Court by the *Supreme Court Ordinances* (discussed above) made this quite clear. The governance of Hong Kong was from the beginning put outside of the orbit of Coke. If the constitutional contentions of British colonists about what he may be contended to have said about judicial review were irrelevant, much the same could be said of any Hong Kong Chinese contention to the same effect.

A further reason why the principle underlying *Bonham's case* was not fully received into the common law of Hong Kong is to do with the controversy surrounding the precedent's meaning and the uncertainty created by Coke's apparent inconsistency on the issue of parliamentary supremacy from one report to another. Put simply, there was a weak view of judicial review on offer in the jurisprudence itself. Coke averred in the report of *Bonham's case* that "the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void."[60] Yet in another report he speaks of the supremacy of parliament as being "so transcendent and absolute, as it cannot be confined, either for causes or persons, within

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57 *Supra* note 51 at 481.
58 *Supra* note 52 at 480.
59 *Ibid.*
60 8 Co. Rep. at 118a (C.P. 1610); (1610) 77 E. R. at 652.

any bounds."[61] This conundrum was identified by Helmholz who rejects all of the several competing explanations and proposes that the reference to 'the common right and reason' was in fact a reference unexceptionable in its time to the inferiority of statute law to natural law in the eyes of the judges.[62] This seems a questionable position to take considering that Coke regarded equally the courts of law and the king's ministers, should either dare to contradict the Magna Carta as "holden to nought".[63] The reported words of Coke in *Bonham's Case*, although strong, could refer to the ability of judges to correct mistakes through the process of judicial review when, on the face of a statute it is unfair, or they could go as far as empowering common law courts to render void statutes entirely on a ground of repugnancy.[64] In this light, the ruling of Fok J. in the *Zuhai Bridge Case* does not strike down the raft of statutes which empower the DEP to grant permits, but is a limited censure of the process taken in a particular case to issue a permit.

Given room to manoeuvre in the jurisprudence itself, courts in Hong Kong clearly joined a tradition of treading a path most in harmony with an authoritarian model of government. Courts simply declined opportunities for judicial review or instead only carried out minor corrections of legislation or executive decision-making; they did not void statutes or administrative decisions. The cautionary ruling of Fok J. in the *Zuhai Bridge Case* sits within this tradition. It is akin to a slap on the wrist. It is not a roadblock in nature because of the inevitability of the bridge's construction and the near-certainty that the DEP will follow the right administrative process a second time around. The prerogative of the DEP—to 'cook up' environmental impact reports which place the economic need for the bridge first and the applicant's respiratory health second—is not in doubt in the *Zhuhai Bridge Case*. However, in addition to the unreviewable Crown prerogatives of defence and foreign affairs we might as well add infrastructure developments with deleterious environmental impacts, such is the continuing judicial deference to the authoritarian model in Hong Kong whenever the Chief Executive wants to build something which carries with it large economic implications. Chan has shown that historically in Hong Kong "local governance and political power were monopolized by civil service administrator-bureaucrats" and that they dominated policy formation and decision-making. This leads to a conclusion that "with such a concentration of power and functions in its hands, the civil service also nurtured its own bureaucratic culture of elitism and even arrogance at the expense of public accountability and responsiveness".[65] This finding leads us to

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61 4 Co. Inst. 36.

62 Richard H. Helmholz, "Bonham's Case, Judicial Review and the Law of Nature" (2009) 1 Journal of Legal Analysis 325-354 at 345.

63 Coke, Second Part of the Institutes of Laws of England, 8.

64 This divergence of opinion is observable in the large literature on *Bonham's case*, including but not limited to, the following contributions: Raoul Berger, "Doctor Bonham's Case: Statutory Construction or Constitutional Theory?" (1969) 117 U. Pa. L. Rev. 521-545; Harold J. Cook, "Against Common Right and Reason: *The College of Physicians v. Dr Thomas Bonham*" in Allen D. Boyer, ed., *Law, Liberty, and Parliament: Selected Essays on the Writings of Sir Edward Coke* (Indianapolis: Liberty Fund, 2004) 127; Edward S. Corwin, "The "Higher Law" Background of American Constitutional Law" (1929) 42 Harv. L. Rev. 120-151; Charles M. Gray, "Bonham's Case Reviewed" (1972) 116 Proceedings of the American Philosophical Society 35-58.

65 Ming K. Chan, "The Legacy of the British Administration of Hong Kong: A View From Hong Kong" (1997) 151 China Quarterly 567-582 at 570.

observe that until quite recent times, the courts' deference to overly powerful government departments in the colonial era has been at the expense of properly developing processes of judicial review. Since 1997 there has been a strong development in the superior courts of Hong Kong of a wide raft of individual human rights. The action of Fok J. to quash the permits for the building of a section of the Zhuhai Bridge in the *Zuhai Bridge Case* would seem, in such a light, a timely reminder to the DEP to improve the accountability of its processes. Although the judge himself did add that the quashing of the Director's approval of the EIA Reports and the environmental permits for the bridge project is "not a judgment on the merits of the projects themselves".[66] Once the adverse environmental impact of the projects are properly assessed and presented in compliant environmental impact assessment reports, the decisions will be for the Director and not the court.[67] Yet it nevertheless shows that the court will intervene to ensure the *legality* of the government's decision (at least at first instance).

B. *The Subjecthood Problem*

One reason why an expansive reading of Coke has made little headway in Hong Kong is due in part to the historically doubted subjecthood of the Chinese inhabitants of Hong Kong. To seek judicial review of an administrative decision one must have *locus standi*.[68] To fully comprehend the slow development of merits-based judicial review in Hong Kong, one should not underestimate the fact that for the majority of the colony's history, the Hong Kong Chinese were neither recognised as British subjects, nor allowed to assert their interests in a spirit of pluralistic dispute. Coke himself had been at pains to distinguish between a denizen—an alien born person enfranchised by Letters Patent—and a native subject in terms of the range of rights available to each (the Cromwellians declared, for instance, that only a native subject could inherit English lands).[69] Thus, Coke supplied an idea which was to become a precondition to the exploitative success and authoritarian rule of the British Empire possessions in the Far East as elsewhere—that only a person born in England came within the pale of the constitution and its full guarantees (political participation and judicial review of decisions among them).

Hong Kong's 'them and us' governance is amply demonstrated by the fact that the census in 1921 showed that the majority of people in Hong Kong regarded China as their home, as only 15,645 of the urban population identified themselves as British subjects yet by 1931, 270,478 of the Chinese stated that they had been born in Hong Kong but, as Lennox Mills observed in 1941, "not even this could necessarily support the notion that they regarded it as their home, or that they identified as British

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66 *Supra* note 10 at 188.

67 *Ibid.*

68 For an environment-related discussion of standing see, for instance, Jane E. Schukoske, "Enforcing Environmental Laws in Sri Lanka through Fundamental Rights Litigation" (1996) 8 Int'l Legal Persp. 155-172.

69 Rachel Foxley, "John Lilburn and the Citizenship of 'Free-Born Englishmen'" (2004) 47 The Historical Journal 849-874 at 855.

subjects".[70] The Governor of Hong Kong in 1941 and 1946-7 Sir Mark Young remarked in correspondence to the Secretary of State in 1946, "[t]he geographical position of Hong Kong inevitably makes for a transient population subject to great influxes of the least desirable classes in times of economic and political trouble in China."[71] These transient Chinese were a British problem to be solved not through legal conversion into "non-white British" but through a series of shallow accommodations such as new housing developments in the New Territories. The bestowal by the British of almost limitless commercial freedom made for a minimalist state which concerned itself mainly with enforcement of contracts, the provision of policing and defence and preferential access to markets for British firms. The colonial government was criticised prior to the riots of 1966-7 for not improving Chinese social welfare or educational attainment at a rate commensurate with Hong Kong's booming economy.[72] Until that point their accommodations had maintained the Hong Kong Chinese within the physical polity of the colony if leaving them largely unrecognised in the colony's constitution.

Hong Kong's pre-handover history can be demonstrated to consist of specific and pragmatic measures rather than a programme of progressive constitutional enlargement by the British. This is why prior to 1997 there has been so little historical opportunity for local Chinese to be acculturated in a rights discourse in which it is possible to challenge the government, or that one in which an individual will get a fair go in the courts if the effort to assert a right is made. It is also why judicial review on pressing matters of public concern such as air pollution in *Clean Air Foundation* and the *Zuhai Bridge Case* have had no local common law lineage from which to draw inspiration. Apart from the aberrant loss of the DEP in *Shiu Wing Steel*[73] and the at first instance success in the *Zuhai Bridge Case*, all the other decisions have simply ruled that government standards on pollution are matter of government policy and not challengeable in the courts: *Ng Ngau Chai v. The Town Planning Board*,[74] *Kowloon-Canton Railway Corporation v. Director of Environmental Protection*[75] and *Clean Air Foundation*.[76]

IV. Institutional Defects of Pollution Control in Hong Kong

To this point we have considered the extent to which the failings of judicial review in Hong Kong can be explained by its colonial past and the governance structures it perpetuated. However, in order to understand environmental protection (or the lack of it) in Hong Kong, one needs to appreciate the origin of the economic and political philosophies which make it work. There has always been a lack of political

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70 Lennox A. Mills, *British Rule in Eastern Asia*: *A Study of Contemporary Government and Economic Development in British Malaya and Hong Kong* (London: Oxford University Press, 1942; Minneapolis: University of Minnesota Press, 1942) at 389.

71 W. M. Roger Louis, "Hong Kong: The Critical Phase 1945-1949" (1997) 102:4 The American Historical Review 1052-1084 at 1060.

72 Gary Ka-wai Cheung, *Hong Kong's Watershed: The 1967 Riots* (Hong Kong: Hong Kong University Press, 2009) at 4.

73 *Supra* note 7.

74 HCAL 64/2007 (4 July 2007).

75 EIA Appeal Board Appeal No. 2/2000 (20 July 2001).

76 *Supra* note 11.

will to implement environmental policy and law in Hong Kong.[77] It was not until the late 1970s, that the government began to take the initiative in mobilising political and economic resources to improve the environment. During the early part of its history, there was an institutional attitude that "a government governs best that governs least". As the Hong Kong historian, Geoffrey Sayer, frames it, the approach towards environmental protection of the late 19th and early 20th century was utterly passive, suggesting that neither the English nor Chinese communities in the colony were interested in investing in the preservation of public areas.[78]

Even by the 1980s, at the eve of the enactment of the *Air Pollution Control Ordinance* (Cap. 311) ("*APCO*"), Hong Kong legislators argued that minimal government intervention was optimal because the government had no expertise in environmental affairs.[79] In particular, they were concerned that extensive governmental intervention would adversely affect Hong Kong's economic growth and interfere with the traditional laissez-faire characteristic of the economy.[80] Hence, lawmakers at the time overlooked the social costs which pollution imposed on the community, rather than seeking to legislate a suitable balance between competing social and business interests. As a result, legislations have been drafted in a way where the authority responsible is given wide discretion to define standards and enforce compliance, as can be seen under the *APCO*. However, this has often led to confusion even amongst environmental authorities themselves as to how the environmental objectives laid down under these Ordinances can be achieved. An example is the *Water Pollution Control Ordinance* (Cap. 358), where the law provides no specific control over treatment technologies but provides a range of published standards which are imposed regardless of the origin of the effluent. As one commentator puts it, such "flexible" nature of the legislation has indeed hampered enforcement.[81]

From an administrative law perspective, one may argue that such discretions enjoyed by public bodies are not unrestrained and that their decisions are subject to judicial review if the authority or secretary in question commits "Wednesbury unreasonableness". Yet in reality, cases that have been brought before courts have illustrated how limited the law (or the courts) can be in enforcing legislation. As Woolf put it, "the High Court has consistently turned its face against considering the merits of the environmentally related decision, but instead has confined its attention to scrutinizing the procedural process adopted by Ministers in reaching their decision".[82] In Hong Kong, the judiciary often views an environmental claim similarly, as a technical or procedural matter rather than substantive one.[83] That is, the courts of Hong Kong overlook the environmental substance of the problem while emphasising the procedural steps of a case. The absence of judicial inquiry into the

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77 Bryan Bachner, "The Case for an Environmental Law Court in Hong Kong (Part 1)", online: Hong Kong Lawyer <http://www.hk-lawyer.com/InnerPages_features/0/967/2003/3>.

78 Geoffrey R. Sayer, *Hong Kong 1862-1919: Years of Discretion* (Hong Kong: Hong Kong University Press, 1975) at 57.

79 See Hong Kong Hansard, 27 April 1983 at 850-863.

80 *Ibid.*

81 Paul R. Holmes, "Policies and Principles in Hong Kong's Water Pollution Control Legislation" (1992) 26:7 *Water Science Technology* at 1912-1913.

82 Sir Harry Woolf, "Are the Judiciary Environmentally Myopic?" (1992) 4 J. Envtl. L. 1-14.

83 Bryan Bachner, "The Case for an Environmental Law Court in Hong Kong (Part 2), online: Hong Kong Lawyer <http://www.hk-lawyer.com/InnerPages_features/0/992/2003/4>.

complex substantive issues of these cases will adversely affect good environmental decision-making because it will discourage parties with legitimate environmental claims from bringing cases in the long run.[84] There is a fear that in a small community like Hong Kong, formal complaints against a regulatory authority may bring future burdens. However, it will be noted later in the article that there are reasons to believe that judicial review can be used to good effect against air pollution. Having noted a number of detractive features from a potential anti-pollution litigant's point of view, this article does outline a more saguine case in favour of judicial review in its closing sections.

V. Governance Roles and Scope of Judicial Review

Defining the exact role of a judge in a common law system is key to understanding one's function in resolving environmental claims, in Hong Kong as elsewhere. The separation of powers doctrine posits that good governance is a matter of each arm of government playing their correct role and judges not straying from what they do best, or other arms of government compromising the independence of the judiciary. On this point outgoing Chief Justice Andrew Li said, "[e]veryone, including all organs of government and all public officials, are subject to and equal before the law. The Hong Kong system involves checks and balances between the Executive, the Legislature and the Judiciary."[85]

Brennan observed the contrast between the system Li describes and the one on the Mainland, where there are no checks and balances on the supremacy of the Chinese Communist Party (CCP) and the senior leadership of the Party. In the People's Republic of China (PRC), the People's Congress is charged with responsibility to review the function of the other three branches of government: the Executive, the Judiciary and the Procurate.[86] Of course, this refers to art. 3 of the *Constitution of the People's Republic of China (1982)*.[87] As a practical matter, the PRC model emphasises that the higher echelons of party leadership control the lower organs of government and that the Executive is not fettered by the Judiciary. On this particular point, Hong Kong and its judiciary prefers to count itself as different from the Mainland. For instance, in 2008, when Vice President Xi Jinping visited Hong Kong, he called on Tsang's administration, the Legislative Council of Hong Kong (LegCo) and the judiciary to "understand and support" each other and, as a result of this pronouncement, he was roundly criticised in the local media for not understanding the

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84 *Ibid.*

85 "Chief Justice calls for continued judicial independence in Hong Kong", online: The Free Library <http://www.thefreelibrary.com/Chief+justice+calls+for+continued+judicial+independence+in+H.K.-a0216283888>.

86 Sir Gerard Brennan, "The Purpose and Scope of Judicial Review" in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford: Oxford University Press in association with the Legal Research Foundation, 1986) at 18.

87 Article 3: "The state organs of the People's Republic of China apply the principle of democratic centralism. The National People's Congress and the local people's congresses at different levels are instituted through democratic election. They are responsible to the people and subject to their supervision. All administrative, judicial and procuratorial organs of the state are created by the people's congresses to which they are responsible and under whose supervision they operate. The division of functions and powers between the central and local state organs is guided by the principle of giving full play to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities."

independent status of the judiciary, which it asserted is not to be regarded as a part of the administration.[88]

The absence of notable tensions between LegCo, the Chief Executive and the Judiciary on the air pollution policy at least indicates that Xi Jinping might even have underestimated how much implicit understanding there has actually been between the three organs of government on certain issues. His *faux pas* was to refer to it. Putting to one side local proclamations of judicial independence, Brennan identifies the exact role of the courts in a common law system in regard to reviewing the decisions of policy makers, "[j]udicial review, in our system, is and is intended to be a fetter on the Executive's pursuit of its policies; it is intended to make the Courts the arbiter of legal propriety in the process of administration."[89]

What, then, is the scope of judiciary's review of "legal propriety in the process of administration" and why, in Hong Kong's case, such a scope of action cannot (whatever its extent) include government policy/inactivity on air pollution? Brennan himself qualified his concept by adding that judicial review is not a process designed to "straitjacket" the Executive or to supplant its role with what judges believe to be "correct or preferable".[90] Brennan succeeded Lord Hoffmann as a non-permanent judge on the Court of Final Appeal in 2000 and it is unsurprising that both are seasoned exponents in determining when judicial review is apt. Brennan's comments in 1982 are echoed by Lord Hoffmann's obiter in *Johnson v. Unisys Ltd.* that, "[t]he courts may proceed in harmony with Parliament but there should be no discord."[91] If this view is fully accepted then it is unfair to criticise Hong Kong judges for failing to tackle air pollution—quite simply, it is not their job to do so. Hartmann J. pointed out that art. 62 of the *Basic Law* specifies that it is the government's role to formulate and implement policies and that art. 48 provides that the Chief Executive decides to the extent to which such policy is to be executed.[92] However, judicial activism has been a driver of environmental policy in common law jurisdictions with similar governance schemes. For instance, in India the bench has issued injunctions resulting in lower vehicle emissions and the closing down of several high emission factories. Lal and Jha note that such relief "gives Courts the freedom to innovate upon their decision depending upon the gravity and specific nature of the case. This enables courts to order prompt remedial measures and suggest broad guidelines to future policy making."[93] Through injunctions judges do have a power to control what polluters can and cannot do—but it is not a question of the remedy being strangely absent from the repertoire of the Hong Kong judiciary so much as it is one of the local environmental lobby not asking courts to rule on specific cases of emission "exceedances."

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88 Frank Ching, "Hong Kong Treads the Democracy Tightrope" *The Japan Times* (21 April 2010), online: The Japan Times Online <http://search.japantimes.co.jp/cgi-bin/eo20100421fc.html>.

89 *Supra* note 83.

90 *Ibid.*

91 [2001] UKHL 13 at 37, [2001] 2 All E.R. 801 (H.L.).

92 *Supra* note 11 at 31.

93 Pranay Lal & Veena Jha, "Judicial Activism and the Environment in India: Implications for Transnational Corporations", online: (1999) Occasional Paper No. 6, UNCTAD/CBS Project: Cross Border Environmental Management in Transnational Corporations <http://openarchive.cbs.dk/bitstream/handle/10398/6956/lal_judicial.pdf?sequence=1> (last accessed: 6 October 2011).

VI. Conclusion

As can be seen from the above commentary, there are difficulties—both historical and institutional—in combating pollution in Hong Kong. As the community becomes ever-more informed and demanding, challenges against environmental regulators by NGOs or other community groups will become more frequent. Even business groups such as the Business Environment Council have expressed concerns on air pollution and how that it may adversely impact on the operation of businesses and create competitive disadvantage for Hong Kong.[94]

Hong Kong's history was dominated by an all-powerful Governor supported by executive and civil service elites. Its judiciary has historically been an organ of administration of government rather than a check and balance on the decisions of government or a protector of affected individuals. This has been because of the role conceived for the court by the Governor and the incomplete reception of fundamental jurisprudential concepts underpinning judicial review. The Chief Executive has replaced the Governor and the DEP has replaced the Mandarinate but both do business in the same way as their forebears. However, Fok J. in the *Zhuhai Bridge Case* may prove to be a precious and timely indication that a more procedurally vigilant judiciary is on the horizon. At the very least, the Bench can play a role to demand accountability in government decision-making as long as broader-reaching democratic reforms are forestalled in Hong Kong. The experience of Hong Kong, of course, has been situated within the broader discourse of how English constitutional precepts related to Crown colonies which were far removed from the mother country. The common law, although enduring in Hong Kong, nevertheless shaped itself around local political exigencies not the least of which was an all-powerful Governor and a merely consultative local assembly usually comprised of community dignitaries and business leaders. Hong Kong's elements of governance are not greatly different to this day. However, what is different is the expectations of members of the public that they will be protected from air pollution by sensible laws which are enforced by agencies charged with responsibility for public well-being. It is a welcome development that the judiciary is slowly adjusting the government to public sentiment.

In *Chief Constable of the North Wales Police v. Evans*[95] Lord Hailsham made the point that judicial review was designed to protect the individual against abuse of power by administrative bodies and that it was not up to judges to take away the powers and discretions vested by law in policy makers.[96] The standard dichotomy of subjects of judicial review was provided by Lord Hoffmann in *R (on the application of Alconbury Developments Ltd.) v. Secretary of State for the Environment*.[97] His Honour on the one hand, distinguished between matters of "policy or expediency" in which case safeguards on the decision-making process were irrelevant and judges had no business interfering in and, on the other, "findings of fact, or the evaluation

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94 Jefferson P. VanderWolk, "Green Tax Measures for Hong Kong: A Policy Proposal" (Paper presented in the 2nd International Conference of the Taxation Law Research Program, Asian Institute of International Financial Law, Faculty of Law, Hong Kong University, 29 January 2010) [unpublished].

95 [1982] 1 W.L.R. 1155 (H.L.).

96 *Ibid.* at 1160 (H.L.).

97 [2001] UKHL 23; [2001] 2 W.L.R. 1389.

of facts, such as arise on the question of whether there has been a breach of planning control, that the safeguards are essential for the acceptance of a limited review of fact by the appellate tribunal. In the *Zhuhai Bridge Case*, Fok J. is to be celebrated for entering into the spirit of these words and conducting a review of the factual basis on which the DEP issued its permits.

A major review of environmental laws is needed urgently in Hong Kong. One possibility is to consolidate all aspects of pollution control under a single legislation or regulator such as the *Environment Act 1995* in the UK. This could make enforcement more concerted. Another alternative which some commentators have suggested is the establishment of an environmental law court that specialises in adjudicating environmental disputes. A good example of this is the Land and Environment Court in New South Wales, Australia, which has been in operation since 1979 and has become fully integrated into the New South Wales judicial system. It is made up of judges and technical commissioners and the jurisdiction includes administrative appeals, civil enforcement, environmental offence prosecutions and appeals from lower courts. The Court's power entails evaluating the objectives or merits assessments for planning and development, valuation of land and environmental protection principles. The advantage of such a court is that disputes can be dealt with more swiftly as they are heard by professionals specialising in environmental issues, thus saving both time and costs for the parties. As Hong Kong is in the midst of reviewing its environmental laws as well as updating its AQOs, there is probably no better time than now to introduce thorough-going reforms. The major problem of environmental laws in Hong Kong is the fragmentation of different environmental problems under different environmental statutes and an over-reliance on these outdated enactments. As a result, Hong Kong has at least nine appeal boards that are related to different environmental matters. Each board is made up of a variety of panelists who are appointed to hear disputes on an occasional basis and these boards do not enjoy the same privileges and powers as a court of record.

The co-author of the HKU study mentioned at the outset of this article, Dr. Lai Hak-kan, said that "[t]here is an urgent need for the government to adopt a scientifically valid approach to the setting of air quality regulations which will protect population health."[98] Judges are expert in making decisions on whether government actions are within bounds. But will the Court of Final Appeal step up? If it does, the embarrassment of Hong Kong's air, when properly evaluated, might create political momentum to make changes in the way business is done in the Region. If the local environmental lobby avoids pleadings about the politics of pollution it can use its resources more effectively to seek judicial review of specific permissions which the Environmental Protection Department gives to polluters.

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[98] *Supra* note 3.