

**THE “RIGHT TO HEALTH” AND “RIGHT TO LIFE”:
POSITIVE OBLIGATIONS FOR CONTROLLING AIR
POLLUTION IN HONG KONG IN CLEAN AIR FOUNDATION
v. HKSAR**

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INTRODUCTION TO THE RIGHTS BASED APPROACH IN CLEAN AIR
FOUNDATION V. HKSAR

The case *Clean Air Foundation v Hong Kong Special Administrative Region* highlighted the first time an environmental organization used a rights-based approach to compel the Hong Kong Special Administrative Region (“HKSAR”)—Hong Kong’s government—to mitigate air pollution in Hong Kong. While the case ultimately failed on the merits, Clean Air Foundation did set a prima facie standard for the right to life and the right to health in the environmental context. This paper analyzes how this case

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builds upon rights-based approaches in Hong Kong litigation, but for the first time in the environmental context. First, the paper discusses the political, social, and environmental issues in Hong Kong. Second, the paper reviews the core human rights instruments and obligations in international law. Third, the paper analyzes the HKSAR’s legal framework and the rights-based approach. Fourth, the paper discusses the Clean Air Foundation case and how it established the prima facie standard for the right to life and right to health. Finally, the paper explores different approaches to rights-based environmental protection in Hong Kong, and discusses other rights-based environmental protection cases from around the world.

I. CONTEXT OF HONG KONG SPECIAL ADMINISTRATIVE REGION (HKSAR)

A. *The Political Environment in the HKSAR*

Hong Kong’s air pollution has gained significant domestic and international attention.¹ While the Hong Kong Government (“Government”) adopted Air Quality Objectives (“AQOs”) 25 years ago, the Government repeatedly failed to update them in accordance with World Health Organization (“WHO”) standards.² Beginning in 1997, Government leaders have made political promises to improve the air quality but have fallen well short of creating targets to meet WHO standards.³ Currently,

1. *HK Shares Air Pollution Concerns with WHO*, STANDARD, (Dec. 20, 2012, 4:54PM), http://www.thestandard.com.hk/breaking_news_detail.asp?id=29603&icid=3&d_str=

2. HONG KONG ENVTL. PROT. DEP’T, AIR QUALITY HEALTH INDEX, <http://www.aqi.gov.hk/en.html> (last updated Jan. 27, 2014). The Government monitors air quality hourly at twelve general and three roadside monitoring stations and publishes the data online and through a smartphone application to be available to the public. *Increased transparency on air quality will bring greater urgency for answers*, SOUTH CHINA MORNING POST (Jan. 4, 2014, 3:38AM), <http://www.scmp.com/comment/insight-opinion/article/1396984/increased-transparency-air-quality-will-bring-greater>.

3. Rachel E. Stern, *Hong Kong Haze: Air Pollution as a Social Class Issue*, 43 ASIAN SURVEY 780, 793, 800 (2003), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2791&context=facpubs> (illuminating on the relationship between air pollution and income inequality in Hong Kong, which was addressed in Chief Executive Tung Chee-Hwa’s 1999 and 2000 annual policy speeches in which the Chief Executive vowed to clean up the air pollution. Later former Chief Donald Tsang announced in May 2011 that his administration planned to have new AQOs in place by the end of 2011. Finally, in March 2013, Chief Executive CY Leung announced his own plan to reduce air pollution and improve air quality in his policy report, “A Clean Air for Hong Kong.”). See also MIKE KILBURN & CHRISTINE LOH, PRINCIPLES AND MEASURES TO IMPROVE AIR QUALITY: POLICY RECOMMENDATIONS FOR A NEW ADMINISTRATION (Civic Exchange Jan. 2012), available at http://dl.dropboxusercontent.com/u/2439304/civixexchange/120112PolicyRecommendations_en.pdf (reporting on the air pollution trends in Hong Kong during the 2005–2012 Donald Tsang Administration). See also HONG KONG ENVTL. PROT. DEP’T, A CLEAN AIR PLAN FOR HONG KONG,

Chief Executive Leung Chun-ying (“CY Leung”) has made his own political promises to alleviate air pollution and implemented a new Air Quality Health Index (AQHI) in January 2014.⁴ With so many political promises and little action, citizens of Hong Kong have become increasingly frustrated with the lack of progress and skeptical that any changes would actually work to curb the severe air pollution.⁵

Frustrated with the lack of political action, the Clean Air Foundation and Mr. Gordon David Oldham filed a lawsuit in the Court of First Instance in Hong Kong. They argued that because of the air pollution, the Government has violated human rights as protected under the Basic Law, the Basic Law’s Bill of Rights, and relevant provisions within international treaties, including the “right to life” and the “right to health.”⁶ Other jurisdictions have experienced rights-based environmental cases, but *Clean Air Foundation* was the first public interest litigation of this kind in Hong Kong.⁷ While symbolic, the case established a legal precedent for a rights-based approach to environmental protection through judicial review. This case created the legal space to expand the scope of these rights for protecting the environment.

i. Socio-Economics, Politics and the Colonial Legacy

Today, the HKSAR contains a population of almost 7.2 million people within 1,104 square kilometers and 18 political districts.⁸ Hong

(March 2013), http://www.enb.gov.hk/en/files/New_Air_Plan_en.pdf (outlining Chief Executive CY Leung’s new AQHI program).

4. Michelle Yun, *Hong Kong Will Ban High-Polluting Vehicles to Fight Smog*, BLOOMBERG BUSINESSWEEK (Dec. 19, 2012), <http://www.businessweek.com/news/2012-12-19/hong-kong-will-ban-high-polluting-vehicles-in-bid-to-fight-smog> (describing Chief Executive CY Leung’s ban on the most high-polluting vehicles, his administration’s plan to provide subsidies to phase out diesel-fueled buses and trucks and set new air quality standards for 2014); *Increased transparency*, *supra* note 2.

5. Natasha Khan, *H.K. Is Dirtiest Financial Center in the World*, BUSINESSWEEK (Mar. 22, 2012), <http://www.businessweek.com/news/2012-03-21/hong-kong-as-dirtiest-global-financial-center-is-tsang-s-legacy> (describing how the increasing health concerns over air pollution have started to cause Hong Kong to lose its prospective economic talent, including financiers, to its more eco-friendly neighbor, Singapore).

6. *Clean Air Found. v. Hong Kong Special Admin. Region*, [2007] 35 H.K.C.F.I. 757, ¶ 5, 16–17 (H.K.) [hereinafter *Clean Air Found. v. HKSAR*], available at <http://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2007/757.html?stem=&synonym0ms=&query=clean%20air%20foundation>.

7. *Id.* ¶ 9.

8. CENT. INTELLIGENCE AGENCY, *CIA World Factbook: Hong Kong*, <https://www.cia.gov/library/publications/the-world-factbook/geos/hk.html> (last visited Mar. 9, 2014) (documenting that the vast majority of citizens and residents in Hong Kong are native Chinese (93.6%), with Filipinos (1.9%), Indonesians (1.9%) and internationals (2.6%) comprising the rest of the population).

Kong has a sophisticated, modern service-based economy and a high quality of living. It has a fairly stable and wealthy free-market economy based primarily on international trade and finance (92% services industry).⁹ Additionally, the HKSAR comprises of an administrative government with an executive council, judiciary, and a legislative council.¹⁰ Hong Kong is considered a partial democracy.¹¹

After 155 years of rule, the British government and the People’s Republic of China (“China”) formally signed the Joint Sino-British Declaration on December 19, 1984 to return Hong Kong to China on July 1, 1997.¹² Before the handover, the British and the Chinese designed the “one country, two systems” governance structure that would administer the HKSAR.¹³ The Basic Law of Hong Kong was negotiated and approved in March 1990 by China’s National Peoples Congress.¹⁴ The British colonial legacy in conjunction with the political status quo created a government that favors the business class and economic elites.¹⁵

ii. The Natural Environment

Simply stated, Hong Kong is a concrete jungle encompassed by numerous protected areas, breath-taking views, towering skyscrapers, and densely populated cities.¹⁶ Comprised of more than 200 islands, the

9. *Id.* (noting Hong Kong has a gross domestic product (“GDP”) purchasing power parity (“PPP”) per capita of \$50,900 and GDP PPP of \$365.6 billion and is ranked thirty-sixth in the world for GDP PPP and fourteenth in the world for GDP PPP per capita).

10. Christopher Tung, *Low Carbon Economy for Hong Kong: Legal Assessment Paper*, BUS. ENV’T COUNCIL, CLIMATE CHANGE BUS. FORUM 7 (July 2010), <http://www.climatechangebusinessforum.com/page/file/334/download>.

11. THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA, *infra* note 14, at Ch. 1, art. 9, available at http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf, (last visited March 10, 2014) [hereinafter BASIC LAW] (proclaiming Cantonese and English are the official languages and all government documents are published in both languages. Article 9 states, “[i]n addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region.”); see also *CIA World Factbook: Hong Kong*, *supra* note 8.

12. *1984: Britain Signs Over Hong Kong to China*, BBC NEWS (Dec. 19, 2005), http://news.bbc.co.uk/onthisday/hi/dates/stories/december/19/newsid_2538000/2538857.stm (stating the HKSAR was a former British colony, first occupied in 1841 and formally ceded by China in 1842).

13. *Id.*

14. BASIC LAW at Ch. 1 art. 5 (indicating the PRC’s socialist governance system will not apply for fifty years, and preserving existing rights and freedoms before the handover, including international human rights. “The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.”); see also *CIA World Factbook: Hong Kong*, *supra* note 8.

15. Stern, *supra* note 3, at 793, 795–97.

16. *Hong Kong’s Environment: Conservation*, HONG KONG ENVTL. PROT. DEP’T, (July 3, 2012),

geography of Hong Kong contains steep mountainous terrain, hills and slopes, and lowlands.¹⁷ Also, Hong Kong has rich biodiversity living in a sub-tropical monsoon climate with hot and wet springs and summers, warm and dry falls, and cool and humid winters.¹⁸

iii. Hong Kong's Air Quality Standards and Sources of Pollution

Worldwide, the number of deaths caused by air pollution reached 3.2 million people in 2010, an increase from 80,000 deaths in 1990.¹⁹ A recent Lancet study demonstrated that air pollution kills more people around the world than cholesterol, particularly in Asia.²⁰ In Hong Kong, between January 1, 2005 and December 31, 2011, the Hedley Environmental Index recorded 7,240 premature deaths, 528,388 avoidable hospital bed days, and 49.26 million avoidable doctor visits caused by the air pollution.²¹ Additionally, the air pollution results in more than 3,000 premature deaths per year.²²

With the rich, developed economy of Hong Kong, environmental advocates expect better environmental quality in the HKSAR.²³ Since 2007, the air quality has continuously declined.²⁴ In 2011, a total of 175 days had very high pollution levels, more than two times the number in 2007.²⁵ The Hedley Environmental Index measured fifty-nine “clear sky” days with air

http://www.epd.gov.hk/epd/english/environmentinhk/conservation/conservation_maincontent.html. (explaining approximately 43% of Hong Kong's land area falls under statutes for land protection and conservation).

17. *CIA World Factbook: Hong Kong*, *supra* note 8.

18. *The Natural Environment, Plants & Animals in Hong Kong*, GOV'T H.K., <http://www.gov.hk/en/residents/environment/conservation/naturalenvplantsanimals.htm> (last visited Mar. 8, 2014) (noting Hong Kong is home to approximately 3,000 species of flowering plants [including 120 different kind of orchids]; more than 300 types of native trees; around 2,000 types of moth, 110 types of dragonfly, and 230 butterfly species). *Managing Mai Po Nature Reserve*, WWF-H.K., <http://www.wwf.org.hk/en/whatwedo/conservation/wetlands/managemaipo/> (last visited Mar. 8, 2014) (describing Hong Kong's biologically diverse 1,500-hectare Ramsar Wetlands site at Mai Po Nature Reserve, which contains one of the largest bird migrations in the world); *see also CIA World Factbook: Hong Kong*, *supra* note 8 (documenting Hong Kong's rich and diverse biology).

19. Brad Plumer, *Air Pollution Now Kills More People than High Cholesterol*, WASH. POST (Dec. 20, 2012, 12:31PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/20/air-pollution-now-kills-more-people-than-high-cholesterol/>.

20. *Id.*

21. KILBURN & LOH, *supra* note 3, at 1, 3.

22. Yun, *supra* note 4.

23. Berry Fong Chung Hsu, *Constitutional Protection of a Sustainable Environment in the Hong Kong Special Administrative Region*, 16 J. ENVTL. L. 193, 194 (2004) (“The HKSAR may be considered as a developed country with a third world environment.”).

24. Yun, *supra* note 4.

25. *Id.*

quality levels below WHO short-term standards.²⁶ In November 2012, the Government released an audit report (“The Report”) on monitoring and reporting of air quality and the implementation of air-quality improvement measures. The Report gave an unfavorable review of current conditions.²⁷

Local and regional sources cause the air pollution in Hong Kong. Locally, the main air pollutants include PM₁₀, PM_{2.5}, Volatile Organic Compounds (“VOCs”), NO_x, SO_x, and ozone (O₃), primarily caused by roadside pollution and power plants.²⁸ One of the most successful efforts by the Government to curb emissions was to require coal-fired power plants to install flue gas desulfurization (“FGD”) retrofits, which reduced sulfur emissions by 98 percent.²⁹ Other policy initiatives included using cleaner energy via natural gas and renewables, as well as implementing energy conservation efforts.³⁰ Also, the HKSAR has released draft regulations to phase-out older diesel commercial vehicles (“pre-Euro IV”) to improve roadside emissions.³¹ These trucks account for 17% of the road traffic but contribute 74% of total particulate emissions.³²

Regionally, beginning in 2002, the HKSAR and Guangdong Provincial Government’s Department of Environmental Protection collaborated over reducing air pollution in the Pearl River Delta establishing the Pearl River Delta Regional Air Quality Monitoring Network.³³ Most of the efforts focus on controlling emissions from vehicles

26. *The Cumulative Effect from Midnight to Three O’clock Damage Due to Air Pollution*, HEDLEY ENVTL. INDEX, <http://hedleyindex.sph.hku.hk/html/tc/index.php> (last visited Feb. 27, 2014).

27. HONG KONG ENVTL. PROT. DEP’T: AUDIT COMM’N, MONITORING AND REPORTING OF AIR QUALITY ¶ 6 (2012), available at http://www.aud.gov.hk/pdf_e/e59ch01.pdf (stating, in 2011, the average concentration level of nitrogen dioxide [NO₂] in Hong Kong was 279% higher than Sydney, 47% higher than London, and 36% higher than New York. For PM₁₀, the pollutant levels are 220%, 100%, and 153% higher than those cities, respectively). See also *Hong Kong Government Audit Slams Air Quality*, WALL ST. J. (Nov. 14, 2012, 9:04 PM), <http://blogs.wsj.com/chinarealtime/2012/11/14/hong-kong-government-audit-slams-air-quality/> (noting Hong Kong has consistently failed to meet its air quality goals since 1987).

28. KILBURN & LOH, *supra* note 3, at 2; HEDLEY ENVTL. INDEX, *supra* note 25.

29. KILBURN & LOH, *supra* note 3, at 11.

30. *Id.* at 11–12.

31. HONG KONG ENVTL. PROT. DEP’T, AIR POLLUTION CONTROL ORDINANCE (CAP. 311) 1 (2013), available at http://www.legco.gov.hk/yr13-14/english/subleg/brief/160_brf.pdf.

32. *Joint Petition by Clean Air Network with Medical Professionals, Patients’ Organisations, Public Health Sector to Urge Old, Polluting Vehicles Be Eliminated in Order to Protect Public Health*, CLEAN AIR NETWORK (Nov. 28, 2013), <http://www.hongkongcan.org/eng/2013/11/joint-petition-by-clean-air-network-with-medical-professionals-patients-organisations-public-health-sector-to-urge-old-polluting-vehicles-be-eliminated-in-order-to-protect-public-health-2/>.

33. *Hong Kong Air Pollutant Emission Inventory: 2012 Emission Inventory*, HONG KONG ENVTL. PROT. DEP’T, http://www.epd.gov.hk/epd/english/environmentinhk/air/data/emission_inve.html#3 (last visited Mar. 31, 2014) (explaining the respective governments established emission reduction targets by the metric tonnes); see also *Pearl River Air Data Quality*, HONG KONG ENVTL. PROT. DEP’T, (Aug. 2012),

and power plants, as well as implementing controls on industrial sources of air pollution.³⁴ Based on the data, the Pearl River Delta average emissions were reduced for NO_x, VOCs and respirable suspended particle (“RSP”) (also labeled as PM₁₀) pollution decreased while emissions increased for SO_x (likely caused by coal-burning power plants).³⁵ The air quality in Hong Kong, however, had modest decreases in SO_x, PM₁₀ and increases in NO_x, most likely caused by roadside pollution.³⁶ In addition, the Regional Air Quality Monitoring Network released the 2013 monitoring results from January to June in October 2013.³⁷ The Pearl River Delta initiative and the HKSAR make the air quality information publically available.

Furthermore, the HKSAR government understands the severity of the air pollution problem and its impact on health and living standards. On December 30, 2013, the HKSAR’s Environmental Protection Department launched an air quality index, called the Air Quality Health Index (“AQHI”), to replace the existing Air Pollution Index (“API”).³⁸ The new AQHI will release information based on short-term health risks related to air pollution levels caused by concentrations of NO_x, SO_x, PM_{2.5} and PM₁₀, and ozone.³⁹ The index will be made available publically and on smart-phones (“HK AQHI”) to alert and inform the public on the health risks of air pollution on any given day.⁴⁰ The new AQHI changes the way Hong

<http://www.gov.hk/en/residents/environment/air/raqi.htm> (providing information on the monitoring network for Pearl River Delta).

34. *Pearl River Air Data Quality*, *supra* note 33.

35. See PEARL RIVER DELTA REG’L AIR QUALITY MONITORING NETWORK, GUANGDONG PROVINCIAL ENVTL. MONITORING CTR. & HKSAR’S ENVTL. PROT. DEP’T, A REPORT OF MONITORING RESULTS FOR THE PERIOD BETWEEN JANUARY AND JUNE 2012, http://www.epd.gov.hk/epd/english/resources_pub/publications/files/PRD2012_1-6e.pdf (last visited Mar. 31, 2014) (providing January through July 2012 PRD regional data). See also KILBURN & LOH, *supra* note 3, at 11 (illustrating via chart the Pearl River Delta’s progress in emission reduction).

36. Press Release, Clean Air Network, New PRD Report Shows Hong Kong’s Worsening NO₂ Is Our Own Fault (Apr. 29, 2013), available at <http://hongkongcan.org/eng/2013/04/press-release-new-prd-report-shows-hong-kongs-worsening-no2-is-our-own-fault/>.

37. Press Release, Env’tl. Prot. Dep’t, Regional Air Quality Monitoring Network Results for the First Half of 2013 (Oct. 31, 2013), http://www.epd.gov.hk/epd/english/news_events/press/press_131031a.html (explaining the network monitors air pollution in the Pearl Delta River area, releasing results every six months. The results for the entire 2013 year will be available in April 2014.); PEARL RIVER DELTA REG’L AIR QUALITY MONITORING NETWORK, GUANGDONG PROVINCIAL ENVTL. MONITORING CTR. & HKSAR’S ENVTL. PROT. DEP’T, A REPORT OF MONITORING RESULTS FOR THE PERIOD BETWEEN JANUARY AND JUNE 2012, http://www.epd.gov.hk/epd/english/resources_pub/publications/files/PRD2012_1-6e.pdf (last visited Mar. 31, 2014).

38. Press Release, Env’tl. Prot. Dep’t, Air Quality Health Index to be Launched on December 30 (Dec. 6, 2013), <http://www.info.gov.hk/gia/general/201312/06/P201312060342.htm>.

39. *Id.*

40. *Id.*

Kong has measured air pollution since 1987 by intersecting the concentrations of pollutants and health risks.⁴¹

Local air pollution remains a significant problem in Hong Kong, and reforms to curb emissions still fall short of WHO standards. Despite political declarations to improve Hong Kong’s air quality, the AQOs have not been updated since 1987.⁴² The WHO has updated their standards twice since then, revising them most recently in 2006.⁴³ Hong Kong’s AQOs remain well under WHO standards—despite decades of political intentions to update them—and contribute to the decreasing quality of life in Hong Kong. The concern over the harmful air pollution, lack of government action, and impact on Hong Kong residents creates an atmosphere to take action on the “right to life” and the “right to health,” as established under Hong Kong’s Basic Law, Bill of Rights, and several international treaties.

II. RIGHT TO LIFE AND RIGHT TO HEALTH: INTERNATIONAL PROVISIONS

A. *Overview of International Legal Obligations*

The HKSAR is party to several international treaties dealing with human rights: the International Covenant on Civil and Political Rights (“ICCPR”),⁴⁴ the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),⁴⁵ and the Convention of the Rights of the Child.⁴⁶

41. Gregory Turk et al., *Shanghai Orders Measures to Curb Smog as Hong Kong Starts Index*, BLOOMBERG NEWS (Dec. 6, 2013), <http://www.bloomberg.com/news/2013-12-06/shanghai-haze-forces-plane-cancellations-pollution-warnings.html>.

42. KILBURN & LOH, *supra* note 3, at 7 (stating the Environmental Protection Department understood the AQOs were outdated and began a review of them in 2009, opening the AQOs to public comment, but never adopting them).

43. *Id.*

44. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1976, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *available at* <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. As a territory of the United Kingdom and Northern Ireland, the ICCPR applied to Hong Kong after the UK’s signature on May 20, 1976. It also applied to HKSAR when they became a part of the PRC. “On 3 December 1999, the Government of China notified the Secretary-General that . . . [w]ith regard to the application of the Covenant to Hong Kong, the Secretary-General received communications concerning the status of Hong Kong from the United Kingdom and China (see note 2 under “United Kingdom of Great Britain and Northern Ireland” and note 2 under “China” in the “Historical Information” section in the front matter of this volume). Upon resuming the exercise of sovereignty over Hong Kong, China notified the Secretary-General that the Covenant will also apply to the Hong Kong Special Administrative Region.” *Id.* See also *Ratification of the ICCPR*, UN.ORG, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 31, 2014)(providing a comprehensive list of treaty signatories).

45. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx> [hereinafter ICESCR]. For the ICESCR, the PRC’s Permanent Representative to the United Nations submitted “official notes” for the

Also, the soft law instrument of the International Labour Organization (“ILO”) and the customary law of the United Nations Declaration on Human Rights applies. These rights were codified within the Basic Law under Article 39. The Government has to craft subsequent legislations or policies that will abide by these human rights covenants and will be subject to judicial review for possible violations.⁴⁷

B. *International Covenant on Civil and Political Rights (“ICCPR”)*

Under the ICCPR, State parties have a positive duty to respect and implement the rights of the ICCPR in “good faith.”⁴⁸ Additionally, the “right to life” stipulates: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”⁴⁹ As clarified by the UNHRC General Comment 6, the decision noted that the “right to life” is often too narrowly interpreted.⁵⁰ In other words, this right imposes a legal obligation on States to protect life through positive measures that protect the quality of life, not just life itself.

C. *International Covenant on Economic, Social and Cultural Rights (“ICESCR”)*

The ICESCR contains the provision on the ‘Right to Health,’ which has been used in domestic courts globally for environmental protection cases.⁵¹ Article 12, known as the ‘Right to Health,’ mandates that State Parties “recognize the right of everyone to the enjoyment of the highest

Secretary-General of the United Nations on June 20, 1997 to have the ICESCR apply to HKSAR, “pursuant to the provisions of the Basic Law of the Hong Kong Administrative Region of the People’s Republic of China . . . to be implemented through the respective laws of the two special administrative regions.”

46. U.N. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), *available at* <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

47. Hong Kong Bill of Rights Ordinance, (1991) Cap. 383, § 6(1)(b) (H.K.), *available at* <http://www.hklii.hk/eng/hk/legis/ord/383/cur.html> (pertaining to judicial remedies, Section 6 permits a judge or a tribunal to grant relief if subsequent legislations have violated the Bill of Rights).

48. U.N. Human Rights Comm., *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 18th Sess., CCPR/C/21/Rev.1/Add. 13, ¶ 3 (Mar. 29, 2004), <http://www.refworld.org/docid/478b26ae2.html> (stating under “article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith.”)

49. International Covenant on Civil and Political Rights, *supra* note 44, at art. 6, ¶ 1.

50. U.N. Human Rights Comm., *General Comment No. 6: Article 6 (The Right to Life)*, ¶¶ 1, 5 U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) (Apr. 30, 1982), *available at* [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument) (proclaiming States should work to “reduce infant mortality” and “increase life expectancy”).

51. ICESCR, *supra* note 45.

attainable standard of physical and mental health” and take steps for the “full realization of this right shall include those necessary . . . for the healthy development of the child . . . and [t]he improvement of all aspects of environmental and industrial hygiene”⁵² In addition, General Comment 14 further clarified the “right to health,” explaining that this right contains three levels of obligations by States to—respect, protect, and fulfill—with each one containing further obligations.⁵³ This requires State parties to take positive measures to ensure that all persons enjoy the “right to health.”⁵⁴ Thus, State parties should proactively be promoting the “right to health” in their domestic law and policies, which would include the HKSAR as a State party vis-à-vis China.

D. *The ICCPR and ICESCR Implementation by State Parties*

The ICCPR⁵⁵ and the ICESCR⁵⁶ both mandate that State parties implement the human rights provisions in domestic law and apply them equally to all persons. A State with many resources at its disposal should apply the rights in the ICESCR liberally. However, the rights must be

52. *Id.* at art. 12.

53. U.N. Comm. on Econ., Social and Cultural Rights, *General Comment No. 14*, ¶ 33–36, U.N. Doc. HRI/GEN/1/Rev.7 (Aug 11, 2000), [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En). Under “fulfill,” States must facilitate, provide, and promote the “right to health.” Therefore, States will “adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.” *Id.* The respect obligation requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. *Id.* Additionally, the “protect” obligation directs “States to take measures that prevent third parties from interfering with Article 12 guarantees.” *Id.*

54. *Id.* ¶ 37.

55. International Covenant on Civil and Political Rights, *supra* note 44 (stating both negative and positive obligations for State parties). State parties must “respect” and “ensure” that individuals’ rights are honored within their relevant jurisdictions; take “necessary” steps to adopt laws implementing the rights within the ICCPR; and ensure access to a “competent” judiciary and “effective” remedies. Furthermore, the ICCPR requires that States avoid violating the ICCPR human rights and that any restrictions on these rights should be permissible under the treaty. *Id.* See also Committee on Social, Economic and Cultural Rights, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Human Rights Committee*, *General Comment No. 31* [80], 2187th mtg., CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (explaining the legal obligations under the ICCPR). See also DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 236–38 (2011) (discussing Article 2 of the ICCPR and obligations it imposes on state parties).

56. ICESCR, *supra* note 4551 (placing a more positive obligation on State parties, requiring that parties “take steps” through “progressive realization” to implement the minimum core of rights-based legislations domestically, based on a State’s economic, social, and cultural capacity). For an interpretation of Article 2, see U.N. Comm. on Econ., Social and Cultural Rights, *supra* note 53, at General Comment No. 3.

applied equally, be justiciable, should be self-executing, and applied in domestic courts.⁵⁷

E. *International Labor Organization (ILO)*

Hong Kong ratified the ILO Convention No. 148 on Working Environment (Air Pollution, Noise, and Vibration) on July 1, 1997, making ILO legally binding.⁵⁸ Specifically, Article 3(1) defines “air pollution” as “covers all air contaminated by substances, whatever their physical state, which are harmful to health or otherwise dangerous.”⁵⁹ However, this Convention lacks strong language for requiring State signatories to proactively combat air pollution through strict air quality controls.⁶⁰ Importantly, under Article 13(a) and (b), the HKSAR has a duty to keep workers informed on the potential or existing hazards of air pollution in the work environment.⁶¹

F. *Universal Declaration on Human Rights*

The Universal Declaration on Human Rights (Universal Declaration) contains language that supports the rights-based approach for environmental protection cases. Article 25(1) states: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family”⁶² While the Universal Declaration is a non-binding U.N. resolution, the document has gained the status of customary law in many legal circles.⁶³ In other words, the Universal Declaration can also be used to interpret not only international law, but also domestic law, including in Hong Kong. In sum, the ICCPR, ICESCR, the Universal Declaration and the ILO Convention No. 148 on Air Pollution, Noise and

57. U.N. Comm. on Econ., Social and Cultural Rights, *supra* note 53, at General Comment No. 9. (articulating that a State can be found to violate the ICESCR when it fails to use all resources at its disposal to implement the minimum core of rights).

58. C148—*Working Environment (Air Pollution, Noise and Vibration) Convention, 1977* (No. 148), INT’L LAB. ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312293:NO (last visited Mar. 8, 2014) (providing guidelines for preserving workers’ health).

59. *Id.*

60. *See id.* (articulating that States “shall establish criteria” to determine exposure hazards to air pollution and shall supervise the monitoring of these hazards).

61. *Id.*

62. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.ohchr.org/en/udhr/pages/introduction.aspx>.

63. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (examining the role of non-binding international standards, such as the Universal Declaration of Human Rights as an instrument of customary law).

Vibration all contain rights-based provisions, which apply to the HKSAR legal system.

G. *Convention on the Rights of the Child*

In 2003, China notified the Secretariat—Hong Kong’s high offices—that Convention of the Rights of the Child would apply to the HKSAR.⁶⁴ Under this treaty, the HKSAR has to consider the best interests of the child.⁶⁵ Article 6 contains the provision on the “right to life,” under which “every child has an inherent right to life” and that “State Parties shall ensure to the maximum extent possible the survival and development of the child.”⁶⁶ In other words, the HKSAR has a positive duty to not deny a child in Hong Kong their right to life and ensure a child’s development occurs in a natural environment that preserves their right to life.

III. HONG KONG LEGAL FRAMEWORK: ENABLING A RIGHTS-BASED APPROACH

A. *The Legal Framework of HKSAR*

The Basic Law of Hong Kong acts as the “constitution” for the HKSAR.⁶⁷ Under Article 12, the HKSAR is deemed as a local administrative region under China and the Central People’s Government, but enjoys a high degree of autonomy.⁶⁸ The current governance system has many characteristics similar to the U.K. Government,⁶⁹ with separate executive, judiciary, and legislative branches.⁷⁰ The HKSAR executive government can create policies that may or may not need to become

64. Convention on the Rights of the Child, *supra* note 46.

65. *Id.* at art. 3 (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).

66. *Id.*

67. BASIC LAW, *supra* note 14, at art. 11 (“[I]n accordance with Article 31 of the Constitution of the People’s Republic of China, the systems and policies practised [sic] in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law. No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law.”).

68. BASIC LAW, *supra* note 14, at Ch. 2.

69. Tung, *supra* note 10, at 7.

70. BASIC LAW, *supra* note 14, at Ch. 2 (“The National People’s Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of the Law.”).

legislated by the Legislative Council in order to become law.⁷¹ Courts have acknowledged the separation of powers doctrine in the Basic Law.⁷² However, the Standing Committee of the National People's Congress has the ultimate interpretative authority for the Basic Law.⁷³

While the Basic Law has the power of a constitution for the HKSAR, the Bill of Rights is an ordinary piece of legislation with no over-riding power in mainland China.⁷⁴ The 1991 version of the Bill of Rights had two introductory provisions that were not adopted into HKSAR law by the Standing Committee during the handover in 1997—Articles 2(3) and 4.⁷⁵ Despite this limitation, courts can still refer to the Bill of Rights, as well as other common law decisions relating to human rights.

The HKSAR legal system operates under the common law framework with customary Chinese law in matters of family and land tenure.⁷⁶ Article 8 in the Basic Law stipulates that laws previously in force

71. Tung, *supra* note 10, at 8.

72. Karen Kong, *Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?*, 28 CIV. JUST. Q. 327, 330 (2009).

73. BASIC LAW, *supra* note 14, at Ch. 8, art. 158, available at http://www.basiclaw.gov.hk/en/basiclawtext/chapter_8.html.

74. Hong Kong Bill of Rights Ordinance, *supra* note 47, § 2. (enacted on June 8, 1991 (Cap. 53) and then amended on June 30, 1997 (Cap. 383), the ordinance is the Hong Kong Bill of Rights); Hsu, *supra* note 23, at 198; *see also* Handling of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., effective Feb. 23, 1997) 1 P.R.C. LAWS 13, available at <http://www.asianlii.org/cn/legis/cen/laws/dotscotnnccthotlpifihkiawa160otblothksarotproc2160/dotscotnnccthotlpifihkiawa160otblothksarotproc2160.html> (discussing which previous laws in Hong Kong have maintained their force); *see* Suspension of Operation of Hong Kong Bill of Rights (Amendment) Ordinance, (1997) Cap. 538, 2 § 1 (H.K.), available at <http://www.hklii.hk/eng/hk/legis/ord/538/> (stating that Cap 383 shall not be affected by the Hong Kong Bill of Rights (Amendment) Ordinance 1997).

75. *See* Hong Kong Bill of Rights Ordinance, *supra* note 47, § 2 (showing the provisions were not adopted). The Standing Committee did not adopt that “[i]n interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong, and for ancillary and connected matters.” *Hong Kong Bill of Rights* § 2(3), INT'L HUMAN RIGHTS TREATIES & DOCUMENTS DATABASE, http://www.hkhrm.org.hk/english/law/eng_boro1.html (last visited Feb. 1, 2014); *see generally* DECISION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS ON TREATMENT OF THE LAWS PREVIOUSLY IN FORCE IN HONG KONG IN ACCORDANCE WITH ARTICLE 160 OF THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA (1997), available at http://www.legislation.gov.hk/blis_ind.nsf/curallengdoc/8AB4C17B24B1AA96482575EE000E8402?OpenDocument.

76. *CIA World Factbook: Hong Kong*, *supra* note 8. “Equality before and equal protection of law,” states “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status [cf. ICCPR Art. 26].” Hong Kong Bill of Rights Ordinance, *supra* note 47, § 8, art. 22.

before the handover—including the common law, rules of equity, ordinances, subordinate legislation, and customary law—will remain except those that violate the Basic Law.⁷⁷ When adjudicating cases, the judiciary remains independent as long as the decisions are within the scope of the HKSAR’s autonomy.⁷⁸

On the other hand, the Basic Law provides that the Standing Committee allows the HKSAR courts to remain mostly independent to issue their own judgments. The HKSAR courts are limited, however. “[C]oncerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region,” courts will have to consult the Standing Committee of the National People’s Congress.⁷⁹ This provision seems to strike a balance between preserving HKSAR’s autonomy while asserting the authority of the National People’s Congress over the region.

Interestingly, the Basic Law permits the HKSAR courts to consider common law from other common law countries. Specifically, Article 84 of the Basic Law permits the courts of the HKSAR, when adjudicating cases, to include judicial precedent from other common law jurisdictions—including the United States, South Africa and India—in their legal decisions.⁸⁰ These jurisdictions all have an extensive legal framework for a rights-based approach to environmental protection as well as the common law public trust principle.⁸¹ Thus, HKSAR courts can integrate these common law decisions within their own adjudications to interpret the rights-based approach and the public trust principles embodied within the Basic Law and the Chinese Constitution.

77. BASIC LAW, *supra* note 14, at Ch. 1, art. 8 (“The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.”).

78. *See* BASIC LAW, *supra* note 14, at Ch. 8, art. 158 (outlining the judicial interpretation powers for the interaction between the PRC and the HKSAR and stating “[t]he power of interpretation of this Law shall be vested in the Standing Committee of the National People’s Congress. The Standing Committee of the National People’s Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region. . . . The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases.”).

79. *Id.* *See also Some Facts About the Basic Law*, HONG KONG, <http://www.basiclaw.gov.hk/text/en/facts/index.html> (last updated Mar. 17, 2008) (describing more about the relationship between the Central Authority and the HKSAR).

80. BASIC LAW, *supra* note 14, at Ch. 8, art. 158.

81. Bery Fong Chung Hsu, *A Public Trust Doctrine for Hong Kong*, 15 N.Z. J. ENVTL. L. 89, 100–01 (2011).

i. Application of International Rights-Based Agreements

For the legal application of international treaties in domestic law, Article 153 in the Basic Law outlines the scope of authority of the HKSAR and the role of China in international affairs. From 1997 onwards, the Chinese government dictate what international treaties apply to the HKSAR with consultation.⁸² Additionally, the HKSAR can still apply international treaties or other “relevant international agreements” to which China is not a State party.⁸³ Therefore, international law and soft law could significantly impact domestic legal adjudications.

Significantly, Article 39 of the Basic Law expressly discusses the application of the ICCPR and the ICESCR in domestic law. Article 39 states:

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.⁸⁴

Combined, the Basic Law’s Article 39 with China’s declaration on HKSAR’s membership to the ICESCR states that the ICESCR will be self-executing in HKSAR’s domestic law, interpretations, and court adjudications.⁸⁵

82. BASIC LAW, *supra* note 14, at Ch. 7, art. 153 (“The application to the [HKSAR] of international agreements to which the [PRC] is or becomes a party shall be decided by the Central People’s Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region.”).

83. *Id.* (“International agreements to which the People’s Republic of China is or becomes a party shall be decided by the Central People’s Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region.”).

84. BASIC LAW, *supra* note 14, at Ch. 3, art. 39.

85. Hsu, *supra* note 23, at 200.

ii. Equal Protection and Access to Adjudication and Remedies

While not expressly related to environmental protection or human rights, both the Basic Law and the Bill of Rights require equal application of the law to all Hong Kong Residents and access rights to courts and judicial remedies. Under Article 25, the Basic Law stipulates that “[a]ll Hong Kong residents shall be equal before the law.”⁸⁶ Also, Article 41 extends this legal protection to non-residents of Hong Kong.⁸⁷ Moreover, the Bill of Rights also guarantees equal protection under the law for Hong Kong residents.⁸⁸ The Bill of Rights declares that these fundamental rights must be applied equally across all parts of Hong Kong society.⁸⁹ Finally, under Article 7, the Government and any person acting on behalf of the government is bound by the Bill of Rights.⁹⁰ Thus, the Government has to abide by the Bill of Rights within the scope of their official duties.

Procedurally, the Basic Law and Bill of Rights guarantee access to courts and judicial remedies. The Basic Law requires that Hong Kong residents have access to legal representation in courts, including for suits against executive authorities and their personnel.⁹¹ Article 10 provides that Hong Kong residents must have equality before courts and the right to a fair and public hearing.⁹² Also, Article 6, titled “Remedies for Contravention of

86. BASIC LAW, *supra* note 14, at Ch. 3, art. 25.

87. *See id.* at art. 41 (stipulating “[p]ersons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter.”).

88. Hong Kong Bill of Rights Ordinance, *supra* note 4774, § 8, art. 22 (“Equality before and equal protection of law,” states “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status [cf. ICCPR Art. 26].”).

89. *Id.* § 8, art. 1.

90. *Id.* § 7. Section 7, entitled *Binding effect of Ordinance*, states:

(1) This Ordinance binds only- (a) the Government and all public authorities; and (b) any person acting on behalf of the Government or a public authority. (2) In this section, “person” includes any body of persons, corporate or unincorporate.

91. BASIC LAW, *supra* note 14, at Ch. 3, art. 35. Article 35 articulates:

Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies. . . . Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.

92. Hong Kong Bill of Rights Ordinance, *supra* note 47, § 8, art. 10. Section 8 incorporates Article 14.1 of the ICCPR and states:

[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Bill of Rights,” stipulates a court may grant relief or if a provision of the Bill of Rights has been breached, violated or there is a threat of violation.⁹³

Particularly in environmental cases, rights-based approaches are crucial to environmental protection. The substantive and procedural rights apply to all Hong Kong residents regardless of social class, ethnicity, origin, gender, etc. Thus, if the Government violates environmental laws or human rights, a Hong Kong resident or a public interest organization has standing to bring a lawsuit in court.

iii. Rights-Based Approach Under HKSAR Law

The Basic Law and the Bill of Rights incorporate two aspects of the ICCPR and ICESCR. First, the Basic Law mandates that the Government has an affirmative duty to protect the rights of its citizens under international law.⁹⁴ Hong Kong residents “shall enjoy the other rights and freedoms safeguarded by the laws of the Hong Kong Special Administrative Region.”⁹⁵ Second, Article 11 requires that all Government ordinances and policies be based on the Basic Law, in accordance with “Article 31 of the Constitution of the People’s Republic of China,” in order to “safeguard[] the fundamental rights and freedoms of its residents” enshrined in the Basic Law.⁹⁶ Thus, if a HKSAR law violates these “fundamental rights and freedoms,” judicial review would be a legal option for public interest litigation.

Additionally, the courts of Hong Kong are permitted to consider other common law decisions in their adjudications.⁹⁷ Therefore, courts and laws of the HKSAR have to be interpreted with these human rights agreements in mind—even if not expressly enacted into domestic law—and use common law decisions to aid in the interpretation of these human

93. Hong Kong Bill of Rights Ordinance, *supra* note 47, § 6. Under the Bill of Rights, Section 6 states in full:

(1) A court or tribunal—(a) in proceedings within its jurisdiction in an action for breach of this Ordinance; and (b) in other proceedings within its jurisdiction in which a violation or threatened violation of the Bill of Rights is relevant, may grant such remedy or relief, or make such order, in respect of such a breach, violation or threatened violation as it has power to grant or make in those proceedings and as it considers appropriate and just in the circumstances. (2) No proceedings shall be held to be outside the jurisdiction of any court or tribunal on the ground that they relate to the Bill of Rights.

94. BASIC LAW, *supra* note 14 at art. 4 (“[t]he Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the region in accordance with law.”).

95. *Id.* at Ch. 3 art. 38.

96. *Id.* at Ch. 1 art. 11.

97. *Clean Air Found. v. HKSAR*, 35 H.K.C.F.I. 757, ¶ 32.

rights. In other words, Article 39 and the Chinese declaration on the ICESCR ensures that the rights encompassed within the ICCPR and the ICESCR are self-executing.⁹⁸

The Bill of Rights provides that “[t]here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in Hong Kong pursuant to law, conventions, regulations or custom on the pretext that the Bill of Rights does not recognize such rights or that it recognizes them to a lesser extent . . .” consistent with Article 5.2 of the ICCPR.⁹⁹ As an ordinance, the Bill of Rights itself does not have the elevated status of the Basic Law, but it does incorporate the ICCPR into law. Courts have to refer to these international treaties and basic human rights when interpreting legislation and deciding issues of common law. Thus, the Basic Law and the Bill of Rights embody the fundamental human “right to life” and “right to health” as defined under international law.

First, the “right to life” imposes a positive obligation on the HKSAR to protect life under the law and not arbitrarily deprive a person of this right.¹⁰⁰ Both Article 28 of the Basic Law¹⁰¹ and the Bill of Rights in Section 8 Article 2(1)¹⁰² guarantee the “right to life” for persons of Hong Kong. On the surface, the Bill of Rights protects HKSAR residents against the unlawful deprivation of life, not the actual right to life. However, international jurisprudence and U.N. comments provide a broader scope of responsibilities under the “right to life,” such as protecting citizens from the inadequate storage of radioactive waste from nuclear power plants.¹⁰³

While the “right to life” appears in many legal documents, the “right to health” does not surface in any of the Hong Kong legal documents.

98. U.N. Comm. on Econ., Social and Cultural Rights, *supra* note 53, at General Comment No. 9, ¶ 11. Regarding whether the ICESCR is self-executing, General Comment No. 9 explained: [i]n most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. In order to perform that function effectively, the relevant courts and tribunals must be made aware of the nature and implications of the Covenant and of the important role of judicial remedies in its implementation.

99. Hong Kong Bill of Rights Ordinance, *supra* note 47, § 2, art. 5.

100. Hsu, *supra* note 23, at 200.

101. See BASIC LAW, *supra* note 14, at Ch. 3, art. 28 (stipulating “[t]orture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited”).

102. In the Bill of Rights (Cap. 383), Section 2, Article 1 states “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of this life.” Hong Kong Bill of Rights Ordinance, *supra* note 47 § 8, art. 2.

103. See generally U.N. Comm. Econ., Social and Cultural Rights, *supra* note 53, at General Comment 14 (indicating that the right to life includes the right to a healthy environment) and E.H.P. v. Canada, U.N. Human Rights Comm., 67/1980, U.N. Doc. CCPR/C/17/D/67/1980 (1982), available at http://www.worldcourts.com/hrc/eng/decisions/1982.10.27_EHP_v_Canada.htm (listing potential domestic remedies for the cleanup of contaminated radioactive soil).

However, since China is a party to the ICESCR, the international treaty also applies to Hong Kong.¹⁰⁴ Under the ICESCR, Article 12 defines the “right to health,” under which everyone should enjoy the “highest attainable standard of . . . health.”¹⁰⁵ The Committee on Economic, Social and Cultural Rights further clarified the “right to health” in General Comment 14, which should also be applied domestically in Hong Kong.¹⁰⁶

iv. Rights-Based Cases in Hong Kong Jurisprudence

In Hong Kong, several public interest litigations have used a rights-based approach to find judicial relief. Most public interest litigations use judicial review to initiate a legal case to sue the HKSAR for violating the rights contained in the Basic Law or some other right.¹⁰⁷ The landmark case, *Ng Ka Ling v. Director of Immigration*, provided:

[i]n exercising their judicial power conferred by the Basic Law, the courts of the HKSAR have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the HKSAR or acts of the executive authorities of the HKSAR are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid.¹⁰⁸

The case *R. v. Sin Yau Ming* established the legal review for the constitutionality of Hong Kong legislation.¹⁰⁹ Once a plaintiff establishes a

104. International Covenant on Economic, Social and Cultural Rights, *supra* note 45.

105. *Id.* Article 12 states:

(1) The States Parties to the present covenant recognize the right of everyone to the enjoyment of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) . . . the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene . . .

106. U.N. Comm. on Econ., Social and Cultural Rights, *supra* note 53, at General Comment No. 14.

107. *Kong*, *supra* note 72, at 328.

108. *Ng Ka Ling v. Dir. of Immigration*, [1999] 2 H.K.C.F.A.R. 4, 33 (C.F.A.), available at http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=34052&QS=%28{%24ng+ka+ling}%25parties%29&TP=JU&currpage=T.

109. *R. v. Oakes*, [1986] 1 S.C.R. 103, 105–06 (Can.), available at <http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/scc-csc/en/item/117/index.do> (adopting the constitutional review approach articulated in a case from Canada; the legal test includes: (1) the “objective to be served by the measures limiting a . . . right must be sufficiently important to warrant overriding a constitutionally protected right or freedom”; and (2) the government’s “means to be reasonable and demonstrably justified” and proportionate. The latter proportionality test contains three elements: the government “measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little

prima facie showing of a rights violation, then the burden of proof shifts to the government. The HKSAR would have to show a rational connection between the law and the policy goal to justify the infringement on constitutional rights.

For the most part, the courts have ruled favorably, supporting rights-based claims in judicial reviews. Any ordinances that contravene the Basic Law shall be null and void according to judicial precedent. Cases support the rights enshrined in the Basic Law and Bill of Rights, as demonstrated by cases on equal protection for sexual orientation,¹¹⁰ the right to abode,¹¹¹ the freedom of religion,¹¹² the freedom of speech,¹¹³ and the right to privacy,¹¹⁴ to name a few examples.

While similar to public interest cases in other jurisdictions, judicial review rules often limit the precedential value of these cases, particularly if politics are involved.¹¹⁵ However, Non-Governmental Organizations

as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective—the more severe the deleterious effects of a measure, the more important the objective must be.”); *see also* R. v. Sin Yau-ming, [1991] 1 H.K.P.L.R. 89, 89–90, [1992] H.K.C.L.R. 127, 128 (H.K.).

110. *See* Leung TC William Roy v. Sec’y for Justice, [2005] H.K.C.F.I. 713, ¶ 47 (H.K.), available at <http://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2005/713.html?stem=&synonyms=&query=leung%20tc%20william%20roy> (focusing on Articles 25 and 39 of the Basic Law and Articles 1, 14, and 22 of the Bill of Rights and finding provisions within the Criminal Ordinance unconstitutional).

111. *See* Keith Bradsher, *Hong Kong Court Denies Residency to Domestic*, N.Y. TIMES, (Mar. 25, 2013), http://www.nytimes.com/2013/03/26/world/asia/hong-kong-court-denies-foreign-domestic-helpers-right-to-permanent-residency.html?pagewanted=all&_r=1& (describing the exception of the recent ‘right to abode’ case involving a Philippine woman who was employed as a domestic worker in Hong Kong for twenty-seven years. The case involved Article 24(4) in Committee of the National People’s Congress in Beijing to review the issue before the court opinion. Any legal interpretation from the Standing Committee would be binding on the HKSAR. The court ruled in favor of the HKSAR, which was the expected outcome of the Standing Committee opinion.). *See* Vallejos v. Comm’r of Registration, [2013] 17 H.K.C.F.A. ¶ 4 (C.F.A.) (H.K.), <http://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfa/2013/17.html?stem=&synonyms=&query=Vallejos> (debating the constitutionality of legislation prohibiting persons of non-Chinese nationality who entered Hong Kong for employment as domestic helpers from gaining permanent resident status in Hong Kong).

112. *See generally* Karlo Joanani Dauz v. Dir. of Immigration, [2009] 86 H.K.C.F.I. 406 ¶ 12 (C.F.I.) (H.K.), available at <http://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2009/406.html?stem=&synonyms=&query=Karlo%20Joanani%20Dauz> (discussing the freedom of religion in Hong Kong’s Article 32 of the Basic Law).

113. *See* Leung Kwok Hung v. HKSAR [2005] H.K.C.F.A.R. 41, ¶¶ 54–56 (C.F.A.) (H.K.), available at <http://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfa/2005/41.html?stem=&synonyms=&query=title%28Leung%20Kwok%20Hung%20and%20HKSAR%20%29> (referencing the court’s restrictive “necessity test” that allows a government measure to constrict the rights of free speech and peaceful assembly only if two narrow exceptions apply, such as for national security or public health. This “necessity test” stems from the ICCPR Article 21.).

114. *See generally* Koo Sze Yiu v. HKSAR [2006] H.K.F.C.A. 75 (C.F.A.) (H.K.), available at <http://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfa/2006/75.html?stem=&synonyms=&query=Koo%20Sze%20Yiu> (holding that covert surveillance by the HKSAR violated the right to privacy and due process).

115. *Id.* ¶ 3.

(NGOs) and other public-interest organizations use judicial review to enforce a rights-based approach in Hong Kong jurisprudence. Judicial review provides an additional forum to advance political bargaining.¹¹⁶

v. Application of Chinese Constitution & Common Pool Natural Resources

While China is a civil law country, the Chinese Constitution does apply to Hong Kong.¹¹⁷ The Chinese Constitution contains a provision on environmental governance, specifically dealing with the management and use of common pool resources for the public interest.¹¹⁸

Furthermore, Chapter I, Article 26 of the Chinese Constitution provides that “[t]he state protects and improves the living environment and the ecological environment, and prevents and remedies pollution and other public hazards.”¹¹⁹ Thus, the State has a legal responsibility to protect the public trust as part of environmental protection, as well as prevent and mitigate pollution, which would include air pollution.

The Basic Law contains a similar public trust provision in Article 7, which states:

[t]he land and natural resources within the Hong Kong Special Administrative Region shall be State property. The Government of the Hong Kong Special Administrative Region shall be responsible for their management, use and development and for their lease or grant to individuals, legal persons or organizations for use or development. The revenues derived therefrom shall be exclusively at the disposal of the government of the Region.¹²⁰

116. *Id.* ¶ 11.

117. XIANFA, at art. 5, § 2 and art. 62 § 13 (1982) (China) (“No laws or administrative or local regulations may contravene the Constitution.”); see also Barry Fong Chung Hsu, *Environmental Protection under Common Law*, H.K. LAWYER (Nov. 10, 2011), <http://law.lexisnexis.com/webcenters/hk/Hong-Kong-Lawyer-/Environmental-protection-under-common-law/> (examining the public trust doctrine in Hong Kong and its importance in the legal system to protect the environment where other provisions have not).

118. See *id.* at art. 9, § 1–2 (“(1) All mineral resources, waters, forests, mountains, grasslands, unreclaimed land, beaches and other natural resources are owned by the State, that is, by the whole people, with the exception of the forests, mountains, grasslands, unreclaimed land and beaches that are owned by collectives as prescribed by law. (2) The State ensures the rational use of natural resources and protects rare animals and plants. Appropriation or damaging of natural resources by any organization or individual by whatever means is prohibited.”).

119. *Id.* at art. 26, § 1–2.

120. BASIC LAW, *supra* note 14, at Ch. 1, art. 7.

In other words, the Chinese Constitution contains a “public trust” provision that requires the HKSAR to manage the environment for the benefit of Hong Kong residents.¹²¹ This provision in the Basic Law harmonizes Hong Kong’s property law—and management over natural resources—with Chinese law. Thus, the combination of the Chinese Constitution and the Basic Law Article 7 imposes a legal duty on the executive branch of the Government to protect common pool resources held in public trust, such as clean air.¹²² Ultimately, the Standing Committee of China has final say on the Chinese Constitution and Basic Law interpretations.

vi. Air Quality and Environmental Protection Legal Framework

The Basic Law does not expressly mandate that the HKSAR enact laws and policies to protect the environment. However, Article 119 in the Basic Law requires that “the [HKSAR] shall formulate appropriate policies to promote and co-ordinate the development of various trades such as manufacturing, commerce, tourism, real estate, transport, public utilities, services, agriculture and fisheries, and pay regard to the protection of the environment.”¹²³ The HKSAR enacted two main ordinances for protecting air quality: the Air Pollution Control Ordinance (“APCO”) (Cap. 311) and the Environmental Impact Assessment Ordinance (“EIAO”) (Cap. 499).

Designed after Britain’s Clean Air Act,¹²⁴ the APCO governs the management of air quality in Hong Kong.¹²⁵ The APCO requires that the Secretary of the Environmental Protection Department within the Government establish AQOs.¹²⁶ The AQOs consist of targets for the

121. Additionally, the provision requires a “rational use” standard for the HKSAR to manage common pool resources. Hsu, *supra* note 23, at 196–97.

122. BASIC LAW, *supra* note 14, at Ch. 1, art. 7. (expressing the public trust doctrine and its corresponding assumption that air resources are held in trust by the HKG as opposed to being privately owned by a corporation or individual).

123. BASIC LAW, *supra* note 14, at Ch. 5, § 1, art. 158.

124. KILBURN & LOH, *supra* note 3, at 4.

125. Air Pollution Control Ordinance, (1993) Cap. 311, § 2 (H.K.), available at <http://www.hkii.hk/eng/hk/legis/ord/311/s2.html> (articulating the purpose of the APCO is to curb air pollution. “[A]ir pollution’ means an emission of air pollutant which either alone or with another emission of air pollutant: (a) is prejudicial to health; [or] (b) is a nuisance . . .”

126. *Id.* § 7 (repealed by the 2013 Air Pollution Control Ordinance). For establishing AQOs, § 7 of the APCO states:

(1) The Secretary shall, after consultation with the Advisory Council on the Environment, establish for each air control zone air quality objectives or different objectives for different parts of a zone. (1A) The Secretary may publish air quality objectives for an air control zone by issuing a technical memorandum, which may specify different objectives for different parts of the zone. (2) The air quality objectives for any particular air control zone or part thereof shall be the quality, which, in the

maximum acceptable level of air pollutants, but lack legally binding standards as they are basically suggested guidelines without an enforcement mechanism for violations.¹²⁷ Thus, the Government's failure to meet the AQO targets lacks legal teeth.

Furthermore, Under Section 7 of the APCO, Cap. 311 contains a "direct provision for the Secretary for the Environment, in consultation with a statutory body, not only to introduce air quality objectives, but to update them *whenever necessary* (emphasis added)."¹²⁸ The "whenever necessary" language leaves much open to interpretation and discretion by the Secretary.¹²⁹ At the very minimum, "whenever necessary" should mean to preserve the "right to life" and the "right to health" for Hong Kong residents, as well as preserving the air quality as part of the public interest in the public trust. Moreover, Section 7(2) offers more insight into the powers of the APCO: "[t]he air quality objectives for any particular air control zone or part thereof shall be the quality which, in the opinion of the Secretary, should be achieved and maintained in order to promote the conservation and best use of air in the zone in the public interest."¹³⁰ Public interest is not defined. Furthermore, the HKSAR has the power to grant or deny a license to pollute.¹³¹ The HKSAR has to ensure that the permittee would have the capacity to provide and maintain the "best practicable means" to prevent air pollutants emitting from his premises; that the permittee deliberately work towards complying with the relevant AQOs; and that the permittee "have regard to whether the emission of noxious or offensive emissions would be, or be likely to be, prejudicial to health."¹³² In turn, "prejudicial to health" means pollutants that are injurious, or likely to cause injury, to health.¹³³ So, when the HKSAR issues licenses to pollute, it has to consider the right to health and ensuring that the project will not be prejudicial to health when making these decisions.

The new APCO Amendment repeals Section 7 and adds Section 7A and Section 5, which deal with "air quality objectives."¹³⁴ The objectives

opinion of the Secretary, should be achieved and maintained in order to promote the conservation and best use of air in the zone in the public interest. (3) Any air quality objective may be amended from time to time by the Secretary, after consultation with the Advisory Council on the Environment. *Id.*

127. KILBURN & LOH, *supra* note 3, at 5.

128. ANTON & SHELTON, *supra* note 55, at 459.

129. *Id.*

130. Air Pollution Control Ordinance, *supra* note 125, § 7 (repealed 2013).

131. *Id.* § 15(3).

132. *Id.* § 15(3)(a)-(c).

133. *Id.* § 2.

134. *Id.* § 7A and Sched. 5.

are reviewable every five years.¹³⁵ The Secretary can review the air quality objectives at her discretion, but the objectives “should be achieved and maintained” in order to “promote the conservation of the air in the zone in the public interest;” and “promote the conservation and the air in the zone in the public interest.”¹³⁶ This provision creates tension over the use of the term “public interest.” The term could be used to justify tightening air quality standards for public health reasons, but could also justify an exemption for air pollution that advances the public interest, as a “best use” of the atmosphere, such as building an additional power plant for generating more electricity.

The other main ordinance for protecting air quality is the EIAO (Cap. 499). In a rights-based approach, the EIAO requires that large development projects write an Environmental Impact Assessment report.¹³⁷ The reports must be available for public inspection and comments.¹³⁸ However, the Executive may exempt a public works project, “in the name of the public interest.”¹³⁹ The EIAO ensures that the public has access to information on public works projects (the access right of “Right to Information”). Furthermore, the EIAO permits citizens to sue the government either as individuals or as a civil society group to protest grants of environmental permits or faulty Environmental Impact Assessments (“EIAs”).¹⁴⁰ As currently written, the EIAs do not require analysis of how development projects will impact the “right to life” and the “right to health,” if the Government has exempted the project from air quality standards.¹⁴¹ Finally, the EIAO will refer to the APCO technical memorandum¹⁴² to set air quality standards in EIAs, not the APCO Amendment, for projects with “special licenses” approved before January 1, 2014.¹⁴³ This means that the

135. *Id.*

136. *Id.* § 7A(2).

137. Environmental Impact Assessment Ordinance, (1998) Cap. 499, § 4 (H.K.), available at <http://www.hklii.hk/eng/hk/legis/ord/499/s4.html> [hereinafter EIAO].

138. Air Pollution Control Ordinance, *supra* note 125, § 7.

139. *Id.* § 30(1)–(3).

140. *Ng, Ngau Chai v. Town Planning Bd.*, [2007] 64 HKSAR 674 (H.C.) (H.K.), available at <http://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2007/674.html?stem=&synonyms=&query=title>.

141. AIRPORT AUTH. HONG KONG, EXPANSION OF HONG KONG INTERNATIONAL AIRPORT INTO A THREE-RUNWAY SYSTEM: PROJECT PROFILE 8 (May 2012), available at <http://www.hongkongairport.com/eng/pdf/future/project-profile.pdf>. Under the EIAO, the HKSAR can exempt certain classes of infrastructure projects (called designated projects) from EIA reporting, including impacts on air quality emissions. Controversially, the HKG has exempted the Hong Kong International Airport’s proposal for a third runway from an EIS calculating the increased carbon dioxide emissions and other air pollutants. *Id.*

142. Air Pollution Control Ordinance, *supra* note 125, § 26G.

143. *Id.* See also H.K. ENVTL. PROT. DEP’T, SECOND TECHNICAL MEMORANDUM FOR ALLOCATION OF EMISSIONS ALLOWANCES IN RESPECT OF SPECIFIED LICENSES (Oct. 2010),

HKSAR can still make exceptions for projects (e.g. power plants) and adjust the air quality standards and allowances for emissions accordingly. Of note, the technical memorandum refers to the Basic Law and human rights implications in the emission allowances for these “special licenses,” but does not specifically review the Basic Law and human rights provisions implicated by the “special license.”¹⁴⁴

IV. CASE DISCUSSION—CLEAN AIR FOUNDATION V. HKSAR

A. *The Facts of the Case*

In March 2007, the Clean Air Foundation, an environmental NGO, sued the HKSAR to protect the “environmental rights” of the Hong Kong people.¹⁴⁵ The second claimant was Mr. Gordon David Oldham, an environmental advocate and Hong Kong lawyer who created the Clean Air Foundation to protect Hong Kong’s children who have no choice but to live in a polluted and unhealthy environment.¹⁴⁶ He gathered approximately 900 signatures in 24 hours in support of his organization, thereby creating the necessary plaintiff to bring a judicial review case.¹⁴⁷ Clean Air Foundation and Mr. Oldham filed the lawsuit claiming that the polluted air was slowly killing the citizens of Hong Kong.¹⁴⁸ At the time of the suit, air pollution was Hong Kong’s number one health crisis, and 52 percent of the air pollution was locally generated.¹⁴⁹ The petitioners applied for judicial review under Cap. 4A, Order 53, Rule 3 of the Rules of the High Court seeking relief.¹⁵⁰ Judicial review has been used in public interest cases to

http://www.legco.gov.hk/yr10-11/english/subleg/brief/1041ss5_brif.pdf (providing technical information regarding the emission allowances of special licenses).

144. Air Pollution Control Ordinance, *supra* note 125, § 37B.

145. *Clean Air Found. v. HKSAR*, 35 H.K.C.F.I. 757, ¶ 2–3. The Clean Air Foundation was established by concerned citizens who were disturbed by the air pollution in Hong Kong. The purpose of CAF was also to generate public awareness on the failure of the HKSAR to mitigate the unhealthy air pollution. Air pollution caused Hong Kong’s number one health problem. E-mail from Lisa Genasci, CEO, The ADM Capital Found. (Apr. 22, 2013, 06:26 EST) (on file with author). *See also Hong Kong May Face Legal Challenge Over Dirty Skies*, REUTERS (Mar. 29, 2007), <http://www.reuters.com/article/2007/03/30/environment-hongkong-pollution-dc-idUSHKG16054820070330> (describing Clean Air Foundation’s decision to bring suit regarding HKSAR’s failure to improve air quality).

146. E-mail from Gordon Oldham, Senior Partner at Oldham, Li & Nie Solicitors (June 5, 2013, 12:05 AM EST) (on file with author).

147. *Id.*

148. *Clean Air Found. v. HKSAR*, 35 H.K.C.F.I. 757.

149. E-mail from Lisa Genasci, *supra* note 144.

150. An application for judicial review “must be made if the applicant is seeking- (a) an order for mandamus, prohibition or certiorari; or (b) an injunction under section 21J of the Ordinance restraining a person from acting in any office in which he is not entitled to act.” *Clean Air Found. v. HKSAR*, 35 H.K.C.F.I. 757, ¶ 1. *See also The Laws of Hong Kong; Applications For Judicial Review*

hold the government accountable for failing to execute their obligations under law. According to Mr. Oldham, Clean Air Foundation used the rights-based approach and other approaches, including tort-based claims, but he felt that they would not have the same traction in Hong Kong.¹⁵¹

Basically, the petitioners spurred the HKSAR into air pollution mitigation, claiming that the HKSAR failed in their legal duty to guarantee the “right to life” and “right to health” for Hong Kong residents.¹⁵² They also claimed that the HKSAR failed to pass adequate legislation and policies to control and mitigate air pollution with short-term, medium-term, and long-term measures.¹⁵³ Finally, the petitioners claimed that the HKSAR Government breached the Basic Law and the Bill of Rights, as well as international covenants executed into Hong Kong law.¹⁵⁴

The case, *Clean Air Foundation*, addressed both a procedural issue and a substantive issue. Procedurally, the court had to determine whether judicial review procedure could be applied to the claim that the HKSAR failed to protect Hong Kong citizens from harmful air pollution.¹⁵⁵ Substantively, the secondary question dealt with the “right to life” and the “right to health,” thus “whether, on a purposive interpretation, the constitutional protection can be extended to matters of air pollution control.”¹⁵⁶ The case oscillated between discussions whether the petitioners claimed the violation of Hong Kong citizens’ legal rights to health and life or whether they solely disagreed with government policy.

B. Case Analysis

First, in order to progress the case to a full hearing, the petitioners had to satisfy a legal test for judicial review to prove that their case qualified for the grant of the relief sought.¹⁵⁷ This legal test ensures that cases are “at least prima facie are permitted to go to a full hearing.”¹⁵⁸ Thus, they argued two main points. First, the petitioners put forth a “foundation

(1997), Cap. 4A, Order 53, Rule 3, available at <http://www.hkllii.hk/cgi-bin/sinodisp/eng/hk/legis/reg/4A/s53.html?stem=&synonyms=&query=judicial%20review>.

151. E-mail from Gordon Oldham, *supra* note 143.

152. *Clean Air Found. v. HKSAR*, 35 H.K.C.F.I. 757, ¶ 1. The presiding judge, the Honorable Judge Hartmann, characterized the filing as a “broad frontal attack on what is asserted to be a failure of the Government to tackle the problems presented by air pollution.” *Id.*

153. *See id.* (laying out the short-term, medium-term, and long-term measures the government could take to reduce the air pollution and improve air quality under the Air Pollution Control Ordinance).

154. *Id.* ¶ 6.

155. *Id.* ¶ 11.

156. *Id.* ¶ 17.

157. *Id.* ¶ 12–13.

158. *Id.* ¶ 14.

declaration” of the HKSAR’s obligations under the Basic Law, Bill of Rights and international conventions to protect the “right to life” and the “right to health.”¹⁵⁹ Moreover, the petitioners argued that the HKSAR has a positive legal duty to mitigate air pollution to preserve the “right to health” and the “right to life.”

i. The “Right to Life” and the “Right to Health”

The case noted that emerging international jurisprudence expands on the “right to life” outside the context of crime and punishment.¹⁶⁰ Furthermore, the decision recognized that the HKSAR has an affirmative duty to protect people’s rights to life and health within the environmental context. Under the “right to life,” this substantive right means more than just within the context of crime and punishment. The “right to life” applied in an environmental context has become accepted as part of the international norm and appears in domestic cases around the world.¹⁶¹ Judge Hartmann held that it is “at least prima facie arguable that the constitutional right to life may apply to the circumstances advocated by the applicants; that is, imposing some sort of duty on the Government to combat air pollution.”¹⁶² Thus, the case accepted the claim that the HKSAR has a positive duty to protect the “right to life” through mitigating the air pollution.

Under the second substantive issue, the “right to health,” the case cited Article 12 from the ICESCR.¹⁶³ The court accepted “that it must be prima facie arguable that it imposes some sort of duty on state authorities to

159. The petitioners argued that, “Article 28 of the Basic Law and/or Article 2 of the Hong Kong Bill of Rights Ordinance, in providing for protection of a “right to life” and the “right to health,” as provided by Article 12 of the International Covenant on Economic, Social and Cultural Rights, imposes upon the Government an affirmative duty to protect the residents and the economy of Hong Kong from the known harmful effects of air pollution . . .” *Id.* ¶ 16.

160. ANTON & SHELTON, *supra* note 55, at 462–63 (citing the following cases from India: *Bandhua Mukti Morcha v. Union of India*, 3 S.C.C. 161 (184); *Charan Lal Sahu v. India*, AIR 1990 SC 1480; *Subhash Kumar v. Bihar*, AIR 1991 SC 420; and also citing one case from Costa Rica: *Presidente de la Sociedad Marlene S.A. v. Municipalidad de Tibas, Sala Constitucionale de la Corte Supreme de Justicia (Constitutional Chamber of the Supreme Court) Decision No. 6918/94 of 25 Nov. 1944*); See also *Dr. Mohiuddin Farooque v. Bangladesh* and *Dr. Mohiuddin Farooque v. Ministry of Communication, Bangladesh*, 48 D.L.R. 1996. These cases decided in some varying degree that preventing environmental harm and protecting the natural resource base supported the right to health and the right to a quality life.

161. *Id.*

162. *Clean Air Found. v. HKSAR*, 35 H.K.C.F.I. 757, ¶ 17.

163. ICESCR, *supra* note 45, art. 12 (“[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health . . . [t]he steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: . . . (b) The improvement of all aspects of environmental and industrial hygiene . . .”).

combat air pollution even if it cannot be an absolute duty to ensure with immediate effect the end of all pollution.”¹⁶⁴ In other words, Article 12 of the ICESCR is self-executing. The HKSAR has the duty towards combating air pollution but not completely eradicating it. The court concedes that the HKSAR has a positive duty to mitigate air pollution but has to determine the scope of this duty.

C. *Legal Outcomes*

The case went ahead with the judicial review process. At one stage of the case, the petitioners decided to amend their complaint.¹⁶⁵ The amendments included the claims that the APCO (Cap. 311) and its subsidiary legislation was inconsistent with the HKSAR’s commitments under the Article 28 of the Basic Law; Article 2 of the Hong Kong Bill of Rights; Article 6 of the ICCPR; Article 12 of the ICESCR; and the International Labour Convention (ILO) No. 148 Working Environment (Air Pollution, Noise and Vibration).¹⁶⁶ The wording of the first declaration simply stated that the Government failed to meet its affirmative duties under the Basic Law, Bill of Rights, and international covenants through the inadequate APCO and subsidiary legislation and regulations.¹⁶⁷ Thus, according to the petitioners, the APCO was inconsistent with these legal instruments and therefore invalid.

In the amended claim, the petitioners argued that Section 7 of the Air Pollution Control Ordinance, which is broad in its scope, did not comply with HKSAR’s legal obligations to protect the “right to life” and the “right to health” for Hong Kong residents.¹⁶⁸ The Government countered by highlighting the steps it took to improve air quality.¹⁶⁹

164. *Clean Air Found. v. HKSAR*, 35 H.K.C.F.I. 757, ¶ 19.

165. Rules of the High Court, (2008) Cap. 4A, Order 53 (H.K.), available at <http://www.hklii.hk/cgi-bin/sinodisp/eng/hk/legis/reg/4A/s53.html?stem=&synonyms=&query=judicial%20review>. (“Without prejudice to its powers conferred by Order 20, rule 8, the Court hearing an application for leave may allow the applicant’s statement to be amended, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as the Court thinks fit.” This rule demonstrates that petitioners may amend their complaint during the application for judicial review.)

166. *Clean Air Found. v. HKSAR*, 35 H.K.C.F.I. 757, ¶ 20.

167. *Id.* ¶ 21.

168. *Id.* ¶ 23.

169. *Id.* ¶ 33–35.

D. *Holding*

While the amendments sought to make the claim more specific, the court held that the petitioners' focus on Section 7 of the Air Pollution Control Ordinance was misguided, for fault was with HKSAR's methods to curb the air pollution, rather than with the actual law.¹⁷⁰ By focusing on Section 7 of APCO rather than the rights-based approach, the amended petition undermined the legal foundation and turned the case into one about policy.¹⁷¹ Basically, the petitioners and HKSAR disagreed on the "necessary" steps taken to combat air pollution.¹⁷² As a result, the petitioners lost their lawsuit, as they sought declaratory judgment but did not ask for specific relief.¹⁷³

Ultimately, Judge Hartmann held that the case failed judicial review because curbing air pollution constituted a matter of policy to be decided by the HKSAR.¹⁷⁴ In other words, implementing mechanisms to improve air quality would be issues for the "political process" and not the judiciary.¹⁷⁵ The court decided that it could only apply matters of law and not manage the environment.¹⁷⁶

However, Judge Hartmann did establish a legal precedent for Hong Kong and the rights-based approach to environmental protection. He decided that it is at least *prima facie*¹⁷⁷ arguing (for the purposes of leave for judicial review) that the "right to life" and the "right to health" imposes a positive duty on the HKSAR to combat air pollution to achieve the highest standard of health.¹⁷⁸ *Clean Air Foundation* set a precedent for future rights-based environmental cases as it was the first of its kind.¹⁷⁹ Legally, the case has not yet been over-turned and the concepts of the 'right

170. *Id.* ¶ 25–26.

171. *Id.* ¶ 8 ("But matters of policy, of course, provided they are lawfully determined and executed, are not matters for this court.").

172. *Id.* ¶ 28 (determining that a policy disagreement on how to mitigate air pollution was not a cause of action under the "right to life" and the "right to health.").

173. ANTON & SHELTON, *supra* note 55, at 462.

174. *Clean Air Found. v. HKSAR*, 35 H.K.C.F.I. 757, ¶ 41. ("The real issues here are not issues of legality, they do not go to the Government acting outside its powers. In my judgment, they go to the merits of the policies adopted by Government; more accurately perhaps, to why Government at this time has not chosen to pursue certain objectives.").

175. *Id.* ¶ 43.

176. *Id.* ¶ 9. See also Ng. Ngau Chai v. Town Planning Bd., [2007] 64 HKSAR 674, ¶ 28 (C.F.I.) (H.K.), available at <http://www.hkii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2007/674.html?stem=&synonyms=&query=title>.

177. BLACK'S LAW DICTIONARY 1310 (9th ed. 2009) (defining a *prima facie* case as "[t]he establishment of a legally required rebuttable presumption.").

178. *Clean Air Found. v. HKSAR*, 35 H.K.C.F.I. 757, ¶ 17.

179. E-mail from John Scott, Senior Counsel, Des Voeux Chambers (June 3, 2013, 05:56 EST) (on file with author).

to life’ and ‘right to health’ in the environmental context have not been further reviewed by the Court of First Instance or subject to review in Hong Kong the appellate courts.¹⁸⁰ Furthermore, the case has been referenced in at least one other lawsuit against the HKSAR, the *Chu Yee Wah* case.¹⁸¹ The legacy of *Clean Air Foundation* established the prima facie rights to life and health, but it also highlighted the struggle between the legal system to enforce these rights and not tipping the balance of power between the judicial and executive branches.¹⁸² While *Clean Air Foundation* failed to win in court, the case helped in the struggle to improve air quality in Hong Kong. If the case was brought again today, the legal issues might have stronger foundations as a result of the legal precedent and a more environmentally-engaged HKSAR.¹⁸³

Since *Clean Air Foundation* in 2007, the new HKSAR regime announced in January 2012 that the government would be updating the AQOs in 2013, which would take effect in 2014.¹⁸⁴ Under-Secretary for the Environment, Dr. Christine Loh Kung-wai—a long-time environmental advocate and former CEO of Civic Exchange—brings environmental experience to her position. Environmental advocates are more hopeful that the new HKSAR regime will implement programs to improve the air quality, from requiring stricter bus emissions to improving AQOs.¹⁸⁵ In fact, the Legislative Council passed an amendment on July 18, 2013 that updates the AQOs in line with WHO standards, called the Air Pollution (Amendment) Ordinance 2013, effective January 1, 2014.¹⁸⁶ The Amendment establishes a five year review period, incorporates

180. *Id.*

181. *See* *Chu Yee Wah v. Env'tl. Prot.*, [2011] 9 HKSAR 1, ¶ 172 (C.F.I.) (H.K.), available at <http://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2011/259.html?stem=&synonyms=&query=Chu%20Yee%20Wah> (“Thus, although suggestions were made at the ACE and public consultation stage in respect of the EIA Reports in the present case that the proposed AQOs or WHO guidelines should be applied instead of the existing AQOs, it is not for the court to impose a new policy in his regard. To do so would be to trespass on the balancing process which is the exclusive domain of the Executive.”).

182. *Id.* ¶ 171–72. The *Chu Yee Wah* case additionally discussed how the HKSAR, under Section 7 of the APCO, has the power to make more stringent AQOs, but that they will do so based on social and economic factors, including public health. The court determined that the HKSAR may apply its chosen AQOs rather than WHO standards in EIA reports. For a court to suggest that the HKSAR should use a more stringent air quality standard would trespass on the HKSAR’s executive powers. The court deferred to the HKSAR’s policy reasons for using the lower air quality standards. *Id.*

183. E-mail from Gordon Oldham, *supra* note 145.

184. *See* *Hong Kong’s Air Quality Objectives*, H.K. ENVTL. PROT. DEP’T, http://www.epd.gov.hk/epd/english/environmentinhk/air/air_quality_objectives/air_quality_objectives.html (last visited Jan. 28, 2014) (illustrating Hong Kong’s new air quality objectives).

185. E-mail from Lisa Genasci, CEO, ADM Capital Found. (Apr. 22, 2013, 07:37 EST) (on file with author).

186. Air Pollution Control (Amendment), No. 12, (2013) O.H.K. § 1 (H.K.), available at <http://www.gld.gov.hk/egazette/pdf/20131729/es12013172912.pdf>.

considerations of the “public interest” when reviewing air control zones, and added Section 5 with updated air quality impact assessment standards.¹⁸⁷ The new AQOs would comply with the WHO’s widely-implemented air quality standards and upgrade the bus emissions standards to match those in Europe.¹⁸⁸

If the revised AQOs fail to incorporate improved air quality standards, petitioners would have a cause of action under judicial review to protest their inadequacy. However, the pleadings would have to be very specific and supported by evidence, such as public health data. The evidence would link the harm caused by the air pollution, the violation of the fundamental rights, and the responsibility of the HKSAR to protect the health and environment for Hong Kong citizens..

V. DIFFERENT APPROACHES TO A RIGHTS-BASED PROTECTION OF THE ENVIRONMENT

A. *Prima Facie Case for “Right to Life” and “Right to Health”*

Under *Clean Air Foundation*, the court established the prima facie claim to the “right to life” and “right to health.” Focusing on the HKSAR’s activities that currently violate the fundamental rights of Hong Kong residents presents a stronger case than attacking the HKSAR for their policies under the APCO.

Essentially, a case would need to prove how the air pollution is arbitrarily depriving people of life and negatively impacting their quality of health. The Government clearly knows and understands the damaging extent of the air pollution.¹⁸⁹ Yet, the Government lacks the political will to implement stricter standards to the APCO. Despite the data on the worsening air pollution and impact on human health, the Government has not revised the AQOs in twenty-five years and are well outdated according to WHO standards.¹⁹⁰ The impact of the air pollution on the Hong Kong community has been well documented. Yet, the causation element proved and continues to prove difficult and costly to satisfy.¹⁹¹ The HKSAR,

187. *Id.*

188. Press Release, HKSAR Env’tl. Prot. Dept., Government Welcomes Passage of Air Pollution Control (Amendment) Ordinance 2013, (July 10, 2013), <http://www.info.gov.hk/gia/general/201307/10/P201307100698.htm>.

189. AUDIT COMM’N HONG KONG, *Report No. 59, Implementation of Air Quality Improvement Measures*, ch. 2, at v, ix 68 (Oct. 26, 2012), http://www.aud.gov.hk/pdf_e/e59ch02.pdf.

190. *Id.* at v, 68 (stating the Hong Kong Government plans to implement new, stricter standards in 2014 despite not implementing the 2009 standards).

191. E-mail from John Scott, *supra* note 178. If another public interest case was brought, evidence to prove the causation of worsening air quality and increasing public health problems would

through omission or failure to act, has enabled the air quality to deteriorate, thus violating these environmental rights.

Moreover, a recent government audit observed:

[t]here is growing public concern over the worsening air pollution in Hong Kong and its adverse impacts on public health. According to the Environmental Protection Department’s Consultant, upon attainment of the 2014 AQOs, about 4,200 unnecessary hospital admissions and 7,400 statistical life years would be saved each year, or an improved average life expectancy of around one month for the entire population.¹⁹²

Despite the evidence, the Government has not devoted any government department to specifically monitor the connections between public health and air pollution.¹⁹³ The government’s failure to accurately track the impacts of air pollution on Hong Kong residents negatively affects their rights to life and health.

B. *Review Other Common Law Interpretations of Human Rights and Environment*

Another strategy would be to turn to the persuasive evidence—common law cases on “right to life” and “right to health” for environmental protection. Under Article 84 of the Basic Law, the courts of the HKSAR can refer to other common law decisions when adjudicating.¹⁹⁴ This ability to review foreign rights-based cases on the “right to life” and “right to health” in the environmental context aids in enriching these rights in Hong Kong.

Several common law countries have developed legal precedent for the rights-based approach to environmental protection.¹⁹⁵ In India, the courts have developed jurisprudence on the “right to life” in the environmental context. One of the leading cases on the “right to life” was

help establish connectivity between government inaction and violation of the rights to life and health. Expert evidence from a specific scientific source would make a huge difference in future environmental rights-based cases, especially in those like the *Clean Air Foundation*, where the violation of these rights causes physical harm to the public. *Id.*

192. AUDIT COMM’N HONG KONG, *supra* note 189, at ch. 1, at v.

193. KILBURN & LOH, *supra* note 3, at 8.

194. BASIC LAW, *supra* note 14, at Ch. 4, § 4, art. 84, available at http://www.basiclaw.gov.hk/en/basiclawtext/chapter_4.html.

195. ANTON & SHELTON, *supra* note 55, at 462–63.

Subhash Kumar v. State Of Bihar, which decided: the “right to life guaranteed by article 21 [of the Constitution] includes the right of enjoyment of pollution-free water and air for full enjoyment.”¹⁹⁶ In the Bangladesh cases of *Dr. Mohiuddin Farooque v. Bangladesh* and *Dr. Mohiuddin Farooque v. Ministry of Communication*, the Supreme Court decided that the “right to life” included the protection of the environment and “ecological balance” free from air and water pollution.¹⁹⁷ All of these cases would help Hong Kong build their legal portfolio on the rights-based approach to environmental protection, including expanding to other “fundamental rights” under the Basic Law.

C. *Expanding the Role of the Public Trust for Protecting Rights Life and Health*

Clean Air Foundation v. HKSAR contained no mention of the Basic Law’s Article 7, which states that natural resources are the property of the Government, establishing a legal avenue for the public trust doctrine. The petitioners could have accused the Government of not acting on behalf of the public interest by allowing the air quality to deteriorate despite knowledge that the AQOs were woefully inadequate.¹⁹⁸

The Hong Kong Harbour cases illustrate the concept of the public trust doctrine, even if the Ordinance or the case language do not specifically refer to it. Section 3 of the Hong Kong Harbour Ordinance provides:

(1)The harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbor; and (2) All public officers and public bodies shall have regard to the principle stated in

196. *Id.* at 463 (citing *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420); *Subhash Kumar vs. State Of Bihar And Ors*, (1991) A.I.R. 1991 S.C. 420, 1991 SCR (1) 5 (India), <http://indiankanoon.org/doc/1646284/>).

197. *Id.*

198. *Clean Air Found. v. HKSAR*, 35 H.K.C.F.I. 757, ¶ 33–34. Mr. Tse Chin Wan, the Assistant Director of the Environmental Protection Department at the time of the lawsuit, referred to the fact that air pollution control must be balanced with competing economic, social, and policy considerations. He also discussed the regional cooperation to combat air pollution in the PRD that must be done in conjunction with efforts under the APCO. Finally, he mentioned that “[c]ertain air pollution control measures are extremely costly” and must be take into account the “wider social, economic and policy context.” *Id.*

subsection (1) for guidance in the exercise of any powers vested in them.¹⁹⁹

Administrative actions should still be subject to review. Courts would have to apply a balancing test to determine whether the administrative action for the public interest outweighs the presumption against reclamation.

The ordinance itself creates a presumption against degrading the harbor, with the HKSAR acting as managers for people of Hong Kong. In this case, Judge Hartmann decided that “[t]he 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.”²⁰⁰ Although the preservation of Victoria Harbour did not constitute a fundamental right, it did concern the public interest of maintaining a natural resource, national treasure, and healthy environment for all citizens and future residents of Hong Kong to enjoy.²⁰¹ Furthermore, the preservation of the Victoria Harbour raises further concerns over water pollution and air quality degradation.

Judges may consult international and comparative jurisprudence with regards to the public trust doctrine, even though it did not in the Hong Kong Harbour cases.²⁰² Previous cases have only applied a literal interpretation of statutes, rather than giving a more liberal interpretation to include the public trust doctrine and the rights-based approach to broaden the scope of the law.

With help from a petitioner’s brief advocating for the public trust, Hong Kong courts can refer to the United States case *Illinois Central Railroad Co. v. Illinois* and other public trust case law to develop their own public trust jurisprudence.²⁰³ As a common law country, the U.S. has an expansive legal precedent on the role of government and the public trust. Additionally, in two Sri Lankan cases, *Gunaratne v. Ceylon Petroleum*

199. Soc’y for the Protection of the Harbour v. Chief Exec. in Council [2004] 2 H.K.L.R.D. 902, ¶ 6 (C.F.I.) (H.K.), available at http://www.devb.gov.hk/reclamation/en/court/cr_20040309/index.html.

200. *Id.* ¶ 77.

201. Kong, *supra* note 72, at 333, 338.

202. *Id.* at 340.

203. Ill. Cent. R.R. Co. v. Ill., 146 U.S. 387, 435 (1892). (“It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.”).

Corporation and Premachandra and Dodangoda v. Jayawickreme and Bakeer Markar, the court decided that “[w]hen applicable as a legal principle, [the] public trust contemplates that certain things, such as natural resources and the exercise of public power, are held by governments in trust for the citizenry and must be used for the public benefit.”²⁰⁴ These cases expand the public trust doctrine to include the principle of intergenerational equity, in which the present generation holds natural resources in trust for future generations to enjoy.²⁰⁵

While the Philippines practice some common law, as part of East Asia, their legal decisions hold persuasive merit, especially if and when Asia forms a human rights commission.²⁰⁶ Specifically, the Filipino court established the principle of “inter-generational equity” as part of the government’s legal obligation²⁰⁷ to protect and preserve natural resources for the public interest in the groundbreaking *Minors Oposa* case.²⁰⁸ Courts

204. DINAH SHELTON & ALEXANDRE KISS, JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW 23 (2005).

205. Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay, G.R. No. 171947-48 (S.C., Dec. 18, 2008) (Phil.), available at <http://sc.judiciary.gov.ph/jurisprudence/2008/december2008/171947-48.htm>. (“[I]n *Oposa v. Factoran, Jr.*, the Court stated that the right to a balanced and healthful ecology need not even be written in the Constitution for it is assumed, like other civil and political rights guaranteed in the Bill of Rights, to exist from the inception of mankind and it is an issue of transcendental importance with intergenerational implications.”); see also *Gunaratne v. Ceylon Petroleum Corporation*, (1996) 1 Sri L R 315 (Sri Lanka) (considering the right to a healthy environment), noted in DINAH SHELTON & ALEXANDRE KISS, JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW 23 (2005); see also Kirsty Schneeberger, *Intergenerational Equity: Implementing the Principle in Mainstream Decision-Making*, 23 ELM 20, 21–22, 26 (2011), available at <http://www.lawtext.com/pdfs/sampleArticles/ELMSCHNEEBERGER20to29.pdf> (discussing intergenerational equity in the context of the public trust doctrine).

206. See generally HUMAN RIGHTS IN THE ASIA PACIFIC REGION: TOWARDS INSTITUTION BUILDING (Hitoshi Nasu & Ben Saul eds., 2011) (discussing the nature of the development of a pan-Asian human rights regime). See, e.g., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <http://www.oas.org/en/iachr> (2011) (providing information on the established Human Rights Commission for the Americas); INTER-AMERICAN COURT OF HUMAN RIGHTS, <http://www.corteidh.or.cr/> (last visited Jan. 24, 2014) (providing information on the Human Rights court for the Americas); COUNCIL OF EUROPE, <http://www.coe.int/pages/home.aspx?p=home> (2014) (offering information on the human rights commission for Europe); EUROPEAN COURT OF HUMAN RIGHTS, <http://echr.coe.int> (2014) (offering information on the human rights court for Europe); AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, www.achr.org (2014) (supplying information on the human rights commission for Africa); AFRICAN COURT ON HUMAN AND PEOPLES’ RIGHTS, <http://www.african-court.org/en/> (last visited Jan. 24, 2014) (giving information on the human rights court for Africa).

207. Constitution of the Republic of Philippines, Sec. 16 art. II (1987), available at <http://www.gov.ph/the-philippine-constitutions/the-1987-constitution-of-the-republic-of-the-philippines/the-1987-constitution-of-the-republic-of-the-philippines-article-ii/> (“the State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.”).

208. *Minors Oposa v. Factoran*, G.R. No. 101083 (S.C., Jul. 30, 1993) (Phil.), available at <http://www.elaw.org/node/1343> [hereinafter *Minors Oposa*] (recognizing the rights to a “balanced and healthful ecology,” “self-preservation,” and “self-perpetuation” contained in Section 16, Article II of the

applied this precedent in later legal decisions. In the *Manilla Bay* case, the court decided that “[t]he Government [of the Philippines] cannot escape their obligation to future generations of Filipinos to keep the waters of the Manila Bay clean and clear as humanly as possible. Anything less would be a betrayal of the trust reposed in them.”²⁰⁹ As common law decisions, these cases can be applied to adjudications decided in Hong Kong, as permissible under Article 84 of the Basic Law, which would only strengthen a public interest cause of action.²¹⁰

D. *The Right to Equal Protection & Fundamental Rights*

Furthermore, a judicial review of the “Right to Equal Protection” and the Basic Law’s guarantee to protect “fundamental rights” in Article 11 would help further develop the relation between the Government’s failure to mitigate the air pollution and preserve fundamental rights through law. This legal theory would help clarify whether the unequal application of the APCO would give rise to an environmental justice case.

For instance, the APCO has varying degrees of success in certain parts of Hong Kong, which often corresponds to income levels.²¹¹ The APCO manages air quality in “zones,” so certain zones may be cleaner than others. Areas in Hong Kong with lower economic status tend to have worse air quality.²¹² Moreover, hospitals located in lower-income areas, such as United Christian Hospital in Kwun Tong, have higher admittance rates for respiratory illnesses linked to air pollution.²¹³ All Hong Kong citizens should have equal protection under the law—regardless of economic class—therefore, the unequal implementation of the APCO in different air control zones violates this right of equal protection.

Philippine Constitution, and the principle of “intergenerational equity” to preserve the natural resources for future Filipino generations to enjoy. The environmental advocate Tony Oposa brought the case.)

209. *Metro. Manila Dev. Auth.*, G.R. No. 171947–48 (S.C., Dec. 18, 2008) (Phil.), available at <http://sc.judiciary.gov.ph/jurisprudence/2008/december2008/171947-48.htm> (mandating that Department of the Environment and Natural Resources (“DENR”) is the proper agency for the “conservation, management, development, and proper use of the country’s environment and natural resources” and for the implementation of the law to clean up the Manila Bay as soon as possible).

210. BASIC LAW, *supra* note 14, at Ch. 4, § 4, art. 84.

211. Stern, *supra* note 3, at 787–88.

212. *Id.*

213. *Id.* at 790.

E. *Sustainable Development & the Rights-Based Approach*

Finally, the principle of sustainable development has been gaining traction in the international legal community and in Hong Kong.²¹⁴ The HKSAR is party to international treaties containing sustainable development principles within them: the United Nations Framework Convention in Climate Change; the soft law instruments of the Rio Declaration and Agenda 21; and the sustainable development legal guidelines called The Principles: New Delhi Declaration of Principles of International Law relating to Sustainable Development, 2002 (“The New Delhi Declaration”).²¹⁵ In particular, the New Delhi Declaration outlines the seven principles of sustainable development, which include:

- (1) the duty of states to ensure sustainable use of natural resources;
- (2) inter-generational equity and the eradication of poverty;
- (3) common but differentiated responsibilities;
- (4) precaution;
- (5) public participation, engagement and access to information;
- (6) good governance;
- (7) integration and inter-relationship, in particular with relation to human rights and social economic and environmental objectives.²¹⁶

214. Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT’L L.J. 423, 423, 456 (1973). The Stockholm Declaration on the Human Environment (“Stockholm Declaration”), a politically binding document gaining customary legal status, first discussed the concept of “Sustainable Development” in the report *Our Common Future* in 1987. *Id.* Principle 2 of the Declaration states: “[t]he natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.” *Id.* This Principle establishes the principle of sustainable development and inter-generational equity. Additionally, the 1992 U.S. Conference on Environment and Development (“UNCED”) adopted the Rio Declaration on Environment and Development (“Rio Declaration”), which has gained traction in policy circles. *Id.*; see also United Nations Conference on Environment and Development, June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. DOC. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (outlining the internationally recognized objectives to achieve sustainable development).

215. See *Status of Ratification of the Kyoto protocol*, U. N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (2014), http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (indicating China’s involvement in the sustainable development declarations and stating Hong Kong ratified the UNFCCC and the Kyoto Protocol as part of joining the PRC).

216. Tung, *supra* note 10, at 30; see also *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 2 April 2002, 2 INT’L ENVTL. AGREEMENTS: POL., L. & ECON 211, 211–16 (2002), www.cisd.org/tribunals/pdf/NewDelhiDeclaration.pdf (articulating New Delhi’s principles and objectives relating to sustainable development); see also INT’L LAW ASS’N, <http://www.ila-hq.org> (last visited Feb. 20, 2014) (providing access to global committees, decisions, and publications).

The New Delhi Declaration is not a legally binding treaty. However, the principles could be used to help interpret the concept of sustainable development under binding treaty obligations and domestic law, as well as in the absence of binding treaties and enabling domestic law, particularly in local adjudications.

The HKSAR first grappled with concept of ‘sustainable development’ in the Second Review of Progress on the 1989 White Paper, “The Sustainable Development for the 21st Century in Hong Kong” (“SUSDEV”), on pollution in Hong Kong.²¹⁷ More recently, the SUSDEV study determined that “[s]ustainable development in Hong Kong balances social, economic, environmental and resource needs, both for present and future generations, simultaneously achieving a vibrant economy, social progress and a high quality environment, locally, nationally and internationally, through the efforts of the community and the Government.”²¹⁸ The SUSDEV study is not a legal document per say, but it does call for a more holistic approach to development, which would include passing sustainable development laws.²¹⁹ The lack of implementation of sustainable development principles have contributed to HKSAR’s disregard of the “right to health” and “right to life” for Hong Kong residents. Thus, sustainable development norms could be used to impact local adjudications on the rights-based approach to environmental protection in Hong Kong.

CONCLUSION

After *Clean Air Foundation*, the legal precedent established that the Government has a legal duty to safeguard fundamental rights in the context of environmental protection. Other environmental cases have cited this precedent in their petitions and adjudications, even under different Hong Kong laws.²²⁰ So far, this precedent has not been overturned. A future judicial review would have to avoid attacking the Government based on policy choices.

217. Tung, *supra* note 10, at 27.

218. *Id.* at 26; *see also* HKSAR PLANNING DEP’T, http://www.pland.gov.hk/pland_en/p_study/comp_s/susdev/ex_summary/final_eng/ch1.htm (last visited Feb. 28, 2014).

219. Tung, *supra* note 10, at 27. Moreover, a key finding of the report concluded, “Hong Kong’s approach to sustainable development must take into account the particular conditions and characteristics of Hong Kong (and the wider region) and consideration could be given to enshrining sustainable development principles into law.” *Id.*

220. *See* *Chu Yee Wah v. Env’tl. Prot.*, [2011] 9 HKSAR 1, ¶ 172 (C.F.I.) (H.K.), *available at* <http://www.hklii.hk/cgi-> (focusing on a judicial review under the EIAO and APCO and discussing the HKG’s failure to update the AQO’s).

Legal precedent has established the “right to life” and “right to health” in the environmental context, but future claims will have to connect the violation of that right with a specific causation, such as the HKSAR’s inability²²¹ to update the AQOs in line with international standards before establishing the AQHIs in December 2013.²²² For instance, the latest WHO report listed outdoor air pollution as a carcinogen for the first time.²²³ As a result, lawsuits could arise linking the HKSAR’s inadequate AQOs and adverse health impacts (e.g. lung cancer) over the past twenty-five years.²²⁴ If the science can provide the causal link, particularly in work-related cases, then litigants will have more success in court to prove that the HKSAR’s failure to prevent the air pollution caused their cancer.

If the evidence of a prima facie violation shifts the burden of proof to the HKSAR, then it would have to show why the Ordinance as written or implemented continues to fail to mitigate environmental degradation. The trick will be proving that preserving the rights-based approach to a clean environment outweighs the government’s failure to act, particularly for economic or political purposes. On the other hand, the burden of proof should be on the HKSAR to show how their actions did not violate these rights, rather than requiring public interest groups to gather expensive expert evidence to prove causation, that an environmental harm caused human health issues.

For many decades, the Government has set aside environmental considerations in favor of economic development, which has not taken into account the economics of environmental and human externalities. As the recognition of human rights for environmental protection gains more traction, Hong Kong will have to review its current development priorities to ensure they remain in line with this emerging jurisprudence. The role of judicial review will continue to provide an avenue to spur the HKSAR into action on air pollution and other environmental problems in order to protect

221. Tom Holland, *Powerful Evidence Hong Kong Officials Just Don't Care About Pollution*, SOUTH CHINA MORNING POST (Oct. 8, 2013), <http://www.scmp.com/business/article/1326682/powerful-evidence-hong-kong-officials-just-dont-care-about-pollution>.

222. Ben Brumfield, *Air Pollution Causes Cancer, World Health Authority Says*, CNN (Oct. 17, 2013), <http://www.cnn.com/2013/10/17/health/geneva-air-pollution-carcinogenic-who/>.

223. *Id.* (outlining a study conducted by the International Agency for Research on Cancer that reports lung cancer killed 223,000 people worldwide in 2010, with the sectors generating the most emissions including transportation, stationary power generation, industrial and agricultural emissions, and residential heating and cooking).

224. See Emily Tsang, *More Lawsuits Expected After WHO Links Air Pollution and Cancer*, SOUTH CHINA MORNING POST (Oct. 19, 2013), <http://www.scmp.com/news/hong-kong/article/1334874/more-lawsuits-expected-after-who-links-air-pollution-and-cancer> (explaining that lawyers expect more claims against the government because of the increase in public awareness in respect to the link between air pollution and lung cancer).

the rights enshrined in the Basic Law, Bill of Rights, international treaties, and international customary law.

AUTHOR’S NOTE

The Clean Air Foundation case occurred during the Government’s former API regime. The Government has since updated with the AQHI along WHO standards that took effect on January 1, 2014. The Government has finally taken action to improve air quality, but many advocates still feel that these updates fall short, as the AQHI is a public awareness tool rather than a measure to curb the problem. At the very least, this Government is committed to air quality transparency by publishing the AQOs online, which increases public awareness.²²⁵

225. Anna Cummins, *Hong Kong’s new Air Quality Health Index*, TIME OUT HONG KONG (Jan. 8, 2014), <http://www.timeout.com.hk/big-smog/features/63300/hong-kongs-new-air-quality-health-index.html>.