

Judicial Responses to Politically Sensitive Cases in an Authoritarian Setting:

The Case of Hong Kong

I WAIKEUNG TAM is Research Associate Professor at the Department of Government and International Affairs at Lingnan University, Dorothy Y. L. Wong Building, Tuen Mun, New Territories, Hong Kong (wktam@ln.edu.hk).

ABSTRACT: Courts around the globe have increasingly handled politically sensitive issues. Judicial decisions that are unfavourable to the political elites may invite political attacks. An emerging literature has explored how courts around the world develop strategies to respond to politically thorny issues. This article contributes to this literature by studying how courts in Hong Kong develop strategies for handling politically sensitive cases. Based on in-depth analysis of 58 politically sensitive cases that were heard by courts in Hong Kong between 1999 and 2023, this article finds that Hong Kong's courts adopt the following strategies: deference to the government, denying standing to the applicants, ruling that the applicants failed to follow the proper procedures, deciding that a dispute does not exist, delaying the political and legal effects of judgments that are unfavourable to the government, and emphasising that politics plays no role in judges' decisions.

KEYWORDS: politically sensitive cases, judicial politics, courts under authoritarianism, law and society, Hong Kong.

Introduction

Courts around the globe have increasingly handled politically sensitive issues, such as electoral disputes, macroeconomic management, and national security (Hirschl 2008). Judicial decisions that are unfavourable to the political elites are likely to invite political attacks. An emerging literature has explored how courts around the world develop strategies to respond to politically sensitive issues in order to minimise political attacks. This article contributes to this literature by studying how courts in the Hong Kong Special Administrative Region (HKSAR) develop strategies for handling politically sensitive cases, thanks to an in-depth analysis of 58 politically sensitive cases that were heard by courts in Hong Kong between 1999 and 2023. The article proceeds as follows. First, it reviews the literature on why and how courts around the globe devise strategies to handle politically sensitive cases, the operation of courts under authoritarian regimes, and the unique position of Hong Kong's courts. Second, it highlights the increasing number of politically sensitive cases Hong Kong's courts have heard since 1997 and the political backlash that they have encountered. The third part outlines the data and methodology, which are based on in-depth analysis of 58 cases listed in the table. The fourth part examines the

tactics and strategies that courts in Hong Kong adopt while deciding politically sensitive cases. These tactics and strategies include: deference to the government, denying standing to the applicants, ruling that the applicants failed to follow the proper procedures, deciding that a dispute does not exist, delaying the political and legal effects of judgments that are unfavourable to the government, and emphasising that politics plays no role in judges' decisions. The final part presents the conclusions. This article defines politically sensitive cases as those cases in which decisions are likely to arouse strong political backlash from powerful actors such as the government.

Literature review

Court decisions on politically sensitive issues and political backlash

It has long been recognised that courts are relatively powerless vis-à-vis the political branches, so courts should avoid directly confronting the latter, otherwise, they are likely to be punished. In 1788, Alexander Hamilton, one of the Founding Fathers of the United States, wrote that the judiciary has no influence over the

sword or the purse, and therefore courts must act cautiously to avoid political attacks by the executive and legislature (Shapiro 2009: 391-97). In *Marbury v. Madison* (1803), while declaring a power of judicial review of federal laws, the US Supreme Court protected itself from political attack by ruling that under the particulars of the case it did not have jurisdiction to act. Without this judicial deferral to the political branches, the history of judicial review in the US may have looked different, as a Federalist Chief Justice would have had to confront a Republican President (Dixon and Issacharoff 2016: 686). Alexander Bickel, a leading scholar of American constitutional law, also contends that courts should adopt strategies to avoid directly confronting the political branches (1962).

There are numerous cases in which courts challenged the political branches and were subsequently punished. In the United States, the Warren Court (1953-1969) encountered political attacks such as congressional efforts to curb its power and jurisdiction, because the Court made liberal decisions on politically thorny issues including racial desegregation and freedom of religion. The first Russian Constitutional Court was disbanded by President Yeltsin in 1993 after it actively opposed Yeltsin's policies, especially his confrontation with the legislature (Trochev 2008). The Constitutional Court of Kazakhstan was removed from the Constitution by President Nazarbayev in 1995 after repeatedly ruling against the regime. In Belarus, Lukashenko forced the justices of the Constitutional Court to resign in 1996 after the Court actively invalidated the antidemocratic laws he initiated (Mazmanyan 2015: 206). The Mubarak regime in Egypt punished the Supreme Constitutional Court in the early 2000s when the Court challenged the regime's core interests, such as the suppression of the human rights movement (Moustafa 2007).

Since courts have increasingly handled politically thorny issues and may face political backlash if they make judgements that offend the political elites, an emerging literature has examined the strategies and tactics that they have adopted when handling politically sensitive cases.

Avoidance of politically sensitive issues

Avoidance of deciding politically sensitive issues is an important strategy adopted by courts around the globe, as discussed by Delaney (2016). Avoidance can be applied at different stages of a court case: *ex ante*, *in medio*, and *ex post*. *Ex ante* avoidance allows the Court to avoid deciding the merits of a case. According to Delaney (2016: 17-9), the US Supreme Court tends to adopt two common *ex ante* avoidance techniques that include the denial of *certiorari*¹, and declaring that an applicant does not have standing. When the Court agrees to hear a case, it will issue a writ of *certiorari*, which highlights the specific legal issues that the Court will consider. By refusing to grant *certiorari*, the Court has avoided hearing many politically contentious cases in the first place. The Court also avoids deciding the merits of politically sensitive claims by declaring that an applicant does not have standing to pursue a case (*ibid.*). *In medio* avoidance happens after the courts have heard the merits of the case raised by the contending parties. Delaney (*ibid.*: 29-43) discusses how the European Court of Human Rights (ECtHR) created an *in medio* avoidance technique, namely, the margin of appreciation. The ECtHR seeks to strike a balance between national views of human rights and the uniform application

of the European Convention on Human Rights and Fundamental Freedoms (the Convention), because it depends on the cooperation of national governments in implementing its judgments. To avoid political backlash from individual member states concerning the ECtHR's decisions on politically sensitive cases, the ECtHR adopts the doctrine of the margin of appreciation. This doctrine gives individual member states permissible variation in the application of the Convention. *Ex post* avoidance happens when a court rules that a law is unconstitutional but suspends the declaration of invalidity of the law, so as to permit the legislature to remedy the violation. For example, in 2006, the Constitutional Court of South Africa (CCSA) found that the Marriage Act was unconstitutional because it excluded gay and lesbian couples. However, public opinion in South Africa was overwhelmingly against same-sex marriage, and the political elite had considerable disagreement on gay and lesbian equality. To avoid political attacks, the CCSA ruled that Parliament would have one year from the date of the decision to remedy the defect in the Marriage Act (*ibid.*: 49-50).

Odermatt (2018) applies the concept of avoidance to investigate how international courts such as the International Court of Justice mitigate political attacks while handling politically sensitive cases. He examines four avoidance techniques commonly adopted by international courts, including denying standing to the party that brings the dispute to the courts, deciding that a dispute does not exist, deferring to the state, and refraining from handling the most politically sensitive issues in their judgments.

Judicial deferral

Dixon and Issacharoff (2016) discuss how the constitutional courts in Germany, India, Colombia, and Indonesia use the strategy of judicial deferral (i.e., the courts defer the effect and/or implementation of their decisions) to avoid confrontation with the political branches when the courts find that a statute or government policy is unconstitutional. Judicial deferral has facilitated these constitutional courts to check the actions of powerful political actors without provoking political backlash.

Courts under authoritarian regimes

Having reviewed how courts in different countries employ strategies when handling politically sensitive cases, our literature review proceeds to recent studies of courts under authoritarian contexts. These studies are broadly divided into two themes. The first theme examines why authoritarian regimes allow judicial independence and argues that an independent judiciary helps the regimes attract more foreign investment, develop a market economy, and monitor the performance of the bureaucrats (Moustafa 2007; Ginsburg and Moustafa 2008; Rajah 2012). However, judicial power in authoritarian regimes tends to be contingent rather than institutionalised, and is subject to curtailment if the leaders become displeased (Solomon 2007: 123). Research shows that courts and judges in authoritarian regimes are often co-opted, manipulated, and dominated by the ruling elites (Urribarri 2011; Tushnet 2015; Scheppele 2018; Crouch 2023). The second theme concerns judicial

1. *Certiorari* refers to a writ by which a higher court reviews a lower court's decision.

behaviour under authoritarian contexts. Helmke (2005) studies judicial behaviour in Argentina from the 1940s to the 1990s. As judges in Argentina lacked institutional security, they had strong motivation to strategically rule against the incumbent government when that government began to lose power. Hilbink (2007) examines why Chilean judges failed to defend human rights and the rule of law under illiberal regimes. She argues that the way Chilean judges defined their role (i.e., the ideal of apoliticism) crucially shaped their behaviour.

The unique position of Hong Kong's courts

The previous paragraph reviewed some major works on courts under authoritarian contexts. Hong Kong's courts, however, are different from their counterparts in other authoritarian regimes. Hong Kong is a unique case, because it has been relatively liberal and a leading common law jurisdiction since the British colonial period. Hong Kong courts have been held in high esteem. Chan (1997) describes the rule of law, including the British-style common law legal system with an independent and impartial judiciary, as an important legacy of British colonial rule in Hong Kong. Tam (2013: 43-5) discusses how the British established an independent and competent judiciary during their centuries-long colonial rule. The volume edited by Young and Ghai (2013) highlights the remarkable achievements of the Hong Kong Court of Final Appeal (HKCFA) in its first 13 years. Ghai (2013: 13), for instance, argues that the HKCFA built up a considerable body of case law, most of it of exceptionally high quality. Evaluating the HKCFA's jurisprudence relating to the Basic Law, Chen and Lo (2013: 390) wrote:

The work it [HKCFA] has done is good work. It has served us well as the custodian of the constitution of the HKSAR. It deserves our salute. And given the nature of the challenges inherent in the enterprise of "one country, two systems," it deserves our understanding were it to encounter stormy waters again under the captaincy of the new Chief Justice.

It was not until the imposition of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (national security law, NSL) on Hong Kong in 2020 that the autonomy and prestige of Hong Kong's courts were weakened (Cohen 2022). For example, according to article 44 of the NSL, the Chief Executive of Hong Kong will designate a pool of judges to handle cases concerning offences endangering national security. In this context, the present study examines how a relatively competent and independent judiciary under a leading common law jurisdiction – Hong Kong – responds to politically sensitive cases under the growing influence of Beijing.

Politically sensitive cases in Hong Kong

Hong Kong's courts have heard more politically sensitive cases since 1997 for two major reasons. First, civil society and pro-democracy politicians have increasingly turned to the courts to pursue their causes (Tam 2013). Second, the government has increasingly used the law to contain dissidents and the opposition, especially after the 2014 Umbrella Movement, the 2019 Anti-extradition Law Amendment Bill Movement (Anti-ELAB Movement),

and the implementation of the NSL in 2020. The table below shows the politically sensitive cases that Hong Kong's courts have heard from 1997 to 2023. These cases involve a variety of politically contentious issues such as whether the 2014 decision of the Standing Committee of the National People's Congress (NPCSC) on political reform in Hong Kong is legally binding, the trials of the leaders of the Umbrella Movement, and the constitutionality of the Prohibition on Face Covering Regulations enacted by the government under the Emergency Regulations Ordinance during the Anti-ELAB Movement.

The courts have faced political attacks when their judgments in these sensitive cases were unfavourable to Beijing and the pro-establishment camp. In *Ng Ka Ling and Another v. Director of Immigration* [1999] HKCFA 72, the HKCFA declared that the Hong Kong courts have jurisdiction to review whether any legislative acts of the National People's Congress (NPC) are consistent with the Basic Law and to nullify those found to be inconsistent. Beijing criticised the HKCFA for placing itself above the national government. Another example is the judgment on the constitutionality of the Prohibition on Face Covering Regulations and Emergency Regulations Ordinance by the Court of First Instance (CFI) in November 2019.² The CFI ruled that the Prohibition on Face Covering Regulations enacted under the Emergency Regulations Ordinance was unconstitutional and that the Emergency Regulations Ordinance itself was also partially unconstitutional.³ The Legislative Affairs Commission of the NPCSC criticised the CFI decision for seriously undermining the governance of the Hong Kong government and highlighted that the NPCSC alone has the authority to determine whether a law in Hong Kong is consistent with the Basic Law.⁴ Finally, in *Lai Chee Ying v. HKSAR* [2020] HKCFI 3161, Lai applied for bail after being charged with fraud and conspiracy to collusion with a foreign country or external elements to endanger national security. Judge Lee approved Lai's application in December 2020 and his decision was severely criticised by Beijing.⁵ An editorial in the pro-Beijing newspaper *Wen Wei Po* (文匯報) criticised Judge Lee for seriously misunderstanding article 42 of the NSL and seriously undermining the authority of the NSL. As the editorial put it: "If a top felon like Lai Chee Ying can be granted bail, all the accused who have violated the NSL can also be on bail."⁶

2. *Kwok Wing Hang and Others v. Chief Executive in Council and Another* [2019] HKCFI 2820.
3. Holmes Chan, "Hong Kong's High Court Rules Anti-mask Law Unconstitutional," *Hong Kong Free Press*, 18 November 2019, <https://hongkongfp.com/2019/11/18/breaking-hong-kongs-high-court-rules-anti-mask-law-unconstitutional/> (accessed on 6 June 2023). It should be noted that the CFI decision was subsequently reversed by the Court of Appeal, and on appeal to the HKCFA, the HKCFA also upheld the constitutionality of the Emergency Regulations Ordinance.
4. Wu Weisi 吳維思 and Zhang Baofeng 張寶峰, "港法律是否符合規定, 只能由人大常委決定" (*Gang falü shifou fu guiding, zhineng you renda changweihui jue ding*, The NPCSC alone can determine whether a law in Hong Kong is consistent with the Basic Law), *Ta Kung Pao* (大公報), 20 November 2019, p. A2.
5. It should be noted that this CFI decision was subsequently reversed by the HKCFA.
6. "黎智英案損國安法權威, 須採取措施防潛逃" (*Li Zhiying an sun guo'an fa quanwei, xu caiqu cuoshi fang qiantao*, Lai Chee Ying's case undermines the authority of the National Security Law and measures must be taken to prevent Lai from absconding), *Wen Wei Po* (文匯報), 26 December 2020, p. A5.

As argued by Baum (2006), judges face different sets of audiences. Hong Kong's courts have also encountered attacks from the pro-democracy camp when their judgments are unfavourable to that camp. For example, the Judiciary of Hong Kong received complaints against some judges for making biased and inappropriate comments while hearing and convicting participants in the Anti-ELAB Movement.⁷

Hong Kong's judges are well aware of the potential political backlash in deciding politically sensitive cases. Former Chief Justice of the Court of Final Appeal Geoffrey Ma (2010-2021) emphasised that courts should consider the limits they should observe in hearing politically sensitive cases so as to avoid being drawn into a political debate.⁸ With a view to minimising political backlash, courts in Hong Kong have therefore adopted strategies and tactics in deciding politically sensitive cases. The discussion below examines them.

Data and methodology

The major sources of the data in this study are court judgments published by the Hong Kong Legal Information Institute⁹ and the Judiciary of Hong Kong.¹⁰ Among these two sources, I chose what I considered being the 58 main politically sensitive cases. I read these 58 cases and analysed their legal reasoning and political content. I supplemented the data with information from newspaper reports and existing studies of judicial politics in Hong Kong. These 58 cases, heard by courts at various levels in Hong Kong between 1999 and 2023, can be broadly divided into 21 criminal trials and 37 judicial review applications. The former involved the prosecutions of political opposition and social activists, and the latter involved challenges to important government policies. These 58 cases were chosen because their decisions were likely to or had aroused strong political backlash from the government. Two examples are discussed here. In *Chan Yu Nam v. Secretary for Justice* [2010] HKCA 364, Chan challenged the constitutionality of corporate voting for functional constituency elections to the Legislative Council. As functional constituency elections are a crucial means for Beijing to control LegCo, any judicial decisions that supported Chan would have aroused strong opposition from Beijing. In *Leung Lai Kwok Yvonne v. The Chief Secretary for Administration and Others* [2015] HKCFI 929, Leung argued that the decision made by the NPCSC in August 2014 concerning the election of the Chief Executive in 2017 is not legally binding on Hong Kong. Since the NPC is the highest state organ in China, any judicial rulings that overturned the NPC decision would have been opposed by Beijing. The table below shows the politically sensitive cases in Hong Kong that are examined in this study.

Strategies and tactics of Hong Kong's courts

Deference to the government

Deference to the government is the most common strategy adopted by courts in Hong Kong. The table shows that courts deferred to the government in 74% of the cases studied here (43 out of 58 cases). The deferential stance towards the government is particularly evident in cases relating to national security and anti-sedition laws. Except for *Secretary for Justice v. Timothy Wynn Owen KC* [2022] HKCFA 23, the government was the winning party in every NSL case. In *HKSAR v. Lai Chee Ying* [2021] HKCFA 3, in which the government opposed granting bail to Lai, the HKCFA ruled in favour of the government. The HKCFA held that article 42(2) of the NSL introduces a new and more stringent threshold requirement for the granting of bail, which differs from the Criminal Procedure Ordinance. Under section 9G(1) of the Criminal Procedure Ordinance, bail may be granted unless there are substantial grounds to believe the accused will commit an offence while on bail.¹² Thus, the Criminal Procedure Ordinance embodies the presumption in favour of bail. By contrast, the HKCFA held that article 42(2) of the NSL excludes that presumption. Under the NSL, no bail should be granted unless there are sufficient grounds to believe that the accused will not continue to commit acts endangering national security.¹³ The HKCFA's decision on the new and more stringent threshold requirement for bail has made it more difficult for the accused in NSL-related cases to obtain bail. In *Tong Ying Kit v. Secretary for Justice* [2021] HKCFI 1397, the CFI upholds the power of the Secretary for Justice to issue a certificate under article 46(1) of the NSL directing that an accused in NSL case can be tried without a jury.¹⁴ The CFI's decision marks a significant step backward for the rule of law, given that trial by jury plays a key role in safeguarding judicial independence and guarding against politically motivated prosecutions.¹⁵

The government has invoked the colonial-era anti-sedition law to prosecute political dissidents since 2020. More than 30 sedition cases have been tried since 2020 in the Magistrates' Courts or the District Court, and the defendants have been convicted in all cases concerned. Two important cases are discussed here. In the first case, *Tam Tak Chi* was convicted of uttering seditious words.¹⁶ In the second, *Lai Man-ling* and the other four members of the General Union of Hong Kong Speech Therapists were convicted of conspiracy to print, publish, distribute, and display seditious publications.¹⁷ In dismissing the challenge raised by *Lai Man-ling*

7. Candice Chau, "Hong Kong Judiciary Throws out Complaints Against Hong Kong Judge and Magistrate," *Hong Kong Free Press*, 23 May 2022, <https://hongkongfp.com/2022/05/23/hong-kong-judiciary-throws-out-complaints-against-hong-kong-judge-and-magistrate/> (accessed on 4 July 2023).

8. See paragraph 1 of the judgment written by Geoffrey Ma in *Kwok Cheuk Kin v. Secretary for Constitutional and Mainland Affairs* [2017] HKCFA 44.

9. The Hong Kong Legal Information Institute (HKLII) is an online database jointly run by the Faculty of Law and Department of Computer Science of the University of Hong Kong. The HKLII contains judgments decided by courts at various levels in Hong Kong dating back to 1946. See <https://www.hklii.org/> (accessed on 7 June 2023).

10. The Judiciary of Hong Kong maintains a website that contains the judgments reached by courts at different levels in Hong Kong. See https://www.judiciary.hk/en/judgments_legal_reference/judgments.html (accessed on 7 June 2023).

12. There are three kinds of circumstances where bail will not be granted. See section 9G(1)(a), (b), and (c) of the Criminal Procedure Ordinance.

13. *HKSAR v. Lai Chee Ying* [2021] HKCFA 3, paragraph 53(b), 54, and 70(b).

14. *Tong Ying Kit* appealed against the CFI decision in June 2021, and the Court of Appeal held that article 46(1) of the NSL does not allow an accused to launch a conventional judicial review against the issuing of a certificate by the Secretary for Justice. See *Tong Ying Kit v. Secretary for Justice* [2021] HKCA 912.

15. Thomas E. Kellogg and Eric Yan-ho Lai, "Death by a Thousand Cuts: Chipping Away at Due Process Rights in HK NSL Cases," *Lawfare*, 28 May 2021, <https://www.lawfaremedia.org/article/death-thousand-cuts-chipping-away-due-process-rights-hk-nsl-cases> (accessed on 1 February 2024).

16. *HKSAR v. Tam Tak Chi* [2022] HKDC 208.

17. *HKSAR v. Lai Man-ling and Others* [2022] HKDC 981.

Table. Fifty-eight major politically sensitive cases in Hong Kong, 1999-2023

Date of decision	Case	Court	Whether the government won or lost	Issues involved
29/01/1999	Ng Ka Ling and Another v. Director of Immigration [1999] HKCFA 72	CFA* ¹¹	Lost	Right of abode in Hong Kong of Mainland-born children of Hong Kong permanent residents.
15/12/1999	HKSAR v. Ng Kung Siu and Another [1999] HKCFA 10	CFA	Won	Whether criminalisation of desecration of the national and regional flags is inconsistent with the constitutional guarantee of freedom of expression.
22/12/2000	Secretary for Justice and Others v. Chan Wah and Others [2000] HKCFA 88	CFA	Lost	The right of non-indigenous villagers to vote and stand as candidates in village representative elections.
20/07/2001	Director of Immigration v. Chong Fung-Yuen [2001] HKCFA 48	CFA	Lost	Right of abode in Hong Kong of Chinese citizens who were born in Hong Kong but neither of whose parents had the right of abode in Hong Kong at the time of their birth.
09/01/2004	Town Planning Board v. Society for the Protection of the Harbour [2004] HKCFA 27	CFA	Lost	The Society opposed harbour reclamation in Wan Chai.
05/05/2005	Yeung May Wan and Others v. HKSAR [2005] HKCFA 24	CFA	Lost	The right of Falun Gong members to peaceful assembly and demonstration.
08/07/2005	Leung Kwok Hung and Others v. HKSAR [2005] HKCFA 41	CFA	Won	Whether the Commissioner of Police's discretion to restrict the right of peaceful assembly for the purpose of public order satisfies the constitutional tests for restriction.
20/07/2005	Lo Siu Lan v. Hong Kong Housing Authority [2005] HKCFA 46	CFA	Won	Lo challenged the government's policy of privatising retail and carpark facilities within public housing estates.
21/11/2005	Ho Choi Wan v. Hong Kong Housing Authority [2005] HKCFA 77	CFA	Won	Ho challenged the government's public housing rental policy.
12/07/2006	Koo Sze Yiu and Another v. Chief Executive of the HKSAR [2006] HKCFA 74	CFA	Lost	The appellants challenged covert surveillance by law enforcement agencies and the temporary validity order issued by the CFI (at the request of the government).
22/01/2007	Leung Kwok Hung v. President of the Legislative Council of the HKSAR and Another [2007] HKCFI 39	CFI**	Won	Whether members of LegCo*** have the power to propose committee stage amendments to bills that will impact government expenditure.
10/08/2007	Chu Hoi Dick and Another v. Secretary for Home Affairs [2007] HKCFI 825	CFI	Won	Chu, a member of Local Action Group, opposed the demolition of Queen's Pier.
07/12/2010	Chan Yu Nam v. Secretary for Justice [2010] HKCA 364	CoA****	Won	Chan, a member of the League of Social Democrats, challenged the constitutionality of corporate voting for functional constituency elections to the LegCo.
13/11/2012	Ho Chun Yan v. Leung Chun Ying [2012] HKCFA 75	CFA	Won	Ho challenged the return of Leung as duly elected Chief Executive in March 2012.
25/03/2013	Vallejos Evangeline Banao v. Commissioner of Registration and Another [2013] HKCFA 17	CFA	Won	The right of foreign domestic helpers who have continuously worked in Hong Kong for more than seven years to acquire Hong Kong permanent resident status.
29/09/2014	Leung Kwok Hung v. President of the Legislative Council of the HKSAR and Another [2014] HKCFA 74	CFA	Won	The circumstances under which a decision of the President of LegCo made during the legislative process be judicially reviewed. Leung challenged the President's decision to end a filibuster.
05/06/2015	Leung Lai Kwok Yvonne v. The Chief Secretary for Administration and Others [2015] HKCFI 929	CFI	Won	Leung challenged the decision made by the NPCSC in 31 August 2014 (831 Decision) concerning the election of the Chief Executive of the HKSAR in 2017.
11/07/2017	Kwok Cheuk Kin v. Secretary for Constitutional and Mainland Affairs [2017] HKCFA 44	CFA	Won	Constitutionality of a provision of the Legislative Council Ordinance to bar a legislator who resigned from the LegCo from standing in a by-election within six months of resignation.

11. Note: * HKCFA or CFA: Hong Kong Court of Final Appeal; ** CFI or HKCFI: Hong Kong Court of First Instance; *** LegCo: Legislative Council; **** HKCA or CoA: Hong Kong Court of Appeal; ***** HCAL: Hong Kong Constitutional and Administrative Law; ***** HKDC: Hong Kong District Court.

Date of decision	Case	Court	Whether the government won or lost	Issues involved
14/07/2017	Secretary for Justice v. Nathan Law Kwun Chung [2017] HKCFI 1239	CFI	Won	The Secretary applied for judicial review to disqualify four pro-democracy legislators, Nathan Law Kwun Chung, Leung Kwok Hung, Lau Siu Lai, and Yiu Chung Yim, from assuming office, arguing that they neglected or declined to take the oath of a legislator.
01/09/2017	Yau Wai Ching and Another v. Chief Executive of HKSAR, Secretary for Justice [2017] HKCFA 54	CFA	Won	Yau Wai Ching and Leung Chung Hang, members of the political party Youngspiration, challenged the lower court's decision to dismiss them from legislative office.
27/09/2017	Kwok Cheuk Kin v. Chief Executive in Council [HCAL 453/2017] *****	CFI	Won	The constitutionality of a proposed arrangement by the HKSAR government regarding Hong Kong and Mainland customs, immigration, and quarantine procedures at the West Kowloon Station of the Hong Kong Section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link.
06/02/2018	Chow Yong Kang Alex v. Secretary for Justice [2018] HKCFA 4	CFA	Lost	Three student activists, Alex Chow Yong Kang, Nathan Law Kwun Chung, and Joshua Wong Chi Fung, appealed against their sentences of imprisonment for participating in unlawful assembly or inciting others to participate in unlawful assembly, shortly before the Umbrella Movement.
13/02/2018	Chan Ho Tin v. Lo Ying-Ki Alan [2018] HKCFI 345	CFI	Won	Chan, convenor of the Hong Kong National Party, challenged the government's decision to invalidate his nomination as a candidate for the 2016 legislative election.
28/09/2018	Lam Long Yin v. Secretary for Justice [2018] HKCFA 43	CFA	Lost	Thirteen social activists appealed against their sentences of imprisonment for participating in unlawful assembly outside the legislative chamber.
13/12/2018	Leung Kwok Hung v. Secretary for Transport and Housing [2018] HKCFI 2657	CFI	Won	Whether the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance is inconsistent with the Basic Law.
15/02/2019	Leung Kwok Hung v. Secretary for Justice [2019] HKCA 173	CoA	Won	Leung appealed against the lower court's decision that he neglected to take the legislative oath and therefore was disqualified from taking up the office as legislator.
09/04/2019	HKSAR v. Tai Yiu Ting and Others [2019] HKDC 450 *****	District Court	Won	Trial of the leaders and organisers of the Umbrella Movement. Tai Yiu Ting, Chan Kin Man, Chu Yiu Ming, and the other six organisers of the Umbrella Movement were charged with conspiracy to commit public nuisance and incitement to commit public nuisance.
12/06/2019	Leung Kwok Hung v. President of the Legislative Council [2019] HKCFI 1482	CFI	Won	Leung challenged the decision of LegCo to amend the Rules of Procedure of the LegCo in 2017. The decision sets the quorum of a committee of the whole Council to 20 members including the Chairman.
04/10/2019	Shum Lester v. Chief Executive in Council [2019] HKCFI 2471	CFI	Won	Shum applied for suspension of enforcement of the Prohibition on Face Covering Regulation. The Regulation sought to deter citizen participation in the Anti-ELAB Movement.
13/11/2019	So Tsun Fung v. Commissioner of Police [2019] HKCFI 2799	CFI	Won	So Tsun Fung, President of the Executive Committee of Student Union of the Chinese University of Hong Kong (CUHK), applied for an injunction restraining the police from entering CUHK and using teargas, rubber bullets, or other projectiles against protestors within CUHK. The protests were part of the Anti-ELAB Movement.
14/02/2020	Cheung Tak Wing v. Director of Administration [2020] HKCA 124	CoA	Won	Cheung, a social activist, challenged the constitutionality of the Director's policy, which requires applications to be made for use of the East Wing Forecourt of the Hong Kong government headquarters for public assemblies and processions.
18/03/2020	Kwok Cheuk Kin v. Lee Wai Man and Others [2020] HKCFI 461	CFI	Won	Kwok applied for judicial review and argued that three senior police officers, Lee Wai Man, Lee Hon Man, and Yau Nai Keung, and the police force failed to take prompt action to stop a gang of white-clad assailants from attacking citizens at Yuen Long Station in the evening of 21 July 2019.

Date of decision	Case	Court	Whether the government won or lost	Issues involved
02/04/2020	Sham Wing Kan v. Commissioner of Police [2020] HKCA 186	CoA	Won	Sham, a member of the Civil Human Rights Front, challenged the power of the police to search without warrant the contents of mobile phones seized on arrest.
27/05/2020	Kwok Cheuk Kin v. Leung Kwan Yuen (President of Legislative Council) and Another [2020] HKCFI 919	CFI	Won	Kwok challenged Leung's decision to appoint Chan Kin Por (a pro-government legislator) to preside over the election of the Chairman of the House Committee for the 2019-2020 session of LegCo. LegCo failed to elect the Chairman of the House Committee for seven months due to filibuster by pro-democracy legislators.
21/08/2020	Tong Ying Kit v. HKSAR (NSL case) [2020] HKCFI 2133	CFI	Won	Tong was charged with inciting secession and committing terrorist activities under the 2020 National Security Law (NSL). He applied for a writ of <i>habeas corpus</i> .
23/09/2020	Wong Chi Fung v. Secretary for Justice and Another [2020] HKCFI 2444	CFI	Won	Wong challenged the government's decision to bar him from standing for the 2019 District Council Election.
19/11/2020	Hong Kong Journalists Association v. Commissioner of Police and Another [2020] HKCFI 2882	CFI	Lost	Whether the police force, especially anti-riot police officers and the Special Tactical Contingent, were required to display their unique identification numbers or other distinctive identification numbers or marks when carrying out duties during the Anti-ELAB Movement.
27/11/2020	Leung Kwok Hung v. Commissioner of Correctional Services [2020] HKCFA 37	CFA	Lost	Leung (also known as Long Hair) contended that the requirement for male prisoners to keep their hair sufficiently short, while female prisoners have a freer choice, violates the Sex Discrimination Ordinance.
21/12/2020	Kwok Wing Hang and 23 Others v. Chief Executive in Council and Another [2020] HKCFA 42	CFA	Won	Constitutionality of the Emergency Regulations Ordinance and prohibition of the wearing of masks and other facial coverings at public gatherings during the Anti-ELAB Movement.
21/12/2020	Hong Kong Journalists Association v. Commissioner of Police and Another [2020] HKCFI 3101	CFI	Won	Whether Hong Kong Police Force acted unlawfully in failing to facilitate, and in certain cases actively hindering, lawful journalistic activities during the Anti-ELAB Movement.
09/02/2021	HKSAR v. Lai Chee Ying (NSL case) [2021] HKCFA 3	CFA	Won	Application for bail by Jimmy Lai Chee Ying, the founder of <i>Apple Daily</i> , who is charged with collusion with a foreign country or external elements to endanger national security under the NSL.
20/05/2021	Tong Ying Kit v. Secretary for Justice (NSL case) [2021] HKCFI 1397	CFI	CFI	Tong was charged with inciting secession and committing terrorist activities under the NSL. He challenged the Secretary's decision to issue a certificate under article 46(1) of the NSL directing that his case be tried without a jury.
27/07/2021	HKSAR v. Tong Ying Kit (NSL case) [2021] HKCFI 2200	CFI	Won	Tong was charged with inciting secession and committing terrorist activities under the NSL.
27/09/2021	Leung Kwok Hung v. Secretary for Justice [2021] HKCFA 32	CFA	Won	Leung was prosecuted for an offence of contempt during a legislative committee meeting. The trial focused on the extent to which a legislator may be subject to criminal prosecution for disorderly conduct interrupting legislative proceedings.
25/10/2021	HKSAR v. Ma Chun Man (NSL case) [2021] HKDC 1325	District Court	Won	Ma was charged with inciting secession under the NSL.
04/11/2021	HKSAR v. Tong Wai Hung [2021] HKCFA 37	CFA	Lost	Tong was acquitted of unlawful assembly and riot during the Anti-ELAB Movement. The government sought to establish that under the joint enterprise doctrine, it is possible to assign a defendant with liability as principal for a riot without the defendant being present at the scene of the riot.
05/11/2021	Kwok Cheuk Kin v. Director of Lands and Others [2021] HKCFA 38	CFA	Won	Kwok challenged the Small House Policy, which benefits only male indigenous villagers in the New Territories.

Date of decision	Case	Court	Whether the government won or lost	Issues involved
09/12/2021	HKSAR v. Lai Chee Ying and Others [2021] HKDC 1547	District Court	Won	Trial of three prominent pro-democracy politicians and activists who were charged with inciting others to knowingly participate in unauthorised assembly and of knowingly participating in unauthorised assembly to commemorate the 1989 Tiananmen crackdown on 4 June 2020.
02/03/2022	HKSAR v. Tam Tak Chi [2022] HKDC 208	District Court	Won	Tam, a social activist and former vice-chair of People Power, was prosecuted for uttering seditious words and holding unauthorised assembly.
30/03/2022	Law Yee Mei v. Chief Executive of HKSAR and Others [2022] HKCFI 688	CFI	Won	Law challenged the policy of the Covid-19 Vaccine Pass. Under the Vaccine Pass, only citizens who had been vaccinated with at least one dose of a Covid-19 jab could enter restaurants or other designated premises.
15/07/2022	HKSAR v. Chan Chun Kit [2022] HKCFA 15	CFA	Lost	Chan appealed against his conviction of possessing an instrument fit for unlawful purposes (i.e., 48 pieces of six-inch plastic cable ties) during the Anti-ELAB Movement.
07/09/2022	HKSAR v. Lai Man-ling and Others [2022] HKDC 981	District Court	Won	Five members of the General Union of Hong Kong Speech Therapists were charged with conspiracy to print, publish, distribute, and display seditious publications. The publications were three books about sheep and wolves and were said to have alluded to the Anti-ELAB Movement, the detention of 12 Hong Kong fugitives by the Chinese authorities, and a strike staged by Hong Kong medics at the initial stage of Covid-19 outbreak.
19/10/2022	Lai Chee Ying v. Commissioner of Police (NSL case) [2022] HKCA 1574	CoA	Won	Lai Chee Ying is charged with collusion with a foreign country or external elements to endanger national security under the NSL. The police seized his iPhones. Lai contends that the police have no power to access journalistic material stored in the phones.
21/10/2022	Kwok Cheuk Kin v. Secretary for Health [2022] HKCFI 3225	CFI	Lost	Kwok challenged that the Secretary had no legal power to invalidate certain medical exemption certificates simply through a press release. The certificates exempted holders from the Covid-19 vaccine requirements.
28/11/2022	Secretary for Justice v. Timothy Wynn Owen KC (NSL case) [2022] HKCFA 23	CFA	Lost	Lai Chee Ying is charged with conspiracy in relation to seditious publications and collusion with a foreign country or external elements to endanger national security. Lai applied to permit Timothy Wynn Owen KC ad hoc admission to represent him in the trial.
05/06/2023	Choy Yuk Ling v. HKSAR [2023] HKCFA 12	CFA	Lost	Whether investigative journalism is included as a reason for applying for a certificate of particulars of a vehicle under the Road Traffic Ordinance. Choy, an investigative journalist, was charged with making false statements to obtain vehicle information for producing a documentary about the mob attack at Yuen Long Station on the evening of 21 July 2019.
22/08/2023	Lui Sai Yu v. HKSAR (NSL case) [2023] HKCFA 26	CFA	Won	Lui was charged with incitement to secession and pleaded guilty. He challenged the judge's refusal to give the full one-third discount for his guilty plea. Lui's appeal focused on whether the stipulation of fixed-term imprisonment of not less than five years in article 21 of the NSL for offences of a serious nature is mandatory, and whether the three mitigating factors in sentencing mentioned in article 33 of the NSL are exhaustive.
01/12/2023	Kwok Cheuk Kin v. Chief Executive in Council [2023] HKCFI 3074	CFI	Won	Kwok challenged the new nomination requirement in the 2023 District Council Ordinary Election, which effectively bars pro-democracy groups from standing for election.

Sources: compiled by the author, based on court judgments published by the Hong Kong Legal Information Institute and the Judiciary of Hong Kong.

and her colleagues against the constitutionality of the offences of publishing seditious publications and seditious intention, Judge Kwok emphasised that there is a pressing need to safeguard national security and public order, and that the offences do not impose restriction more than necessary on the right to freedom of expression and publication.¹⁸

Having discussed judicial deference towards the government in NSL and sedition cases, the following paragraphs focus on how the courts justified their deferential position in non-NSL and non-sedition cases. The first justification is the separation of powers. The courts have emphasised the importance of giving due weight to the view of the legislature (LegCo) and of not interfering in matters that are within the functions and powers of LegCo (Lo and Chen 2018). In *HKSAR v. Ng Kung Siu and Another* [1999] HKCFA 10, the HKCFA held that the Court should give due weight to the view of LegCo that the National Flag Ordinance and Regional Flag Ordinance should include the provision that criminalises desecration of the national and regional flags.¹⁹ In *Leung Lai Kwok Yvonne v. Chief Secretary for Administration and Others* [2015] HKCFI 929, the judge justified his decision not to grant leave to Leung to challenge the government's proposed constitutional reform by highlighting that under the concept of separation of powers, the legislature and the judiciary have distinct and different roles. The court should in general and as far as possible avoid interfering in the legislative process and entertaining a pre-enactment challenge (to a legislative proposal).²⁰ In *Kwok Cheuk Kin v. Chief Executive in Council* [2023] HKCFI 3074, the CFI rejected Kwok's argument that the new nomination requirement in the 2023 District Council Ordinary Election represents a substantial retrogression in terms of the representativeness of the District Councils and the pluralism of elected members of the District Councils. The CFI held that the issue of retrogression is clearly within the debate of LegCo, and the decision regarding the composition of the District Councils is essentially a political decision requiring some element of judgment amongst the legislature.²¹

Closely related to the separation of powers is the justification that the case involves political or policy considerations. Judges stressed that it is not for the courts to decide matters of policy, so long as a policy is lawfully formulated and implemented. This is an *in medio avoidance* technique – the margin of appreciation (Delaney 2016: 29-43). In dismissing Kwok Cheuk Kin's challenge to a provision of the Legislative Council Ordinance to bar a legislator who resigned from LegCo from standing in a by-election within six months of resignation, the HKCFA held that where electoral laws involve political or policy considerations, a wider margin of appreciation ought to be accorded to the legislature. In particular, when there has been active political debate on an issue or piece of legislation, the Court will be inclined to give a wider margin of appreciation to the legislature.²² In *Chu Hoi Dick and Another v. Secretary for Home Affairs* [2007] HKCFI 825, the judge mentioned that it is entirely a matter for the government to decide the weight to be assigned to each factor concerning whether a building should be declared a monument. The Court will not intervene unless the government has acted unreasonably in the *Wednesbury* sense, meaning that its action or decision is so unreasonable that no reasonable person acting reasonably could have made it.²³ In *Chan Ho Tin v. Lo Ying-*

Ki Alan [2018] HKCFI 345, Chan, who is the convenor of the Hong Kong National Party, challenged the government's decision to invalidate his nomination as a candidate for the 2016 legislative election. In explaining its dismissal of Chan's challenge, the CFI held that:

Electoral regimes involve a host of disparate political and policy considerations. In the constitutional framework of the HKSAR, it is the LegCo who has the power and responsibilities to make such political and policy decisions. Thus, whilst the Government bears the burden to justify the legislative restriction as an appropriate or justified one vis-à-vis an alleged constitutional right concerning election, the Court would accord a wide margin of discretion to the legislature, as this is pre-eminently a political judgment.²⁴

The next ground on which the courts justified their deference to the government is that the NPCSC has interpreted certain articles of the Basic Law that are relevant to the case, and that the interpretation is binding on the courts of Hong Kong. In its dismissal of Yau Wai Ching and Leung Chung Hang's appeal against the lower court's decision to remove them from legislative office in 2016, the HKCFA stated that the NPCSC power to interpret the Basic Law is provided for expressly in the Basic Law and is in general and unqualified terms. The NPCSC interpretation of article 104 is clear in its scope and effect and it is binding on the courts of Hong Kong.²⁵ In *Leung Kwok Hung v. Secretary of Justice*, the Court of Appeal described Leung's challenge to the NPCSC interpretation of article 104 of the Basic Law as an impermissible challenge, and held that the Hong Kong courts have no jurisdiction to examine the validity of an interpretation of the Basic Law by the NPCSC.²⁶

It should be noted that Hong Kong's courts in recent years have also recognised that apart from the NPCSC interpretation of the Basic Law, *all* the decisions made by the NPCSC related to Hong Kong are binding on them and are not subject to legal challenge. In *Leung Lai Kwok Yvonne v. The Chief Secretary for Administration and Others* [2015] HKCFI 929, the judge held that the 831 Decision, being a decision by the NPCSC, is not subject to review by the Court in Hong Kong. The NPCSC has the ultimate authority to approve or reject any proposed electoral reform from Hong Kong.²⁷ In dismissing Leung Kwok Hung's challenge to the

18. *HKSAR v. Lai Man-ling and Others* [2022] HKDC 981, paragraph 104-110.

19. *HKSAR v. Ng Kung Siu and Another* [1999] HKCFA 10, paragraph 58 and 59.

20. *Leung Lai Kwok Yvonne v. Chief Secretary for Administration and Others* [2015] HKCFI 929, paragraph 40.

21. *Kwok Cheuk Kin v. Chief Executive in Council* [2023] HKCFI 3074, paragraph 202 and 208.

22. *Kwok Cheuk Kin v. Secretary for Constitutional and Mainland Affairs* [2017] HKCFA 44, paragraph 42.

23. *Chu Hoi Dick and Another v. Secretary for Home Affairs* [2007] HKCFI 825, paragraph 21.

24. *Chan Ho Tin v. Lo Ying-Ki Alan* [2018] HKCFI 345, paragraph 153.

25. *Yau Wai Ching and Another v. Chief Executive of the HKSAR and Secretary for Justice* [2017] HKCFA 54, paragraph 35 and 36.

26. *Leung Kwok Hung v. Secretary of Justice* [2019] HKCA 173, paragraph D1, D3, and 24.

27. *Leung Lai Kwok Yvonne v. The Chief Secretary for Administration and Others* [2015] HKCFI 929, paragraph 30.

Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance in 2018, the judge highlighted that the Decision of the NPCSC on Approving the Co-operation Arrangement between the Mainland and Hong Kong, and more broadly, all decisions made by the NPCSC, are binding on courts in Hong Kong and are not subject to challenge.²⁸

Denying standing to the applicants

Hong Kong courts also adopt other strategies. One of them is to deny standing to the applicants to pursue a case so that the courts can avoid hearing the merits of a case. This corresponds to an *ex ante* avoidance strategy (Delaney 2016; Odermatt 2018). In *Kwok Cheuk Kin v. Leung Kwan Yuen* (President of Legislative Council) and Another [2020] HKCFI 919, Kwok challenged Leung's decision to appoint pro-establishment legislator Chan Kin Por to preside over the election of the Chairman of the House Committee for the 2019-2020 session of LegCo. The judge dismissed Kwok's application on the grounds that Kwok lacked the necessary *locus* to bring the application. The judge elaborated his decision as follows:

I am clearly of the view that the applicant does not have a sufficient interest in the matter (...). The Decision [by the President of the Legislative Council] does not affect his rights or interests directly, and there are obviously other persons who have a much greater interest in bringing the judicial review, namely those legislators who opposed the Decision.²⁹

Having ruled that Kwok lacked the standing to pursue his case, the judge decided that it was unnecessary to hear the merits of both parties.

Procedurally flawed applications

The courts also avoid hearing the merits of politically sensitive cases by ruling that the applicants for judicial review failed to follow the proper procedures. In *Wong Chi Fung v. Secretary for Justice and Another*, Wong challenged the government's decision to bar him from standing for the 2019 District Council Election. The Court dismissed Wong's application for judicial review, holding that Wong had chosen the wrong legal procedure to challenge the government's decision. Instead, the Court highlighted that Wong should have pursued his cause by election petition.³⁰ In *Kwok Cheuk Kin v. Lee Wai Man and Others*, Kwok applied for judicial review and argued that three senior police officers in Yuen Long Police District and the police force failed to promptly stop a gang of white-clad assailants from attacking citizens at Yuen Long Station on the evening of 21 July 2019. The Court refused Kwok's application and held that Kwok failed to follow the proper procedure under Order 53, Rule 3(2)(a) of the Rules of the High Court, which requires the reasons for judicial review to be stated in the application form.³¹

Deciding that a dispute does not exist

Hong Kong courts also avoid addressing the merits of politically sensitive cases by deciding that a dispute does not exist (Odermatt 2018). In *Kwok Cheuk Kin v. Chief Executive in Council* [HCAL 453/2017], Kwok applied for leave to challenge the constitutionality of a proposed arrangement by the Hong Kong government

regarding Hong Kong and Mainland customs, immigration, and quarantine procedures at the West Kowloon Station of the Hong Kong Section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link (the Proposed Co-location Arrangement). The judge refused to grant leave to Kwok to apply for judicial review, as he ruled that the Proposed Co-location Arrangement is an intermediate decision that does not affect the rights or interests of Kwok. This is because the Hong Kong government cannot proceed on its own to implement the *final* Co-location Arrangement. Instead, the decisions by other parties such as the NPCSC would determine the actual implementation of the *final* Co-location Arrangement. Accordingly, the judge held that the Proposed Co-location Arrangement does not carry with it any substantive legal consequences insofar as the rights and interests of Kwok are concerned.³² As the judge ruled that the Proposed Co-location Arrangement is not a finalised decision and the Arrangement has not infringed on the rights and interests of Kwok, there is no legal dispute between Kwok and the Hong Kong government.

Delaying the political and legal effects of judgments

Another strategy consists in delaying the political and legal effects of judgments that are unfavourable to the government (Delaney 2016; Dixon and Issacharoff 2016). This delaying tactic manifests in two related ways. First, the judges refuse to specify the remedies that the government must undertake when the Court ruled that the government lost in a dispute. In *Hong Kong Journalists Association v. Commissioner of Police and Another* [2020] HKCFI 2882, for example, Judge Chow ruled that the government lost. Chow made two declarations: (1) the Commissioner fails to establish and maintain an effective system to ensure that every police officer deployed during the Anti-extradition Bill Movement wears and prominently displays an identification number or mark that is unique to that officer, and this failure violates article 3 of the Bill of Rights Ordinance; and (2) the government has a duty, under article 3 of the Bill of Rights Ordinance, to establish and maintain an independent mechanism capable of effectively investigating complaints of ill-treatment by police officers, and that the existing complaint mechanism based on the Complaints Against the Police Office, with oversight by the Independent Police Complaints Council, is inadequate to discharge this obligation. Although he decided against the government and made the above declarations, Chow refused to grant the order of mandamus³³

28. *Leung Kwok Hung v. Secretary for Transport and Housing* [2018] HKCFI 2657, paragraph 53, 62, and 74. The Court of Appeal upheld the CFI decision in June 2021. See *Leung Kwok Hung v. Secretary for Transport and Housing* [2021] HKCA 871.

29. *Kwok Cheuk Kin v. Leung Kwan Yuen* (President of Legislative Council) and Another [2020] HKCFI 919, paragraph 9 to 12.

30. *Wong Chi Fung v. Secretary for Justice and Another* [2020] HKCFI 2444, paragraph 2 and 37.

31. *Kwok Cheuk Kin v. Lee Wai Man and Others* [2020] HKCFI 461, paragraph 1 and 4.

32. *Kwok Cheuk Kin v. Chief Executive in Council* [HCAL 453/2017], paragraph 37, 38, and 46.

33. An order of mandamus refers to an order from a court to a government official ordering the government official to properly fulfill their official duties or correct an abuse of discretion. See the Legal Information Institute at Cornell Law School, Cornell University, [https://www.law.cornell.edu/wex/mandamus#:~:text=A%20\(writ%20of\)%20mandamus%20is,correct%20an%20abuse%20of%20discretion](https://www.law.cornell.edu/wex/mandamus#:~:text=A%20(writ%20of)%20mandamus%20is,correct%20an%20abuse%20of%20discretion) (accessed on 6 September 2024).

sought by one of the appellants. He explained his decision as follows: “I refuse to grant the order of mandamus sought by the applicant because it is in principle a matter for the Commissioner to devise an appropriate system to meet the declaration (Chow made).”³⁴ Chow also did not specify how the government should reform the existing police complaints mechanism, though he ruled that the existing mechanism is inadequate. Chow’s refusal defers his ruling’s unfavourable legal and political effect on the government, as the police officers are still not required to display their unique identification numbers while on duty, and the current police complaint mechanism will continue. Like *Marbury v. Madison*, the deferral by Chow protects the Court against political backlash from the pro-establishment camp and the government.

Second, judges can delay the political and legal effects of judgments that are unfavourable to the government by refusing to stipulate the time for implementing the legal remedies. Commenting on *Brown v. Board of Education*, Justice Traynor argues:

The extraordinary technique of the *Brown* decision, allowing an unspecified time for adjustment, was the only possible way of insuring orderly transition from an old social order to a new (...). There would have been great risk of its failure had the Court ordered its decision to take effect at an appointed hour or even in an appointed year (1967: 298).

Similarly, in *Hong Kong Journalists Association v. Commissioner of Police and Another* [2020] HKCFI 2882, Judge Chow did not specify the time for the government to implement the legal remedies.

Politics plays no role in judicial decisions

To ward off criticism from parties across the political spectrum, the courts also emphasise that politics plays no role in judges’ decisions in politically sensitive cases. In his speech at the Ceremonial Opening of the Legal Year 2019, Geoffrey Ma stated that the Court is dealing with one aspect only, namely a resolution of the legal issues arising in the dispute before it. In determining the outcome of any cases, the courts will only consider the law.³⁵ In *Chow Yong Kang Alex v. Secretary of Justice*, the HKCFA stated:

The convictions and sentences of the three appellants have led to widespread publicity and intense, sometimes heated, public discourse. Since the actions leading to the appellants’ convictions arose from the political debate on the proposed constitutional reforms of the election of the Chief Executive, strong expressions of opinion have been voiced and feelings on both sides of the debate have run high [emphasis added]. The Court will not discuss the worthiness of the cause espoused [by the appellants]. It is not the task of the courts to take sides on political issues or to prefer one set of social or other values over another. The duty of the courts is to adjudicate on the legal issues raised in any case according to the law.³⁶

In explaining her judgment on sentencing a group of pro-democracy activists who participated in an unauthorised assembly on 4 June 2020 to commemorate the 1989 Tiananmen crackdown,

Judge Woodcock said that she did not consider the purpose of the assembly, nor the politics, beliefs, stance, and opinions of the defendants. Their sentences did not reflect or relate in any way to the politics, beliefs, stance, and opinions of any defendant.³⁷

Conclusion

This article examines the strategies that courts in Hong Kong adopt while deciding politically sensitive cases. There are many significant yet unexplored questions arising from the adoption of these strategies, such as their impacts and the factors behind choosing one strategy over the others. For example, does the deferral of implementation of judgments that are unfavourable to the government allow Hong Kong’s courts to acquire the institutional capacity to engage in a robust check of the government, as argued by Dixon and Issacharoff (2016)? Alternatively, when Hong Kong’s courts avoid handling politically sensitive issues, will this avoidance undermine the rule of law (Odermatt 2018)? Finally, do courts at different levels have different considerations when handling politically sensitive cases? These significant questions are beyond the scope of this article and need to be addressed in further studies.

While there are many significant yet unexplored questions, this conclusion briefly discusses the impacts of the judicial responses on the reputation of the courts. As discussed in this article, deference to the government is the most common strategy adopted by the courts in Hong Kong, especially in cases relating to national security and anti-secession laws. While deference can protect the courts from political attacks from Beijing and the pro-establishment camp, this strategy has also incurred criticism from other audiences of the courts (Baum 2006) and has undermined the reputation of the courts. The recent incident of the resignation of Lord Lawrence Collins and Lord Jonathan Sumption, two British overseas Non-permanent Judges of the HKCFA, illustrates this point.

Lord Collins and Lord Sumption resigned from the HKCFA one week after the CFI convicted 14 out of 16 pro-democracy figures on charges of taking part in a conspiracy to commit subversion (the 47 pan-democrats’ trial).³⁸ Lord Collins said that he resigned because of the political situation in Hong Kong.³⁹ Lord Sumption’s explanations for his resignation, and comments on the 47 pan-democrats’ trial and other politically sensitive cases in particular, dealt a blow to

34. *Hong Kong Journalists Association v. Commissioner of Police and Another* [2020] HKCFI 2882, paragraph 123, 124, and 127.

35. “CJ’s speech at Ceremonial Opening of the Legal Year 2019,” *Government of the Hong Kong Special Administrative Region Press Releases*, <https://www.info.gov.hk/gia/general/201901/14/P2019011400413.htm?fontSize=1> (accessed on 6 July 2023).

36. *Chow Yong Kang Alex v. Secretary of Justice* [2018] HKCFA 4, paragraph 4, 5, and 75.

37. *HKSAR v. Lee Cheuk-yan and Others* [2021] HKDC 1572, paragraph 36 and 49.

38. In 2021, 47 pro-democracy figures were charged under the NSL with conspiracy to commit subversion after they organised and participated in unofficial primaries to enhance their chances of winning in the 2020 legislative election. Their plan was to use their veto power over government bills and the budget in the legislature to force the Hong Kong government to respond to the five major demands raised during the 2019 Anti-ELAB Movement. Among the defendants, 31 pleaded guilty and 16 pleaded not guilty.

39. Tom Grundy, “Two UK Judges Quit Hong Kong’s Top Court, as Lord Collins Cites ‘Political Situation,’” *Hong Kong Free Press*, 6 June 2024, <https://hongkongfp.com/2024/06/13/uk-judge-says-he-did-not-quit-top-hong-kong-court-sooner-as-he-wanted-to-see-how-things-develop-post-security-law/> (accessed on 25 June 2024).

the court's reputation. He told the BBC's *Today* programme that the CFI's conviction of the 14 pan-democrats was the last straw in his decision to resign.⁴⁰ He also wrote an op-ed in the *Financial Times* that criticised the CFI's decision in the 47 pan-democrats' case as legally indefensible.⁴¹ More importantly, Lord Sumption painted a pessimistic picture of the judiciary, as he wrote:

The real problem is that the [CFI's] decision is symptomatic of a growing malaise in the Hong Kong judiciary (...). Many judges have lost sight of their traditional role as defenders of liberty of the subject, even when the law allows it (...). Hefty jail sentences are dished out to people publishing "disloyal" cartoon books for children,⁴² or singing pro-democracy songs, or organising silent vigils for the victims of Tiananmen Square.⁴³

Summing up, the resignation of Lord Collins and Lord Sumption after the CFI's decision in the 47 pan-democrats' trial and Lord Sumption's criticism of the judicial deference in politically sensitive cases have undermined Hong Kong courts' reputation, at least from the perspectives of some prominent overseas judges, such as Lord Collins and Lord Sumption.

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40. Tom Grundy, "UK Judge Says He Did Not Quit Top Hong Kong Court Sooner as He Wanted 'to See How Things Develop' Post-security Law," *Hong Kong Free Press*, 13 June 2024, <https://hongkongfp.com/2024/06/13/uk-judge-says-he-did-not-quit-top-hong-kong-court-sooner-as-he-wanted-to-see-how-things-develop-post-security-law/> (accessed on 25 June 2024).
41. Jonathan Sumption, "The Rule of Law in Hong Kong is in Grave Danger," *Financial Times*, 10 June 2024, <https://www.ft.com/content/60c825be-b70a-4152-895f-f6127974570a> (accessed on 24 June 2024).
42. HKSAR v. Lai Man-ling and Others [2022] HKDC 981.
43. In December 2021, the District Council sentenced five prominent pro-democracy activists, including former legislators (Lee Cheuk-yan, Leung Yiu-chung, and Wu Chi-wai) and members of the Hong Kong Alliance in Support of Patriotic Democratic Movements of China, to imprisonment for holding or participating in a peaceful assembly to commemorate the 1989 Tiananmen crackdown on 4 June 2020. The length of their imprisonment ranged from four-and-a-half to 12 months. HKSAR v. Lee Cheuk-yan and Others [2021] HKDC 1572. See also Jonathan Sumption, "The Rule of Law (...)," op. cit.

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