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Developing an Index of the Rule of Law: Sharing the Experience of Hong Kong

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Benny Y.T. Tai

Abstract

The Rule of Law is considered a major aspect of modern governance. For every legal system, it is important whether the Rule of Law is attained and how far it has been attained. Though there are various indicators and indexes of the Rule of Law they all have their limitations. This paper reported a study conducted in Hong Kong in 2005, combining qualitative and quantitative methodologies, to assess the level of attainment of the Rule of Law in Hong Kong. It is found that the level of attainment is high but a downward trend is also discovered. A main objective of developing this new methodology in assessing Rule of Law, is that it could be used for tracking the development of the Rule of Law in a particular legal system and facilitating comparison between legal systems.

KEYWORDS: rule of law

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I. INTRODUCTION

The *rule of law* is generally considered to be a major feature of modern democratic governance,¹ and is also recognised as the cornerstone of Hong Kong's success.² Many studies have been conducted to develop indicators or indexes that illustrate the level of attainment of the rule of law in different countries. Some of these have had a regional focus,³ whereas others have covered a global span.⁴ Some have been conducted by non-private organisations at the domestic,⁵ regional,⁶ or international⁷ levels with funding from national, regional, or international sources. Others have been developed by profit-making

¹ Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, *Governance Matters IV: Governance Indicators for 1996-2004*, May 2005, World Bank Institute Working Papers and Articles <<http://www.worldbank.org/wbi/governance/pubs/govmatters4.html>>; Olufemi Taiwo, "Rule of Law: The New Leviathan?" (1999) 12 Can. J.L. & Juris. 151; Steven Kautz, "Liberty, Justice and Rule of Law" (1999) 11 Yale Journal of Law and the Humanities 435; David Dyzenhaus, "Recrafting Rule of Law" in David Dyzenhaus, ed., *Recrafting Rule of Law: The Limits of Legal Order*, (Oxford-Portland-Oregon: Hart Publishing, 1999); Keith Mason, "Rule of Law" in P. D. Finn, ed., *Essays on Law and Government Vol. 1*, (North Ryde, N.S.W: The Law Book Company Ltd, 1995); Allan C. Hutchinson and Patrick Monahan, *Rule of Law: Ideal or Ideology* (Toronto; Calgary and Vancouver: Carswell, 1987), p. ix; and Norman S. March, "Rule of Law as a Supra-National Concept" in A.G. Guest, ed., *Oxford Essays in Jurisprudence* (Oxford : Clarendon Press, 1968).

² Benny Y.T. Tai, "The Development of Constitutionalism in Hong Kong" in Raymond Wacks, ed., *The New Legal Order in Hong Kong* (Hong Kong: Hong Kong University Press, 1999) and Anne S. Y. Cheng and Albert H. Y. Chen, "The Search for Rule of Law in the Hong Kong Special Administrative Region, 1997-2003" in Wong Yiu-chung, ed., *One Country, Two Systems in Crisis* (Lanham: Lexington Books, 2004).

³ See, for e.g., Afrobarometer <<http://www.afrobarometer.org/>>; Latinobarómetro <<http://www.latinobarometro.org/index.php?id=150>>; Progress towards Good Governance in Africa <http://www.uneca.org/adf/adf_4_report_final_sml.pdf> and Latin American Public Opinion Project <<http://sitemason.vanderbilt.edu/lapop>>.

⁴ See, for e.g., Bertelsmann Transformation Index <<http://www.bertelsmann-transformation-index.de/11.0.html?&L=1>> and Freedom in the World <<http://www.freedomhouse.org/template.cfm?page=15&year=2005>>.

⁵ See, for e.g., Latin American Public Opinion Project conducted by the Centre for the Americas at the Vanderbilt University with funding support from the USAID; and Latinobarómetro developed by the Latinobarómetro Corporation, a private, non-profit institution based in Santiago, Chile, with Chilean academics and politicians from the political science arena as members of its board of directors.

⁶ See, for e.g., Progress towards Good Governance in Africa developed by the United Nations Economic Commission for Africa; Country Policy and Institutional Assessment conducted by the African Development Bank <<http://afdb.org>> and Country Policy and Institutional Assessment conducted by the Asian Development Bank <<http://www.adb.org>>.

⁷ See, for e.g., Freedom in the World developed by the Freedom House and World Business Environment Survey conducted by the World Bank's Investment Climate and Institute Units <<http://info.worldbank.org/governance/wbes/index2.html>>.

private corporations.⁸ Most have been original studies, whilst some have been compiled by using data derived from other studies.⁹ Some have been based upon public perception measured through public surveys,¹⁰ while some others have been developed by panels of experts.¹¹ Yet another category of studies has been based on a mixture of these two methods.¹²

Many of these studies have covered Hong Kong but all such existing studies have limitations. First, most such studies have not specifically been concerned with measuring the rule of law, and incorporate it as part of a wider focus on governance, competitiveness, or democracy. As a result, the indexes derived from such studies have not been able to single out the level of attainment of rule of law by the country or territory under study. Second, no single study within those mentioned above covers the various issues relating to the rule of law. Third, relying upon public perception might not be an accurate way of evaluating the attainment of rule of law in a country. Some studies relied instead upon expert analysis, but much depends on the nature of expertise held by the panel of experts. In some studies, the experts included only senior executives in private enterprises, whose knowledge about the rule of law might not be sufficient by itself to enable an accurate overall evaluation of the existence of rule of law in a country. The academy has also been a major source of experts for several of these studies. Here, the results might be more reliable especially if there is a careful selection of the panel members, but those in the academic field again might not, by themselves, have sufficient knowledge to enable them to make an accurate overall assessment.

There have been various local studies on the rule of law in Hong Kong over the past 10 years. Most of them have adopted qualitative methods. Although they were conducted by credible legal scholars, these studies are not supported by hard

⁸ See, for e.g., Bertelsmann Transformation Index developed by the Bertelsmann Foundation; Business Environment Risk Intelligence developed by the BERI S.A.; Country Risk Forecast conducted by the Economist Intelligence Unit <<http://www.eiu.com>>; and World Markets Online developed by the World Markets Research Centre <<http://www.worldmarketsanalysis.com/>>.

⁹ See, for e.g., CIRI Human Rights Dataset <<http://www.humanrightsdata.com>> developed by David L. Cingranell and David L. Richards; the Political Terror Scale developed by Linda Cornett and Mark Gibney using the annual reports of the Amnesty International and the US State Department Country Reports on Human Rights Practices <http://www.humansecurityreport.info/background/Cornett-Gibney_Political_Terror_Scale_1980-2001.pdf>; and the Governance Indicators for 1996-2004 developed by Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi for the World Bank using a combination of 37 separate data sources constructed by 31 different organisations <http://worldbank.org/wbi/governance/pdf/GovMatters_IV_main.pdf>.

¹⁰ See, for e.g., Afrobarometer, Latinobarómetro and Latin American Public Opinion Project.

¹¹ See, for e.g., Bertelsmann Transformation Index, Business Environment Risk Intelligence, Country Risk Forecast by the Economist Intelligence Unit, Freedom in the World, International Country Risk Guide developed by the PRS Group <<http://www.prsgroup.com/index.html>>, and the World Business Environment Survey.

¹² See, for e.g., World Competitiveness Yearbook published by the Institute for Management Development <<http://www02.imd.ch/wcc/yearbook/>>, Progress towards Good Governance in Africa, Global Competitiveness Report published by the World Economic Forum <<http://www.weforum.org/gcp>>, and World Markets Online.

data and are based mainly on the subjective perception of the researchers.¹³ Furthermore, they do not provide any indicators or index for comparing and tracking the development of rule of law in Hong Kong.

There are also several studies that deal with the public's attitude towards the rule of law in Hong Kong.¹⁴ These studies provide some indexing but only reflect the perception of the general public. As such, there is a need to develop an index specifically reflecting the actual level of attainment of the rule of law in Hong Kong.

II. METHODOLOGY FOR DEVELOPING AN INDEX FOR HONG KONG

This article reports the conclusions of a study conducted in 2005¹⁵ to compile an index on the rule of law in Hong Kong that could be used for various purposes. First, it can be an indication of the development of the rule of law in Hong Kong. Second, it can provide relevant information for planning to improve the rule of law in Hong Kong, and third, it can be used as a basis for comparing the development of the rule of law between Hong Kong and other societies.

This study adopted an *institutional* approach to the rule of law. This understanding of the rule of law means that the institutions of government act

¹³ Tai (Note 2); Cheng and Chen (Note 2); Ralf Horlemann, *Hong Kong's Transition to Chinese Rule*, (London; New York: Routledge Curzon, Taylor & Francis Group, 2003), Chapter 6; Johannes Chan, "Civil Liberties, Rule of Law and Human Rights: The Hong Kong Special Administrative Region in its First Four Years" in Lau Siu-kai, ed., *The First Tung Chee-hwa Administration: The First Five Years of the HKSAR* (Hong Kong: Chinese University Press, 2002).

¹⁴ Hsin-chi Kuan, "Support for Rule of Law in Hong Kong," (1997) 27 HKLJ 189-205; Hsin-chi Kuan, "Popular Attitudes towards Rule of Law" in Lau Siu-kai, Lee Ming-kwan, Wan Po-san and Wong Siu-lun, eds., *Indicators of Social Development*, (Hong Kong: Hong Kong Institute of Asia-Pacific Studies, the Chinese University of Hong Kong, 2005); and Subjective Social and Legal Indicators conducted by the Public Opinion Programme at the University of Hong Kong <<http://hkupop.hku.hk/english/popexpress/judiciary/index.html>>.

¹⁵ The study was commissioned by the Hong Kong Council of Social Service (HKCSS). The HKCSS launched the Project on Social Development Index for Hong Kong in February 1999. Under this project, social development in Hong Kong is measured using a Social Development Index (SDI). The Index consists of 47 social, political and economic indicators across 14 sectors of development including: (1) Strength of Civil Society; (2) Political Participation; (3) Internationalization; (4) Economics; (5) Environmental Quality; (6) Arts and Entertainment; (7) Sports and Recreation; (8) Science and Technology; (9) Education; (10) Health; (11) Personal Safety; (12) Housing; (13) Crime and Public Safety and (14) Family Solidarity. 31 additional indicators are used to assess changes over time in social development patterns among five vulnerable population groups including women, low-income persons, children, youth and the elderly. In June 2000, the Social Development Index 2000 (SDI 2000) was published, while the Index (SDI) for 2002 was released in May of that year. The HKCSS wanted to include Rule of Law as an additional sector to be covered by the SDI. The research team was led by the author as the principal investigator. Other members of the research team included Robert Chung, Public Opinion Programme, the University of Hong Kong; John Clancey, Asian Human Rights Commission, Hong Kong, Alvin Kwok, Hong Kong Christian Service, Karen Jo Laidler, Department of Sociology, the University of Hong Kong, Alan Leong, SC, practicing barrister, and Chua Hoi Wai, the Hong Kong Council of Social Service.

through the law and under it. The institutions of government are designed according to certain principles, and they operate according to specific procedures to ensure that the social objective of using the law to rule can be achieved. An alternative approach to the study of the rule of law is the *value-based* approach which looks into the content of laws and ascertains whether they recognise certain fundamental human rights and values.

In the legal literature on the rule of law, there has been a longstanding debate between these two approaches to the rule of law.¹⁶ In this study, the institutional approach, which is a narrower one, is preferred for several reasons: First, it is arguably easier to assess the level of the rule of law using the institutional approach. Depending on the value one emphasizes, the assessment of Rule of Law using the value approach can be very varied. However, the components of the rule of law under the institutional approach are generally agreed upon by legal scholars.¹⁷

Second, it is also generally accepted that the institutional approach provides the minimum requirements of Rule of Law. Even though people may disagree on the substantive content of the laws, legal systems that can satisfy the requirements under the institutional approach can at least illustrate that the system has satisfied the minimum standard, no matter what values one would expect it to serve.¹⁸

Third, the institutional approach arguably enables more focused discussion and comparison between researchers of the rule of law even if they belong to different political traditions.¹⁹

The detailed understanding of the rule of law adopted in this study is provided in Table 1. It covers several major aspects of the rule of law: (1) basic requirements of laws, (2) government under the law, (3) rule against arbitrary powers, (4) equality before the Law, (5) impartial implementation of the law, (6) access to justice, and (7) procedural justice. These seven criteria are drawn from various well-known studies on the rule of Law.²⁰ Categorised in a coherent manner, the features of the rule of law identified in these studies are fundamental to any legal system that purports to adhere to the rule of law. However, in order to check whether these criteria are truly appropriate indicators of the rule of law, a weighting mechanism for each criterion is incorporated in this study. The use of this weighting mechanism will be explained further in the following parts.

¹⁶ See Randall Peerenboom, "Varieties of Rule of Law" in Randall Peerenboom, ed., *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.*, (London and New York: Routledge, 2004). These approaches have been referred to as the procedural and substantive approaches or the thin and thick conceptions of the rule of law.

¹⁷ Ronald J. Daniels and Michael Trebilcock, "The Political Economy of Rule of Law Reform in Developing Countries" (2005) 26 Mich. J. Int'l L 99-140; Brian Z. Tamanaha, "The Lessons of Law-and -Development Studies" (1995) 89 Am. J. Int'l L 470-486" and Thomas Carothers, "The Rule of Law Revival" (1998) 77 Foreign Affairs 95-106.

¹⁸ Ibid.

¹⁹ Peerenboom (See Note 16).

²⁰ Lon. L. Fuller, *The Morality of Law*, (New Haven and London: Yale University Press, 1969); Robert Summers, "A Formal Theory of Rule of Law" (1993) 6 Ratio Juris p127-142; Joseph Raz, "Rule of Law and its Virtue (1977) The Law Quarterly Review pp195-202; and Walker (Note 16).

Table 1: Criteria of Rule of Law ²¹

<p>(I) Basic requirements of laws</p> <p>(a) Generality Laws apply to general classes but not to specific persons or entities. Generality significantly limits the discretion of judges and others in authority. It forces them to justify the distinctions that they make between persons by reference to the relevant legal rules and principles.</p> <p>(b) Publication Laws must be open and adequately publicised so that people who are to be guided by the law are able to find out what it is. The laws may also be subject to public criticism. If the laws are not made readily available, there is no check against a disregard of them by those charged with their application and enforcement.</p> <p>(c) Stability Laws should not be changed too frequently, or people will find it difficult to find out what the law is at any given moment and will be constantly in fear that the law has been changed since they last learnt what it is. Stability is essential especially for the long-term planning of their lives by people.</p> <p>(d) Clarity Laws should not be ambiguous, vague, obscure, or imprecise since they are likely to mislead or confuse at least some of those who desire to be guided by them.</p> <p>(e) Non-retroactivity If retrospective penal liability is imposed, the individual is placed in a position where his conduct was lawful at the time of his action, but is subsequently responsible as if his conduct was then unlawful. Non-retroactivity is essential for the certainty of the law, since people can be certain of the legal consequences of their action when they carry it out.</p> <p>(f) Against impossibility Actions that the laws require and forbid must be of a kind which people can reasonably be expected to do and avoid. The law must not impose impossible requirements. Legislators and judges must act in good faith, and believe that the laws can be obeyed and executed.</p> <p>(g) Against arbitrariness The laws should not grant arbitrary power to the government so as to prevent it from using legal power for personal gain, favouritism, or vengeance.</p> <p>(h) General congruence of law with social values The law should remain reasonably in accordance with public opinion. Otherwise, there may be widespread disrespect for the law, and pressures for violent change may build up and find expression in arbitrary and lawless actions.</p>

²¹ An anonymous reviewer of this article has given some valuable comments on the criteria to measure the rule of law adopted in this study. First, the reviewer noted that some of the criteria may need to be refined to avoid overlapping. Second, many of the criteria are vague and require more guidelines if they are to be used across countries. Thirdly, many of the criteria are also contested and there is wide variation across institutions. For example, countries differ significantly over judicial review, and in particular whether regular courts or special administrative and constitutional courts should have certain powers. In addition, some countries do not allow courts to overturn abstract acts (generally applicable rules). The author is very grateful to the reviewer for these astute comments. As this article is a report of a study that has already been completed, the criteria for measuring rule of law which had already been provided to the assessors and the members of the comparison group cannot be changed. However, these criteria could be modified on the basis of these comments from the reviewer if similar studies are to be conducted in Hong Kong in the future or in other legal systems. The comments will greatly improve the comparability of the findings.

Table 1: Criteria of Rule of Law (continued)

(2) Government under the Law

Governmental powers are based on and delimited by law. Government officials can only exercise powers authorised by the constitution and the law, and in the manner so provided by them. They are also subject to the law and enjoy no privilege of exemption from legal liabilities.

(3) Rule against arbitrary powers

No arbitrary powers should be granted to government officials. The discretion of law enforcement agencies, other government officials, or political officeholders should not be allowed to pervert the law.

(4) Equality before the law

The law must be the same for everybody. There should be no difference in treatment regardless of any distinction in terms of race, colour, sex, language, religion, political or other convictions, national or social origins, means, status, or other circumstances. Also, each person should have access to the legal system, on equal terms and without discrimination, to enforce rights, to secure remedies, and to protect interests.

(5) Impartial Enforcement of the Law²²

(a) Congruence between official action and declared rule

There must be effective procedures and institutions, such as judicial review of executive action, to ensure that government action is also in accordance with law. The ordinary courts should be empowered to rule on disputes between the government and citizens. The courts should observe the restraints on power of the government. The Courts should also have the powers to review both subordinate and primary legislation.

(b) Judicial independence

The rules concerning the independence of the judiciary—the method of appointing judges, their security of tenure, the method of determining their salaries, and other conditions of service—are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law. This implies freedom from interference by the executive, whether by way of threats or by way of blandishments such as the offering of the prospect of an exalted career. In addition, there should be no interference from the legislature on the exercise of judicial function.

(6) Access to Justice

(a) Accessibility of courts

The courts should be easily accessible. Given the central position of the courts in upholding Rule of Law, their accessibility is of great importance. Long delays, excessive costs, and so on may effectively turn the law into a dead letter and frustrate one's ability to effectively guide oneself by the law.

(b) Independent legal profession

Legal representation is required in a rule of law system. In criminal cases, it is particularly important that the accused should have the opportunity to be represented.

(c) Procedures to complain against government actions and decisions

There should be extra-judicial channels to bring complaints against administrative actions and decisions on other grounds like maladministration.

(7) Procedural Fairness

(a) Presumption of innocence

This presumption dictates that in every criminal case, it is for the prosecution to prove an accused's guilt, not for the accused to prove his or her innocence. If guilt is not proved to the requisite standard, then the accused is entitled to acquittal.

²² Even though corruption had not been explicitly included as one of the criteria, the criterion of 'impartial enforcement of the law' includes the situation of corruption by government officials.

Table 1: Criteria of Rule of Law (continued)

<p>(7) Procedural Fairness (continued)</p> <p>(b) Natural justice: unbiased tribunal and fair hearing Justice and Rule of Law demand that in the conduct of legal and administrative proceedings, procedural fairness is observed. It comprises two fundamental rules of fair procedure: that a man may not be a judge in his own cause, and that a man's defence must always be fairly heard.</p> <p>(c) Basic rules of evidence to achieve justice Evidence gathered by the police must be acquired by lawful means. The evidence admitted into court must be both of an admissible nature and fairly presented. For Rule of Law to be observed, it is of central importance that the evidence before the court be both complete and reliable.</p> <p>(d) Fair Trial In the determination of any criminal charges against an individual or of his/her rights and obligations in a suit at law, each is entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (<i>order public</i>), or national security in a democratic society, or when the interests of the private lives of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. However any judgment rendered in a criminal case or in a suit of law shall be made public except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.</p>

This study has adopted a combination of qualitative as well as quantitative methods to compile an index for the rule of law. The first stage of the study was to collect a list of quantifiable legal data relating to Rule of Law (see Table 2).

Table 2: Legal Data (2000-2003)

<p>(1) Crime Rate</p> <ul style="list-style-type: none">(a) Number of reported crimes by type of offence(b) Number of minor offences reported(c) Offenders arrested by age group <p>(2) Number of police complaints and number of complaints that can be substantiated</p> <p>(3) Number of complaints to the Ombudsman and number of complaints that can be substantiated</p> <p>(4) Number of judicial review cases</p> <p>(5) Number of judicial review cases reported in the Judiciary website and number of cases in which judicial remedies (6) are granted to the applicants.</p> <p>(7) Legal Aid</p> <ul style="list-style-type: none">(a) Number of legal aid applications(b) Number of legal aid certificates granted(c) Number of cases annually heard by courts of all levels <p>(8) Number of judges per 100,000 persons</p> <p>(9) Number of lawyers per 100,000 persons</p> <p>(10) Waiting time for case disposition by courts of all levels</p>

Table 2: Legal Data (2000-2003) (continued)

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| (11) % of criminal trials in the Court of First Instance where at least one accused was not represented at the commencement of trial |
| (12) Judiciary salary as a % of what a comparable professional makes in private practice |
| (13) Number of complaints, investigations, prosecutions and convictions by the ICAC |
| (14) % of accused found guilty in criminal cases at the Magistrates, District Court and the Court of First Instance |
| (15) Successful rate of criminal appeal (in %) of convictions and sentencing at various levels of courts |
| (16) Salary of police officer as a % of what a comparable professional makes in private practice |
| (17) Salary of a prosecutor as a % of what a comparable professional makes in private practice |
| (18) Number of cases handled by the Duty Lawyer Service ²³ |

The data included are considered to be relevant in determining the level of attainment of the rule of law. However, this study does not use the data to directly derive an index for the rule of law because there can be various possible readings of the same data which may lead to inconclusive results.²⁴ A good example is the difficulty in ascertaining whether an increased number of applications for judicial review indicates a higher level of attainment of the rule of law. This increase may result either because people have confidence that the judiciary is an independent and fair entity which addresses people's grievances against the government, or, alternatively, because there are more illegal acts committed by the government.²⁵

In addition to the quantifiable legal data, data concerning public perception on several aspects of the rule of Law was also included in an information

²³ The Duty Lawyer Service is funded by the HKSAR Government but independently managed and administered jointly by the Bar Association and Law Society through the Council of the Duty Lawyer Service. The Duty Lawyer Service runs the Duty Lawyer Scheme which provides free legal representation by qualified lawyers in private practice to eligible defendants appearing in all Magistrates Courts, Juvenile Courts and Coroners Courts in Hong Kong.

²⁴ See Kevin Davis, "What can the Rule of Law Variable tell us about Rule of Law Reforms" (2005) 26 *Mich. J. Int'l. L.* 141 at 145-148. Davis pointed out that quantitative study on Rule of Law usually encounters two main problems. First, the choice of legal variables could not indicate the actual level of attainment of Rule of Law. Second, the researchers might have drawn wrong inferences from the data. For these reasons, this study did not rely on any legal variable or set of legal variables to derive the Index on Rule of Law directly. The criteria of Rule of Law adopted in this study are only used as a reference for the experts in making their assessment on the level of attainment of Rule of Law. They were not asked to infer an index from those criteria directly but to give their assessment on the importance weighting and the level of attainment of each of the criterion separately. The experts were also asked to give an importance weighting to each criterion to ensure that the criteria are relevant legal variables for Rule of Law.

²⁵ See the explanations for the increased number of judicial review applications given by the Chief Justice in his speech at the Ceremonial Opening of the Legal Year 2006 <<http://www.info.gov.hk/gia/general/200601/09/P200601090137.htm>>.

package.²⁶ (See Table 3.)

This data was useful because one of the factors in determining the level of attainment of the rule of law in a community is the public's attitude towards the law.²⁷ However, like the quantifiable legal data, the index for the rule of law cannot be derived solely from public perceptions. As noted earlier, the public's perception of the level of rule of law may not be approximate to the actual level of attainment of the ideal.

In the end, assessment and analysis of the rule of law must still be based upon some degree of expert input. We believe that experts' assessment can provide a more accurate evaluation of the level of rule of law. Unlike other studies, experts with insiders' knowledge on Rule of Law were selected in this study. The assessors in this study were all randomly selected government administrators, law enforcement officials, judges, legislators, and legal practitioners.²⁸ We believe that assessment by insiders can provide a more accurate evaluation of how the law is in fact made, enforced, applied, and adjudicated. However, we do recognise problems inherent in relying upon insider expertise, and as is set out shortly, we have taken steps to address these issues.

The experts' personal knowledge and experience are critical to this study. However, no expert can be expected to have the same level of knowledge of every aspect of the rule of law. The purpose of providing the experts with the information package was to ensure that they had a comprehensive and common knowledge base to make their assessment.

²⁶ The data were collected from polls conducted in mid- and late-2004. This survey was conducted by telephone interviewers. The target population of the survey were Cantonese speakers in Hong Kong aged 18 or above. Telephone numbers were first selected randomly from telephone directories as seed numbers. Another set of numbers was then generated by using the plus/minus one/two method. Duplicate numbers were then screened out, and the remaining numbers were mixed in a random order to constitute the final sample. Upon successful contact being made with a target household, one member of the household was selected among those present using the "next birthday" rule. There were 1,020 successful samples and the response rate was 67.4%.

²⁷ Walker (Note 16).

²⁸ The original plan was to randomly select 6 judges from all levels of courts, 6 Legislative Councillors, 2 officials from the Department of Justice, 2 senior officials (Administrative Officer rank) from the Government with no legal professional qualifications, 2 senior officials (superintendent or above) from law enforcement agencies, 3 practicing barristers, and 6 practicing solicitors as our assessors. We sent out our invitation to the randomly selected assessors and when a person refused, we randomly selected another from the category and sent out the invitation to the newly selected assessor. The actual assessors who accepted our invitations were 4 judges from all levels of courts, 4 Legislative Councillors, 2 officials from the Department of Justice, 2 senior officials (superintendent or above) from law enforcement agencies, 3 practicing barristers, and 4 practicing solicitors. No senior officials (Administrative Officer rank) from the Government accepted our invitation. This had been taken into account when we compiled the final score for the Index.

Table 3: Subjective Statistics

(1) Percentage of the population who know how to access the legal system ²⁹
(2) Percentage of citizens responding that they will be fairly treated if arrested ³⁰
(3) Percentage of those arrested and charged with a crime who allegedly received bad treatment from the police ³¹
(4) Rating by citizens on the impartiality of the courts in Hong Kong
(5) Rating by citizens on whether Hong Kong is a society governed by the rule of law

All assessors were provided with the information package and the criteria on Rule of Law adopted in this study. Each assessor was given a form (Table 4) in which he/she had to indicate the weight of importance that he/she would place on the seven criteria on a scale from 1 to 10.

Table 4: Assessment Table

	Criteria	Weighting (1 [Less Important] →→→10 [Very Important])	Score %
1.	Basic requirements of laws		
2.	Government under the Law		
3.	Rule against arbitrary powers		
4.	Equality before the Law		
5.	Impartial Enforcement of the Law		
6.	Accessibility to Justice		
7.	Procedural Fairness		

²⁹ The finding is:

Percentage of the population who knows how to access the legal system						
	Very clear	Clear	Half-half	Unclear	Very unclear	Don't know/ Hard to Say
If you faced lawsuits, such as being arrested by the police or sued by someone for compensation, would you know clearly how to obtain legal service to help you?	10.6	28.2	12.2	27.7	16.1	5.2
If you had to take legal action, such as claiming for unpaid salary or compensation or filing a judicial review, would you know clearly how to obtain legal service to help you?	10.4	31.0	14.3	25.3	13.2	5.7

³⁰ The finding is:

Percentage of citizens responding that they will be fairly treated if arrested						
	Definitely	Yes	Half-half	No	Definitely not	Don't know/ Hard to say
If you were arrested by the police, do you think that you would be treated fairly?	15.5	45.7	13.0	5.9	2.7	17.3

³¹ The finding is:

Percentage of those arrested and charged with a crime who allegedly received bad treatment from the police						
	Very well	Well	Half-half	Badly	Very badly	Don't know/ Hard to say
How did the police treat you?	8.7	14.1	49.1	4.8	20.9	2.4

The assessors were asked to give a score (ranging from 0-100, with 50 as the passing score) for each individual criterion. They were told that the score should be based on their understanding of the rule of law of Hong Kong at the time when they completed the assessment. The overall score for each of the assessors would be calculated on the basis of the score given for the criteria and the weighting of the criteria. The assessors were also asked to write a one-page explanation for the score they had given. The purpose of this was to enable them to give a succinct explanation of the scores they had given, adding a more substantial dimension to the Index.

A weighted average score and a weighted average importance for each criterion were calculated from the scores given by the assessors. Combining these weighted average scores for all seven criteria, the assessors' index was compiled (Table 5).

It has been questioned whether insiders necessarily have a better or more accurate understanding of ground reality than outsiders. Insiders may, just because they are insiders, have biases and misperceptions that are no less consequential than the biases and misperceptions that outsiders have just because they are outsiders.³²

³² These questions on the reliability of assessment by insiders were raised in a different context but may still be relevant to the discussion of the methodology adopted in this study. *See* Frederick Schauer, "The Limited Domain of the Law" (2004) 90 Virginia L. Rev. 1909 at 1913, fn. 15.

Table 5: Calculation of the Average Scores and Weighting

(a) Steps to Calculate Weighted Average Scores for Each Criterion

(1) From the scores of each criterion $j, j = 1, \dots, 7$, identify the highest and the lowest scores, i.e. $S_{highest,j}$ and $S_{lowest,j}$ respectively, as follows:

$$S_{highest,j} = \max(S_{1j}, \dots, S_{nj})$$

$$S_{lowest,j} = \min(S_{1j}, \dots, S_{nj})$$

(2) Calculate a weighted average of all scores \tilde{S}_j by discarding the highest and the lowest scores and then calculate a simple average of the rest of the scores, i.e.:

$$\tilde{S}_j = \frac{\sum_{i=1}^n S_{ij} - S_{highest,j} - S_{lowest,j}}{n - 2}$$

(b) Steps to Calculate Weighted Average Importance Weights for Each Criterion

(3) From the importance weights of each criterion $j, j = 1, \dots, 7$, identify the highest and the lowest weights, i.e.

$W_{highest,j}$ and $W_{lowest,j}$ respectively, as follows:

$$W_{highest,j} = \max(W_{1j}, \dots, W_{nj})$$

(4) $W_{lowest,j} = \min(W_{1j}, \dots, W_{nj})$ Calculate a weighted average of all scores \tilde{W}_j by discarding the highest and the lowest scores and then calculate a simple average of the rest of the scores, i.e.:

$$\tilde{W}_j = \frac{\sum_{i=1}^n W_{ij} - W_{highest,j} - W_{lowest,j}}{n - 2}$$

(c) Steps to Combine Weighted Average Scores and Weighted Average Importance Weights of All Criteria to Form a

Rule of Law Sub-index

(5) For each criterion $j, j = 1, \dots, 7$, calculate a relative importance weight $\tilde{\tilde{W}}_j$ by the formula:

$$\tilde{\tilde{W}}_j = \frac{\tilde{W}_j}{\sum_{k=1}^7 \tilde{W}_k}$$

(6) Calculate a weighted rule of law score $\tilde{\tilde{S}}$ by the formula:

$$\tilde{\tilde{S}} = \sum_{j=1}^7 \tilde{\tilde{W}}_j \tilde{S}_j$$

To counter the possible biases of insiders, we have adopted several measures in this study to minimize such effect.³³ First, in addition to the insider assessors, a group of independent persons was selected to form a comparison group. The members of this comparison group were chosen purposively. It included three law professors, two law students, four representatives from law-related non-governmental organisations in Hong Kong, and two newspaper reporters working in the field of law. Each of them had different kinds of connections with the legal system so that as a group, they had more knowledge about the actual operation of the legal system than ordinary persons. Their assessment would then not be another type of public perception of the rule of law because all of them are informed outsiders. However, they did not have any direct role in the operation of the legal system, so their views would not constitute another type of insider perspective.

Members of the comparison group were provided with the same set of materials and were asked to follow the same procedure as the assessors. Using the same calculation methods, a comparison index from the assessment of the comparison group was also compiled. The purpose of this was to check the accuracy of the finding of the assessors by way of comparison. The idea was that if discrepancies were found between the conclusions of the assessors and that of the comparison group, explanations would be required.

Second, in calculating the average scores for the assessors, the highest and the lowest scores given by the assessors for each criterion were taken away. Similarly, in calculating the average importance weighting of each criterion, the highest and lowest weights given by the assessors were also not included. The purpose of these measures was to minimize the effect of over-scoring and under-scoring by the assessors on account of their biases.

III. INDEX ON RULE OF LAW FOR HONG KONG 2005: SCORE 75/100

The assessments from the assessors and the comparison group were received between February 2005 and July 2005. By weighting the average score of each criterion with the corresponding relative weight, and by summing up the average scores of all of the seven criteria together, the overall Index for the rule of law were calculated separately for the assessors and the comparison group. The detailed scores are presented in Table 6.

³³ These measures would also avoid the possibility of subjective bias caused by a few widely reported but perhaps non-representative cases.

Table 6: Weights and Scores by Criterion and Weighted Scores

	Criterion	Assessors		Comparison Group	
		Importance Weighting	Score	Importance Weighting	Score
		1-10	0-100	1-10	0-100
1	Basic requirement of law	9.00	78.82	9.22	70.56
2	Government under law	9.12	72.06	9.00	68.89
3	Rule against arbitrary powers	8.88	70.59	9.44	70.78
4	Equality before law	9.18	74.41	9.67	69.22
5	Impartial enforcement of law	9.29	75.00	9.33	70.56
6	Accessibility to justice	8.71	71.32	9.00	66.11
7	Procedural fairness	9.41	80.00	9.00	77.78
	Index of Rule of Law (0-100)	74.66		70.54	

In general, with the exception of the scores for ‘rule against arbitrary powers,’ the average scores from the assessors tended to be higher than those from the comparison group. The assessors were satisfied with ‘procedural fairness’ (80.00), ‘basic requirement of law’ (78.82), ‘government under law’ (72.06), ‘accessibility to justice’ (71.32), and ‘rule against arbitrary powers’ (70.59), respectively. Moreover, in all cases, the average scores were substantially above the passing score of 50. Similarly, the comparison group gave ‘procedural fairness’ (77.78) the highest average score and ‘accessibility to justice’ (66.11) the lowest.

In terms of absolute weights, the average weights of all seven criteria given by both groups were at least high 8s or above, indicating that all the criteria were deemed important by the assessors and the comparison group.³⁴ The criterion with the highest average weight from the assessors was ‘procedural fairness’ (9.41), and the one with the lowest was ‘accessibility to justice’ (8.71). The comparison group gave the highest average weight to ‘equality before law’ (9.67), whilst ‘government under law’, ‘accessibility to justice’, and ‘procedural fairness’ received more or less the same average weight of 9.00. This shows that the criteria selected to determine the rule of law in this study were considered appropriate by those surveyed. There is also no major difference in their assessment of the overall situation relating to the rule of law.

According to the design of this method, in compiling an index for the rule of law in Hong Kong, the focus of the assessment was based on the expert knowledge of the personnel directly involved in the legal process. Even though the planned number of assessors from each sector was not obtained, an almost equal number of assessors from the Judicial, Legislative, and Executive branches did participate in the assessment. The legal profession had also given a positive response to this study. The Index compiled on the basis of the findings of the assessors was 74.66, which was rounded up as **75** out of 100.

³⁴ In future comparative studies on Rule of Law adopting this methodology in different legal systems, the weighting of the criteria given by their assessors can also be compared. The comparison may indicate how different legal systems see the relative importance of a certain criterion in assessing the rule of law in their own systems.

The index compiled on the basis of the finding of the comparison group was 70.54. Since the difference between this and the overall finding of the assessors is not substantial, there is no need to adjust the index based on the finding of the comparison group. Hence, the assessors' index was adopted as the Index of Rule of Law in Hong Kong for 2005.

The score of 75 does not have much meaning without a context. As there is no previous score for the rule of law in Hong Kong, the point of reference cannot be the past score. However, **75** is still considered to be a **high** score in this study. This understanding is based on two reasons. First, the assessors and the comparison group were instructed that 50 is the passing score, 100 is the highest score, and 75 is a score on the high side. Second, in their explanations, many assessors and members of the comparison group used the description of 'high standard' for the rule of law in Hong Kong. This illustrated that for them, the score of 75 was also on the high side.

To add a more frontline perspective when drawing up the recommendations, a focus group was constituted and charged with collecting the views of social service professionals on the rule of law in Hong Kong. The five social service professionals participating in the focus group came from different service fields, including youth outreach, child protection, rehabilitation of ex-offenders, protection of industrial accident victims' rights, and counselling of families with debt problems. The focus group was given the criteria of Rule of Law and members were asked to give comments especially with reference to their experiences as well as those of their clients' in the course of carrying out their services.

IV. HIGH STANDARD IN RULE OF LAW BUT WITH A DECLINING TREND

All of the 19 assessors and the 11 members of the comparison group had given explanations for their assessment. To analyse their assessment of rule of law, their explanations were analysed. In general, most of them agreed that Hong Kong has attained a high standard in Rule of Law. However, they held the view that there has been a decline in the standard in recent years.³⁵

Most assessors and members of the comparison group also agreed that the quality of laws within Hong Kong is good in the sense that it satisfies the basic requirements for law in a system which purports to adhere to the rule of law. Adherence to norms regarding judicial independence and the judicial power to review administrative decisions are considered to be good by most assessors and members of the comparison group. This seems to indicate that they have confidence in the impartiality of the judiciary. However, there is still a concern that judges of lower courts do not have security of tenure.³⁶

³⁵ The assessment of Rule of Law in Hong Kong is surely unique in the constitutional and political context of Hong Kong. Explanations for why Hong Kong could attain a high standard in rule of law cannot be generalized in a way that the Hong Kong experience could be directly exported to other legal systems. To explore why Hong Kong has attained a high standard is not the main objective of this study. Rather, to develop a reliable method to ascertain the standard of the rule of law in Hong Kong or in any other legal system may be even more important.

³⁶ *See also*, Berry F.C. Hsu, "Judicial Independence under the Basic Law", (2004) 34 HKLJ

The assessors and members of the comparison group were also satisfied with the performance of law enforcement agencies which demonstrate professionalism and respect for law. It is generally accepted that people in Hong Kong are considered equal before the law, but there is still a concern that there should be more protection for minorities.³⁷ Generally, it is agreed that the administrative and judicial systems in Hong Kong are procedurally fair.

There is no clear evidence that the HKSAR Government has exercised its powers arbitrarily; however, several assessors raised the concern of favouritism in respect of specific giant local corporations exhibited by Government officials.³⁸

Certain recent incidents have been referred to by some assessors and members of the comparison group as evidence of the downward trend in relation to the rule of law in Hong Kong, especially under the criterion of 'Government under the law'. There is concern that the HKSAR Government might not be able to uphold the rule of law when there are strong political forces opposing it and most especially if there is pressure from the Chinese Government.

The first incident referred to is the ruling made by the HKSAR Government shortening the time for filing an appeal in a judicial review action against a decision of the Housing Authority to privatise shopping facilities and car parks in public housing estates. In this incident, the HKSAR Government was perceived to have demonstrated an attitude in which the legal rights of a citizen could be sacrificed in exchange for administrative convenience.³⁹

279-302.

³⁷ There are now three sets of anti-discrimination laws in Hong Kong to combat sex discrimination, disability discrimination, and family status discrimination. The HKSAR Government has a concrete plan to legislate another set of anti-discrimination laws on race. However, it is still not certain whether there will be any anti-discrimination law on sexual orientation, though the HKSAR Government has conducted a public survey seeking public opinion on the legislation of such law. Age and religious discrimination are still not included in any legislative plan.

³⁸ This finding is very similar to the study by the World Economic Forum on the competitiveness of Hong Kong which, in the 2005 study, is ranked much lower at 28th place, having dropped seven places in 2004. The World Economic Forum's ranking is based on polls by business leaders. The drop is attributable to a tangible deterioration in the quality of the institutional environment in Hong Kong. It was observed that there was a weakening in perceived judicial independence, the protection of property rights, and policy making due to favouritism by government agencies.

³⁹ The Housing Authority encountered a severe budgetary deficit and wanted to raise capital by selling certain retail and car park facilities in public housing estates ('RCPF'). The proposed divestment by the Housing Authority of the RCPF would be accomplished by selling the RCPF to the Link Properties which is owned by a trust called the Link Real Estate Investment Trust ('REIT'). The REIT would be offered for purchase to the public in Hong Kong and to certain investors internationally. The offer to the Hong Kong public of REIT units commenced on 25 November 2004, and dealing in the units was expected to begin on 16 December 2004. On 8 December 2004, a notice of application for leave to apply for judicial review was issued by Madam Lo Siu Lan, a tenant in a public housing estate, on the ground that the Housing Authority had acted *ultra vires* in selling the RCPF to Link Properties. The Court of First Instance decided in favour of the Housing Authority, and Madam Lo had a legal right to file an appeal within 28 days. In order to clear all legal impediments, the Housing Authority applied to the Court of Appeal to have the period of appeal abridged. The Court of Appeal reluctantly allowed abridgement and decided also in favour of the

The second incident concerned the various interpretations accorded by the Standing Committee of the National People's Congress to the Basic Law. It was perceived that through the Committee's manipulation of its constitutional power to interpret Hong Kong's constitutional instrument,⁴⁰ the Basic Law, constitutional questions in Hong Kong were resolved by the political decisions of the Chinese Government under the facade of legal rulings.⁴¹

The third incident concerned decisions taken by the Secretary for Justice, Elsie Leung, to not pursue prosecutions in several cases. This aroused the concern that there would be selective enforcement of law in HKSAR and that certain people in Hong Kong may well be above the law.⁴²

Another criterion that is generally considered to be unsatisfactory is access to justice. High legal cost is one of the major reasons identified here. Other factors are the decrease in quality of lawyers and judges, and the heavy workload of the judiciary, which causes delays.

It is also believed that there should be improvement in publicity for law and basic rights.

Comparing the scores given for each of the seven criteria, 'government under law', 'rule against arbitrary powers', and 'accessibility to justice' were identified

Housing Authority on the substantive issue. The applicant also had 28 days to appeal to the Court of Final Appeal. The Housing Authority again applied to the Court of Final Appeal to have the period of appeal abridged. However, this time, the Court of Final Appeal refused. As a result, the listing finally lapsed on 20 December 2004. See *Lo Siu Lan and Another v. Hong Kong Housing Authority* HCAL 154/2004 (Court of First Instance); *Lo Siu Lan and Another v. Hong Kong Housing Authority* CACV 378/2004 (Court of Appeal); *Lo Siu Lan and Another v. Hong Kong Housing Authority* FAMP No. 2 of 2004 (Court of Final Appeal); *Lo Siu Lan and Another v. Hong Kong Housing Authority* FACV No. 10 of 2005 (Court of Final Appeal).

⁴⁰ Article 67(4) of the Constitutional of the People's Republic of China and Article 158 of the Basic Law of the HKSAR

⁴¹ In April 2004, the Standing Committee of the National People's Congress issued an interpretation and a subsequent decision that gave the power to decide whether there is a need to change the method of the election of the Legislative Council and the Chief Executive back to the Beijing government, and ruled out the introduction of universal suffrage to elect all seats in the Legislative Council and the Chief Executive in 2007 and 2008. In April 2005, it issued another interpretation which provided that the term of a re-elected Chief Executive after the resignation of a Chief Executive should be the remaining term of the resigned Chief Executive. To many people in Hong Kong, these so called interpretations seem to be more like decisions rather than real interpretations of the constitutional text. Also, these interpretations reflected more the political concern of the Chinese Government rather than the legal meaning of the relevant constitutional text. The HKSAR Government in both incidents could do nothing to prevent the abuse of the interpretation power by the Chinese Government, and it joined hands with some pro-Beijing political groups in Hong Kong in urging Hong Kong people to accept such political interpretations from Beijing.

⁴² The oft-cited example was the decision of the Secretary of Justice in 1998 not to prosecute Aw Sian, a member of the Chinese People's Political Consultative Conference and the chairman of a newspaper company in Hong Kong. Three current and former senior executives of Aw Sian's company were charged with conspiracy to defraud, and Aw Sian was also named as one of the parties of the conspiracies stated. There was worry that the pro-Central Government background of Aw Sian might have saved her from prosecution, but the Secretary of Justice openly stated that her decision not to prosecute was solely based on public interest.

as the weakest. This was confirmed by the explanations given by the assessors and the members of the comparison group.

The comparatively poorer scores in these three criteria also account for the general comment offered by assessors as well as the comparison group pointing to a downward trend in observance of the rule of law in Hong Kong. Some of them believe that conditions for the rule of law in Hong Kong were higher than the level attained in 2005.⁴³ As such, some of them expressed worry that conditions affecting the rule of law would further deteriorate.

Based on the findings of this study, there are several recommendations for maintaining and improving Hong Kong's high standard of rule of law. First, the HKSAR Government must take positive steps to maintain the image that the government is bound by the law.⁴⁴ Second, actions must be taken to improve conditions regulating access to justice in Hong Kong. These may include lowering legal costs, wider availability of free legal services, and more transparency in the legal services market. Third, better publicity of the meaning and value of the Rule of Law, the content of major areas of laws relating to the daily life of citizens, and the mechanisms as well as the procedures for citizens to seek legal redress, is needed. The objective is to make information on these matters a part of the general knowledge of Hong Kong citizens.

V. FURTHER STUDIES

Based on the experience of this study, there is a proposal to conduct similar exercises every two years to assess the level of rule of law in Hong Kong. The Index in 2005 yielding a score of 75 out of 100 can be taken as a reference point to track the development of the rule of law in Hong Kong in the coming years.

As the methodology adopted in this study aimed at evaluating the rule of law in Hong Kong only from an institutional approach, there may be other aspects related with the relationship between the Hong Kong society and the law that are not reflected in this Index. In order to provide further information on the status of law in the social development of Hong Kong, other indexes may need to be developed to indicate the extent of respect for law by Hong Kong citizens and their level of knowledge of the law in Hong Kong.⁴⁵

Another possibility is to conduct similar studies on other countries' legal systems so as to compare the level of attainment of rule of law among Asian legal systems.⁴⁶ Such comparative study may provide more information for the Hong

⁴³ As there was no similar study on Rule of Law conducted in Hong Kong before 2005, this impression was based on their subjective perception.

⁴⁴ In late 2005, a new Secretary for Justice, Wong Yan-Lung, was appointed to replace Elsie Leung. Wong Yan-Lung is a senior council, and the public generally has an impression that he is fair, independent, and has professional integrity. The support rating of Wong Yan-Lung in polls conducted by the HKU POP SITE remains high in comparison with that of other principal officials including Elise Leung.

⁴⁵ The opinions of people in Hong Kong are likely to be different from those of Mainland Chinese citizens on the same issues. Some representatives of Mainland Chinese citizens or experts should be included in future surveys.

⁴⁶ Some groundwork has already been done, see Randall Peerenboom, ed., *Asian Discourses of*

Kong legal system to reflect on ways to maintain and improve the conditions affecting rule of law within it by drawing inspiration from the experience of other legal systems.⁴⁷

Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S., (London and New York: Routledge, 2004).

⁴⁷ Hong Kong is a small place, so an aggregate measure may be roughly accurate. However, if a similar study is to be conducted in a large developing country with great regional and institutional variations, a single aggregate score for the whole country may not be very meaningful. Different scores may have to be developed for different areas.