

Social Development Index: Rule of Law Sub-index 2005

Final Report

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1. Background

The Hong Kong Council of Social Service (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 is made up 47 social, political and economic indicators across 14 sectors of development including:

1. Strength of Civil Society
2. Political Participation
3. Internationalization
4. Economic
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
14. Family Solidarity

Additional 31 indicators are used to assess changes over time in social development among five vulnerable population groups including women, low-income persons, children, youth and elderly persons. The Social Development Index 2000 (SDI 2000) and the Social Development Index 2002 (SDI 2002) were published. The next release, the Social Development Index 2006 (SDI 2006), is scheduled for the summer of 2006.

In 2004, with a view to include the Rule of Law as an additional sector to be covered by the SDI, the HKCSS undertook a study to compile a Rule of Law Sub-index for the SDI. It is expected that the Sub-index, as well as its method of compilation, can 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 attainment of the Rule of Law in Hong Kong. Third, it can be used as a basis for comparison between Hong Kong and other societies in their development of the Rule of Law.

Professor Benny Tai, Associate Professor, Department of Law, Faculty of Law, University of Hong Kong, has been invited to be the Chief Investigator of the study. An expert panel of seven members (**Table 1**), with Professor Tai as Convener, has been assembled to advise on the design of the study and the analysis of the findings. The compilation phase of the Rule of Law Sub-index of the Social Development Index concluded in October 2005. This report outlines the conceptual framework and the methodology for assessing the Rule of Law in Hong Kong in Section 2 and Section 3 respectively. Section 4 presents the findings of the study and a discussion follows in Section 5. Ideas for further development of the Sub-index are suggested in Section 6.

Table 1: Expert Panel Members

Mr. Benny Tai (Convener of the Panel)	Associate Professor, Department of Law, Faculty of Law, University of Hong Kong
Dr. Robert Chung	Director, Public Opinion Programme, Faculty of Social Sciences, University of Hong Kong
Mr. John Clancey	Chairperson Asian Human Rights Commission, Hong Kong
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Mr. Chua Hoi Wai	Business Director, Policy Advocacy and International Networks, Hong Kong Council of Social Service

2. Rule of Law

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 through law and act under law. The institutions of government are designed according to certain principles and operate according to certain procedures to ensure these objectives can be achieved. Another approach to rule of law is the value approach which looks into the system of laws and sees whether it recognizes certain fundamental human rights.

The institutional approach, which is a narrower approach, was adopted in this study because it allowed us to be more focused in the study. That does not mean that we do not agree that the content of law should recognize certain fundamental rights, the values approach may overlap with the protection of human rights and may be covered by another Human Rights Sub-index.

Under our institutional approach, the Rule of Law in Hong Kong is judged on the following criteria:

1. Basic requirement 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

2.1 Basic requirements of laws

(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.

(b) Publicized

The law must be open and adequately publicized 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

(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 people's long term planning of their lives since people are to be guided by law in their long term decisions.

(d) Clarity

Law should not be ambiguous, vague, obscure or imprecise which is likely to mislead or confuse at least some of those who desire to be guided by it.

(e) Non-retroactivity

If retrospective penal liability is imposed, the individual is placed in the position where his conduct was lawful at the time of his action but, subsequently, he is held responsible as if his conduct was then unlawful. Non-retroactivity is essential for certainty of law since people can be certain of the legal consequences of their action when they do it.

(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 the laws can be obeyed and executed.

(g) Against arbitrariness

The laws should not grant arbitrary power to the government so as to prevent it from using the legal power for personal gain, favouritism or out of vengeance.

(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.

2.2 Government under the Law

Governmental powers are based and delimited by law. Government officials can only exercise those powers authorized by the constitution and the law in the manner so provided. They are also subject to the law and enjoy no privilege to be exempted by legal liabilities.

2.3 Rule against arbitrary powers

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

2.4 Equality before the law

The law must be the same for everybody. There should be no difference in treatment, regardless of any distinction in their 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.

2.5 Impartial Enforcement of the Law

(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 are empowered to rule on disputes between government and citizen. The courts are of the position to observe the restraint on power of the government. The Courts should also have the powers to review both the 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 way of fixing 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. It 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. Nor should there be any interference from the legislature with the exercise of the judicial function.

2.6 Accessibility to Justice

(a) Accessibility of courts

The courts should be easily accessible. Given the central position of the courts in upholding the rule of law, the accessibility of courts is of great importance. Long delays, excessive costs, etc. may effectively turn the law to a dead letter and frustrate one's ability effectively to 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 other extra-judicial channels to bring their complaints against the administrative actions and decisions on other grounds like maladministration.

2.7 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 be acquitted—that is, he or she must be acquitted.

(b) Natural justice: unbiased tribunal and fair hearing

Justice and the rule of law demand that, in the conduct of legal and administrative proceedings, procedural fairness be 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.

(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 the rule of law to be observed, it is of central importance that the evidence before the court be both complete and reliable.

(d) Fair trial

In the determination of any criminal charges against him/her, or of his/her rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*order public*) 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; but 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.

3. Methodology

Both qualitative as well as quantitative methods were used to compile the Rule of Law sub-index. The whole study consisted of five stages:

1. Quantitative processing of legal data
2. Qualitative assessment of Rule of Law in Hong Kong
3. Compilation of the Rule of Law Sub-index
4. Analysis of Findings
5. Focus group discussion

3.1 Quantitative processing of legal data

Legal statistics relating to Rule of Law in Hong Kong were collected, covering years 2000 to 2003. These statistics served as references by the assessors in stage 2 of this study to assess the Rule of Law in Hong Kong. They included objective data from various government departments and legal organizations, and subjective data gathered through an opinion poll specially conducted by the Public Opinion Programme of the University of Hong Kong in December 2004 for this study. A full list of the statistics included in this data collection exercise is in **Table 2**. Actual figures for the years 2000 to 2003 can be found in **Annex 2 of Appendix 1**.

Table 2: Legal Statistics Related to Rule of Law in Hong Kong

<i>Objective Statistics</i>	
1.1	Crime rate
	(a) Number of reported crimes by type of offence
	(b) Number of minor offences reported
	(c) Offenders arrested by age group
1.2	Number of police complaints and number of complaints that can be substantiated
1.3	Number of complaints to the Ombudsman and number of complaints that can be substantiated
1.4	Number of judicial review cases
1.5	Number of judicial review cases reported in the Judiciary website and number of cases that judicial remedies are granted to the applicants
1.6	Legal aid
	(a) Number of legal aid applications
	(b) Number of legal aid certificates granted

1.7	Number of cases annually heard by courts of all levels
1.8	Number of judges per 100,000 persons
1.9	Number of lawyers per 100,000 persons
1.10	Waiting time for case disposition by courts of all levels
1.11	% of criminal trials in the Court of First Instance where at least 1 accused not represented at the commencement of trial
1.12	Number of complaints, investigations, prosecutions and convictions by the ICAC
1.13	Successful rate of criminal appeal (in %) of convictions and sentencing at various levels of courts
1.14	Number of cases handled by Duty Lawyer Service
<i>Subjective Statistics</i>	
1.15	Rating by citizens on the impartiality of the court in Hong Kong
1.16	Rating by citizens on whether Hong Kong is a society governed by the rule of law
1.17	% of population who know how to access the legal system
1.18	% of citizens responding that they will be fairly treated if arrested
1.19	% of those arrested and charged with a crime who allege having had bad treatment by the police

3.2 Qualitative assessment of Rule of Law in Hong Kong

In the second stage of the study, two groups of participants were invited to conduct the qualitative assessment of the Rule of Law in Hong Kong. One group represented personnel in the legal process and members in the group were chosen randomly, while the other group represented law-related organizations and academics and members were chosen purposively. The Rule of Law Sub-index was based mainly on the assessments of the former group (which we will refer to as “the assessor group”), with assessments of the latter group (which we will refer to as “the comparison group”) serving as comparison.

(a) Sampling

More specifically, the assessor group included a stratified random sample of participants in the legal process. It was planned to have assessors from the following categories:

1. Judges
2. Legislative councilors

3. Department of Justice officials with legal qualification
4. Senior government officials (Administrative Officer [AO] rank) with no legal qualification
5. Senior officials (superintendent or above) from law enforcement agencies
6. Practicing barristers
7. Practicing solicitors

Detailed information on the sampling of the assessors, including the planned sample size, the actual sample size and the number of persons sampled for each category of legal personnel, is in **Table 3**.

Table 3: Sampling Information on the Assessor Group

<i>Category</i>	<i>Sample Size (Planned)</i>	<i>Sample Size (Actual)</i>	<i>Invitations Sent</i>	<i>Response Rate</i>
Judges	6	4	23	17.4%
LegCo Members	6	4	31	12.9%
DOJ Officials	2	2	16	12.5%
Government Officials (AO)	2	0	10	0.0%
Law Enforcement Officers	2	2	10	20.0%
Barristers	3	3	6	50.0%
Solicitors	6	4	30	13.3%
<i>Total</i>	<i>27</i>	<i>19</i>	<i>126</i>	<i>15.1%</i>

In the end, there were 19 assessors recruited, with an overall response rate of 15.1%. Of the seven categories, all except AO ranked government officials are represented. All ten invitations sent to AO ranked government officials were in fact turned down.

The comparison group included a purposive sample of 11 representatives from law-related organizations and academics, who are chosen by the expert panel. They consisted of the following:

1. Three law professors from the University of Hong Kong and the City University of Hong Kong
2. Two law students from the University of Hong Kong
3. Four representatives from law-related non-governmental organizations in Hong Kong
4. Two newspaper reporters working in the legal field

(b) Assessment Procedure

All assessors and comparison group members were provided with a package containing instructions for the assessment, a description of the seven criteria of the Rule of Law and all legal statistics collected in stage 1 of the study. (A copy of the package is in **Appendix 1**). After reviewing the materials contained in the package, they were requested to complete two tasks: (1) assigning a weight (*ranging from 1 [Less Important] →→→→→ 10 [Very Important]*) and a score (*ranging from 0-100 and 50 is the passing score*) to each of the seven categories of criteria and (2) writing a one page explanation on the scores they had given for the Rule of Law in Hong Kong.

(c) Fieldwork Schedule

Invitations for the assessment were sent out between November 2004 and April 2005 in two main batches: November 2004 and February 2005. We received assessments from the invitees who had accepted our invitation between February and July 2005, with the cut-off date being 15 July 2005. Most returned their assessment in February and March 2005.

3.3 Compilation of the Rule of Law Sub-index

A separate Rule of Law sub-index was compiled for each group. The compilation involved (1) calculating a weighted average score for each criterion, (2) calculating a weighted average importance weight for each criterion, and (3) combining the weighted average scores and the weighted average importance weights of all seven criteria to form a Rule of Law Sub-index. Detailed steps are as follows.

(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 calculating 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:

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

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

4. Calculate a weighted average of all scores \tilde{w}_j by discarding the highest and the lowest scores and then calculating 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 $\bar{\tilde{w}}_j$ by the formula:

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

6. Calculate a weighted rule of law score \bar{s} by the formula:

$$\bar{s} = \sum_{j=1}^7 \bar{w}_j \tilde{s}_j$$

3.4 Analysis

On the basis of the legal statistics collected in stage 1 and assessments of the assessor and the comparison groups processed in stages 2 and 3, the expert panel finalized the Rule of Law Sub-index 2005 and made recommendations on how the Rule of Law in Hong Kong can be further developed.

3.5 Focus Group Discussion

To add a more frontline perspective when drawing up our recommendations, we held a focus group to collect social service professionals' views on the rule of law in Hong Kong; especially with reference to their experiences, as well as their clients', in the course of carrying out their services. The five social service professionals participating in the focus group came from different service fields, including youth outreaching, child protection, rehabilitation of ex-offenders, protection of industrial accident victims' rights and counseling of families with debt problems. Where appropriate, their ideas were synthesized and incorporated into our recommendations and ideas for further development of the project.

4 Findings

4.1 Weights and Scores for the Rule of Law Sub-index

Based on the method as outlined in Section 3.3, the average weights and average scores of each criterion and an overall Rule of Law Sub-index were calculated for each group and are presented in **Table 4**.

Table 4: Weights and Scores by Criterion and Weighted Scores

	Criterion	Assessors		Comparison Group	
		Importance Weight	Score	Importance Weight	Score
		<i>1-10</i>	<i>0-100</i>	<i>1-10</i>	<i>0-100</i>
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
	Rule of Law Sub-index <i>0-100</i>	74.66		70.54	

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

In terms of absolute weights, all seven criteria’s average weights given by both groups were at least high 8s or above, indicating that all seven criteria were deemed important by the assessors of both groups. 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), while “government under law”, “accessibility to justice” and “procedural fairness” received more or less the same lowest average weight of 9.00.

By weighting the average score of each criterion with the corresponding relative weight¹ and summing the average scores of all seven criteria together, a Rule of Law sub-index was calculated for each group. The assessors gave an index value of 74.66, while the comparison group gave a lower value of 70.54.

Weights and scores given by individual assessors and comparison group members can be found in **Appendix 2**.

4.2 Supplemental Information on Assessments

All 19 assessors and 11 comparison group members have given explanations for their assessment. They are summarized as follows:

- In general, assessors/comparison group members agreed that Hong Kong has attained a high standard in Rule of Law.
- However, many assessors/comparison group members held the view that there is a decline in standard in recent years.
- Some recent incidents have been referred to by some assessors/comparison group members as evidence of the downward tendency especially on the criterion of Government under the law. There is worry that the HKSAR Government may not be able to uphold the Rule of Law where there is strong political reason especially pressure from the Beijing Government.
- These incidents include: (i) the HKSAR Government applied to shorten the time for filing an appeal in the Link Real Estate Investment Trust’s case; (ii) interpretations by the Standing Committee of the National People’s Congress (iii) decisions of the Secretary for Justice in the prosecution of some cases, e.g. the Aw Sian case.
- Most assessors/comparison group members agreed that the quality of our laws is good in the sense that they can satisfy the basic requirements for law in a system practicing Rule of Law.
- Another criterion that is generally considered to be unsatisfactory is accessibility to justice. High legal cost is one of the major reasons. The other

¹ See Page 12, Section 3.3 (b) 4, for the formula.

factors are the decrease in quality of lawyers and judges and the heavy workload of the judiciary causing delay.

- Judicial independence and the judicial power to review administrative decisions are considered to be good by most assessors. It seems that most assessors/comparison group members have good confidence in the impartiality of our judiciary. However, there is still a concern that judges of lower courts do not have security of tenure.
- In general, there is no clear evidence that the HKSAR Government has exercised its powers arbitrarily. However, some assessors raised the suspicion of favouritism towards certain big local corporations.
- Assessors/comparison group members are also satisfied with the professionalism and respect for law of the law enforcement agencies.
- It is accepted that Hong Kong people are equal before the law but there is still concern that there should be more protection for minorities.
- Generally, it is agreed that Hong Kong has a procedurally fair system.
- It is believed that there should be improvement in publicity for law and basic rights.

5 Conclusion

(1) *High Score for Rule of Law in Hong Kong*

According to the design of this method to compile an index for the Rule of Law of Hong Kong, we rely on the expert knowledge of the personnel directly involved in the legal process. Even though we failed to get the planned number of assessors from each sector, we still manage to get almost equal number of assessors from the Judicial, Legislative and Executive branches. The legal professions also have given response to this study. The index compiled on the basis of the findings of the assessors is 74.66. We will round it up as **75** out of 100.

The index compiled on the basis of the finding of the comparison group is 70.54. As the difference with the finding of the assessors is not substantial, there is no need to adjust the index on the basis the finding of the comparison group.

Our understanding of 75 is that it is a **high** score. This understanding is based on two reasons. First, the assessors/comparison group members are instructed that 50 is the passing score and 100 is the highest score. Second, in their explanations, many assessors/comparison group members used the description of “high standard” for Hong Kong’s Rule of Law.

(2) *No major differences between Assessments from Assessors and Comparison Group*

As the weighing given by assessors/comparison group members to the seven criteria are all above 8, it shows that the criteria selected to determine Rule of Law in this study are appropriate. There is also no major difference in their importance to the assessment of the Rule of Law.

(3) *Concerns over Perceived Decline in Rule of Law*

Comparing the scores given to each of the seven criteria, the weakest three are “Government under law”, “Rule against arbitrary powers” and “Accessibility to Justice”. This can be confirmed by the explanations given by the assessors/comparison group members.

The comparatively poorer scores in these three criteria also account for the assessors/comparison group members' general comment of a downward trend in Hong Kong's Rule of Law. Our understanding of this perceived downward trend is that the level of attainment of Hong Kong's Rule of Law in the past would have been higher than the level attained in 2005. Some assessors/comparison group members also expressed worry that the level of attainment of Rule of Law may further deteriorate.

6 Recommendations

To maintain and improve Hong Kong's high standard of Rule of Law, our recommendations are:

- (1) The HKSAR Government must take positive steps to maintain the image that the Government is bound by law.
- (2) Actions must be taken to improve the accessibility to justice by Hong Kong citizens. These may include lowering of legal cost, wider availability of free legal services, and more transparency in the legal services market.
- (3) Better publicity of the meaning and value the of 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 for legal redress is needed. The objective is to make the above mentioned knowledge a part of the common sense of Hong Kong citizens.

7 Future Development

It is our plan to conduct similar exercise to assess the level of Rule of law in Hong Kong every two years.

As the methodology adopted in this study aims to evaluate the Rule of Law in Hong Kong only from the institutional approach, there may be other aspects related with the relationship between the Hong Kong society and the Law that cannot be revealed from this index. In order to provide further information on the status of law in the social development of Hong Kong, other indexes may needed to be developed to indicate the extent of respect for law by Hong Kong citizens and the level of knowledge of Hong Kong citizens on the Law in Hong Kong.

Appendix 1: Assessment Package

CODE:

	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		

Assessment Table for Hong Kong's Rule of Law

Instructions:

1. You may see the description of the criteria in Annex I.
2. Please give a weighting to each criteria in the assessment of Hong Kong's Rule of Law. "1" means it is less important and "10" means it is very important. The weighting given to a criterion should reflect what you consider to be the degree of importance of that criterion in a scale of 10. The weighting given to each of the criteria is independent from other criteria.
3. Annex II includes legal data which may be relevant in assessing the Rule of Law of Hong Kong. You may refer to them before you give your assessment.
4. Please give a score (ranging from 0-100 and 50 is the passing score) for each criteria of the Rule of Law in Hong Kong. The score should reflect your understanding of Hong Kong's Rule of Law at the time when you complete this Assessment Form.
5. Please write one A4 page explanation of the score you have given for the Rule of Law in Hong Kong. Please see Annex III.
6. **Please return this Assessment Table and Annex III or the one-page explanation to us by fax at 2864-2999 on or before 20 May 2005.**

7. We have invited 6 judges from all levels of courts; 6 Legislative Councilors; 2 officials from the Department of Justice; 2 senior officials (AO rank) from the Government with no legal professional qualification; 2 senior officials (superintendent or above) from law enforcement agencies; 3 practicing barristers; and 6 practicing solicitors to be our assessors. They are all randomly selected from their professional categories.
8. After collecting all the scores from all 24 assessors, an average score will be calculated after deducting the highest 10% and the lowest 10% scores from assessors.
9. We have also invited 3 law professors in the universities in Hong Kong and City University of Hong Kong; 5 representatives from law-related NGOs in Hong Kong; 2 law student in the universities in Hong Kong and 2 newspaper reporters working on the legal field to give their score of the Rule of Law of Hong Kong as control.
10. The Expert Group will develop the index for Hong Kong's Rule of Law on the basis of the average score from our assessors after checking with the scores from our control group and the explanations given by the assessors. A report will be compiled by the Expert Group. They will make recommendations on how the Rule of Law in Hong Kong can be further developed.

11. The members of the Expert Group include:

Mr. Benny Tai, Associate Professor, Department of Law, Faculty of Law, University of Hong Kong (Convenor)

Mr. Chua Hoi Wai, Business Director (Policy Research and Advocacy), Hong Kong Council of Social Service

Mr. John Clancey, Chairperson, Asian Human Rights Commission, Hong Kong

Mr. Alan Leong, S.C.

Dr. Alvin Kwok, Hong Kong Christian Service

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Annex I**Criteria of Rule of Law****(1) Basic requirements of laws****(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.

(b) Publicized

The law must be open and adequately publicized 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

(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 people's long term planning of their lives since people are to be guided by law in their long term decisions.

(d) Clarity

Law should not be ambiguous, vague, obscure or imprecise which is likely to mislead or confuse at least some of those who desire to be guided by it.

(e) Non-retroactivity

If retrospective penal liability is imposed, the individual is placed in the position where his conduct was lawful at the time of his action but, subsequently, he is held responsible as if his conduct was then unlawful. Non-retroactivity is essential for certainty of law since people can be certain of the legal consequences of their action when they do it.

(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 the laws can be obeyed and executed.

- (g) **Against arbitrariness**
The laws should not grant arbitrary power to the government so as to prevent it from using the legal power for personal gain, favouritism or out of vengeance.
- (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.

(2) Government under the Law

Governmental powers are based and delimited by law. Government officials can only exercise those powers authorized by the constitution and the law in the manner so provided by them. They are also subject to the law and enjoy no privilege to be exempted by legal liabilities.

(3) Rule against arbitrary powers

No arbitrary powers should be granted to government officials. The discretion of law enforcement agencies or of other government officials or of 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 their 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 Law

- (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 are empowered to rule on disputes between government and citizen. The courts are of the position to observe the restraint on power of the government. The Courts should also have the powers to review both the 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 way of fixing 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. It 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. Nor should there be any interference from the legislature with the exercise of the judicial function.

(6) Accessibility to Justice

(a) Accessibility of courts

The courts should be easily accessible. Given the central position of the courts in upholding the rule of law, the accessibility of courts is of great importance. Long delays, excessive costs, etc. may effectively turn the law to a dead letter and frustrate one's ability effectively to 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 other extra-judicial channels to bring their complaints against the 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 be acquitted—that is, he or she must be acquitted.

(b) Natural justice: unbiased tribunal and fair hearing

Justice and the rule of law demand that, in the conduct of legal and administrative proceedings, procedural fairness be 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.

- (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 the rule of law to be observed, it is of central importance that the evidence before the court be both complete and reliable.
- (d) Fair Trial
In the determination of any criminal charges against him/her, or of his/her rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*order public*) 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; but 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.

References:

Fuller, *The Morality of Law* (1969)

Geoffrey Walker, *The Rule of Law: Foundation of Constitutional Democracy* (1988)

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Robert Summers, "A Formal Theory of the Rule of Law" (1993) 6 *Ratio Juris* p127-142

Joseph Raz, "The Rule of Law and its Virtue (1977) *The Law Quarterly Review*

Annex II:

**Legal data related to Rule of Law in Hong Kong
(2000-2003)**

Table 1.1a: Number of reported crimes by type of offence (2000-2003)				
	2000	2001	2002	2003
Total violent crime	14812	13551	14140	14542
Rape	104	95	95	70
Indecent assault	1124	1007	991	1018
Murder and manslaughter	43	66	69	52
Attempted murder	7	3	13	2
Wounding	1810	1701	1858	1723
Serious assault	5093	4771	4987	5424
Assault on police	547	431	399	607
Kidnapping and child stealing	4	6	3	1
Cruelty to child	178	181	201	168
Criminal intimidation	1135	888	845	933
Robbery with firearms/arms	8	5	6	4
Robbery with pistol-like objects	76	56	56	44
Other robberies	3349	3106	3431	3167
Aggravated burglary	5	5	9	10
Blackmail	550	556	557	592
Arson	779	674	620	727
Total non-violent crime	62433	59457	61737	73835
Burglary with and without breaking	8964	8637	8202	9066
Snatching	1032	845	1088	1117
Pickpocketing	865	717	859	1681
Shop theft	6973	7470	8122	9304
Theft from vehicle	3228	2881	2647	4232
Taking conveyance without authority	2862	2573	2432	2370
Other thefts	15610	15056	16877	22183
Handling stolen goods	116	124	140	127
Deception, fraud and forgery	5090	5351	6041	6279
Sexual offences other than rape and indecent assault	938	753	773	900
Serious narcotics offences	2312	2473	2243	2142
Serious immigration offences	2008	1654	1074	759
Criminal damage	7022	5904	6192	7608
Unlawful society offences	1014	919	854	764
Possession of arms / ammunition / offensive weapon	567	598	613	737
Other crimes	3832	3502	3580	4566
Overall crime rate per 100000 population	1159	1086	1118	1299

Source: *Hong Kong Annual Digest of Statistics*, various issues.

Table 1.1b: Number of minor offences reported (2000-2003)				
	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
Minor narcotics offences	5994	5931	5194	4506
Possession of dangerous drugs	5687	5727	4959	4387
Possessions of pipe, equipment, etc.	273	180	177	64
Keeping a divan	8	6	23	42
Smoking, consuming, etc	26	18	35	13
Other narcotics offences	0	0	0	0
Miscellaneous offences	27287	25140	24488	26112
Minor gambling	900	915	855	1026
Hawking	1696	1328	1962	2129
Obstruction	5031	2762	1932	1775
Prostitution	934	964	1233	1877
Other miscellaneous offences	18726	19171	18506	19305

Source: *Hong Kong Annual Digest of Statistics*, various issues.

Table 1.1c: Offenders arrested by age group (2000-2003)				
	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
Number of offenders aged 7-15	6229	5909	5335	5156*
Number of offenders aged 7-15 arrested per 100000 population of the corresponding age group	815.7	777.3	697.8	832.2
Number of offenders aged 16-20	6465	6145	6027	6018
Number of offenders aged 16-20 arrested per 100000 population of the corresponding age group	1397.5	1358.9	1354.7	1370.2
Number of offenders aged 21 and over	28236	26775	28303	30877
Number of offenders aged 21 and over arrested per 100000 population of the corresponding age group	566.4	526.8	548.2	592.9

Note: * As from 1 July 2003, the minimum age of criminal responsibility has been raised from 7 to 10.

Before that date, juveniles refer to the age group of 7-15.

Source: *Hong Kong Annual Digest of Statistics*, various issues.

Table 1.2: Number of police complaints and number of complaints that can be substantiated (2000-2003)				
	2000	2001	2002	2003
Total cases received by Complaints Against Police Office	3673	3246	3833	3384
Total allegations endorsed by Independent Police Complaints Council (IPCC)	5934	6103	6213	6262
Allegations fully investigated -	2206	2255	2002	1976
Allegations fully investigated with substantial results	274	271	265	286
Rate of fully investigated and substantiated allegations (%)	12.4%	12.0%	13.2%	14.5%
Allegations fully investigated with false results	470	383	354	255
Allegations not investigated due to 'withdrawn', 'not pursuable' or 'curtailment'	2303	2357	2542	2747
Allegations deals with by 'informal resolution'	1425	1491	1669	1539

Source: *Police Review*, available at <<http://www.info.gov.hk/police/hkp-home/english/reviews.htm>>.

Table 1.3: Number of complaints to the Ombudsman and Number of complaints that can be substantiated* (2000-2003)				
	2000	2001	2002	2003
Complaints received	3709	3736	4382	4661
Complaints brought forward	581	814	760	772
Complaints concluded	3476	3790	4370	4345
By preliminary inquiries				
By referral to complainee departments/organizations for replies (INCH)	364	353	176	203
By rendering assistance/clarification (RAC)	700	1214	1996	1631
By full investigation				
Withdrawn/discontinued	--	6	2	6
Substantiated	28	18	15	14
Partially substantiated	41	263	39	24
Unsubstantiated	80	42	68	236
Incapable of determination	12	2	0	1
Substantiated other than alleged	--	--	--	3
By mediation	29	19	6	7
Complaints screened out				
Restrictions on investigation	795	685	971	1259
Outside jurisdiction	1064	878	758	633
Complaints withdrawn/discontinued	363	310	339	328

Note: * From 2001/02, the reporting year ends on 31 March to coincide with the end of financial year.

Source: *Annual Report of the Ombudsman*, various issues.

Table 1.4: Number of judicial review cases (2000-2003)				
	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
Number of judicial review cases	2752	3848	204	131

Source: The Judiciary of the Hong Kong Special Administrative Region of the People's Republic of China.

Table 1.5: Number of judicial review cases reported in the Judiciary website and number of cases that judicial remedies are granted to the applicants (2001-2003)			
	<u>2001</u>	<u>2002</u>	<u>2003</u>
Number of judicial review cases reported in the Judiciary website	42	37	50
High Court	33	26	44
Court of Appeal	7	6	4
Court of Final Appeal	2	5	2
Number of cases that judicial remedies are granted to the applicants	14	17	16
High Court	12	10	12
Court of Appeal	2	3	2
Court of Final Appeal	0	4	2

Source: The Judiciary of the Hong Kong Special Administrative Region of the People's Republic of China, available at <<http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp>>.

Table 1.6a: Number of legal aid applications (2000-2003)				
	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
Civil cases	21736	20840	25729	21749
Criminal cases	4338	4423	4673	4412

Source: The Legal Aid Department, available at <<http://www.info.gov.hk/lad/eng/ginfo/statistics.htm>>.

Table 1.6b: Number of legal aid certificates (2000-2003)				
	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
Civil cases	9003	9220	9977	10772
Criminal cases	2545	2748	2891	2802

Source: The Legal Aid Department, available at <<http://www.info.gov.hk/lad/eng/ginfo/statistics.htm>>.

Table 1.7: Number of cases annually heard by courts of all levels* (2000-2003)				
	2000	2001	2002	2003
Caseload of the Court of Final Appeal				
Applications for leave to appeal from the High Court				
Brought forward from previous years	20	6	8	28
Filed	59	68	89	90
Disposed of	73	66	69	96
Inactive	0	0	0	0
In progress	6	8	28	22
Substantive appeals from the High Court				
Brought forward from previous years	17	17	13	14
Filed	38	23	22	27
Disposed of	38	27	21	29
Inactive	0	0	0	0
In progress	17	13	14	12
Caseload of the Court of Appeal of the High Court				
Appellate				
Brought forward from previous years	1055	1868	6326	2024
Filed	1658	4728	1111	959
Disposed of	568	761	5413	977
Inactive	491	1315	796	972
In progress	1868	5011	1228	1034
Review of sentences				
Brought forward from previous years	12	2	2	3
Filed	9	16	3	4
Disposed of	14	21	2	2
Inactive	5	0	0	0
In progress	2	2	3	5
Caseload of the Court of First Instance of the High Court				
Appellate				
Brought forward from previous years	765	1112	1302	1342
Filed	1513	1536	1495	1536
Disposed of	1087	1495	1455	1503
Inactive	149	241	298	282
In progress	1112	1061	1044	1093

Table 1.7 (Continued)				
	2000	2001	2002	2003
First Instance				
Brought forward from previous years	18738	12095	53640	59895
Filed	29636	32922	42403	39695
Disposed of	18172	28466	36148	35688
Inactive	37089	37656	44895	50279
In progress	12095	15984	15000	13623
Caseload of the District Court				
Criminal Jurisdiction				
Brought forward from previous years	241	293	466	445
Filed	1229	1192	1334	1339
Disposed of	1177	1019	1355	1176
Inactive	0	0	43	56
In progress	293	466	402	552
Civil Jurisdiction				
Brought forward from previous years	35022	38184	56444	63106
Filed	46974	52490	50032	53136
Disposed of	41323	40699	43370	43928
Inactive	6469	9706	13061	16231
In progress	38184	46738	50045	56083
Caseload of the Magistrates' Courts				
Brought forward from previous years	89560	105286	91279	80633
Filed	381956	341644	298005	282331
Disposed of	374667	339696	308651	279061
Inactive	28992	27044	2335	2349
In progress	105286	109182	78298	81554
Caseload of the Lands Tribunal				
Brought forward from previous years	3652	4732	8408	9993
Filed	5594	6433	6906	8004
Disposed of	4561	5267	5321	5851
Inactive	2510	2967	1267	529
In progress	4732	5441	8726	11617
Caseload of the Labour Tribunal				
Brought forward from previous years	1096	970	2114	2128
Filed	9924	10956	13211	11927
Disposed of	10050	9812	13197	12079
Inactive	0	0	154	375
In progress	970	2114	1974	1601

Table 1.7 (Continued)				
	2000	2001	2002	2003
Caseload of the Small Claims Tribunal				
Brought forward from previous years	35066	31408	30874	20299
Filed	64616	61039	91299	113977
Disposed of	66913	68924	101874	116995
Inactive	7351	6404	69	0
In progress	31408	24470	20230	17281
Caseload of the Obscene Articles Tribunal				
Brought forward from previous years	18680	1834	16744	54014
Filed	166148	270032	231096	122697
Disposed of	182994	255122	193826	173470
Inactive	0	0	0	0
In progress	1834	16744	54014	3241
Caseload of the Coroner's Court				
Brought forward from previous years	27	27	29	31
Filed	184	160	134	109
Disposed of	184	158	132	108
Inactive	0	0	0	0
In progress	27	29	31	32

Note: * 'Cases brought forward from previous years' refers to cases in progress and do not include cases inactive. 'Disposed of' refers to applications for leave to appeal/appeals allowed, dismissed, withdrawn, abandoned or discontinued. 'Inactive' refers to those having no action (including filing of document or hearing) for one year from the date of last filing of document.

Source: *Hong Kong Judiciary Annual Report*, various issues.

Table 1.8: Number of judges and judicial officers per 100,000 persons (2000-2003)				
	2000	2001	2002	2003
Court of Final Appeal	0.41	0.37	0.37	0.40
High Court	0.65	0.58	0.55	0.63
District Court	0.46	0.54	0.47	0.54
Land Tribunal and Magistrates' Courts and other tribunals	1.18	1.23	1.30	1.25

Source: *Hong Kong Judiciary Annual Report*, various issues.

Table 1.9: Number of lawyers per 100,000 persons (2000-2003)				
	2000	2001	2002	2003
Practising solicitors	71.95	75.39	76.22	77.92
Practising barristers	11.06	11.54	11.70	12.35

Sources: Hong Kong Bar Association and the Law Society of Hong Kong.

Table 1.10: Waiting time for case disposition (days) (2000-2003)				
	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
The Court of Final Appeal				
Applications for leave to appeal from the High Court				
Criminal cases	32	36	40	46
Civil cases	40	32	52	46
Substantive appeals from the High Court				
Criminal cases	93	75	83	90
Civil cases	99	76	63	105
The Court of Appeal of the High Court				
Criminal cases - from setting down of a case to hearing	33	38	41	39
Civil cases - from application to fix date to hearing	82	196	176	152
The Court of First Instance of the High Court				
Criminal fixture - from filing of indictment to hearing	186	211	213	192
Criminal running list - from setting down to hearing	85	117	83	73
Civil fixture - from application to fix date to hearing	216	216	198	197
Civil running list - from setting down to hearing	120	154	148	53
Appeals from Magistrates' Courts - from lodging of Notice of Appeal	118	95	86	80
The District Court				
Criminal cases - from first appearance of defendants in District Court to hearing	56	92	68	100
Civil cases - from date of listing to hearing	82	78	102	108
Dissolution of marriage - from setting down to hearing				
Undefended cases *	39	53	20	50
Special procedure cases	26	33		
Defended cases (one day hearing)	84	75	94	94
The Magistrates' Courts				
Summonses (from plea to date of trial)	46	42	46	50
Charge cases				
Cases involving defendants in custody (from plea to date of trial)	39	27	25	31
Cases involving defendants on bail (from plea to date of trial)	51	33	31	38

Table 1.10 (Continued)				
	2000	2001	2002	2003
The Lands Tribunal				
Appeals - from setting down of a case to trial	26	22	34	38
Compensation cases - from setting down of a case to trial	29	18	48	55
Building management cases - from setting down of a case to trial	26	19	36	24
Tenancy cases - from setting down of a case to trial	28	26	24	18
The Labour Tribunal				
From appointment to filing of a case	11	14	19	14
From filing of a case to first hearing	21	24	25	24
The Small Claims				
From filing of a case to first hearing	42	40	54	60
The Obscene Articles Tribunal				
From referral by a magistrate to commencement of determination of the subject matter of a court case	17	23	18	17
From receipt of application to classification	2	2	2	3
From receipt of application to review	29	24	34	26
From receipt of application to reconsideration	20	20	20	23
The Coroner's Court				
From receipt by the Coroner of a completed death report or expiry of the period prescribed for the receipt of any representation (whichever date is later) to hearing	41	45	48	45

Note: * Following the implementation of the Matrimonial Causes (Amendment) Rules in 2002, the undefended cases are also entered to Special Procedure List. Hence, the waiting time for undefended cases has been removed.

Source: *Hong Kong Judiciary Annual Report*, various issues.

Table 1.11: % of criminal trials in the Court of First Instance where at least 1 accused not represented at the commencement of trial (2000-2003)				
	2000	2001	2002	2003
% of criminal trials in the Court of First Instance where at least 1 accused not represented at the commencement of trial	1.0%	1.1%	1.4%	8.2%

Source: The Judiciary of the Hong Kong Special Administrative Region of the People's Republic of China.

Table 1.12: Number of complaints, investigations and prosecutions by the ICAC (2000-2003)				
	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
Number of investigation*	4748	4954	4989	5081
Total number of reporting corruption (excluding election reports)	4390	4476	4371	4310
Public bodies	256	347	330	297
Police	602	513	565	532
Government Departments (less police)	1130	1074	1073	1009
Private sector (excluding election reports)	2402	2542	2403	2472
Number of persons prosecuted for corruption and related offences	608	535	604	421
Government sector	59	61	51	50
Private individuals/public sector	82	127	145	102
Public bodies	12	10	17	10
Private sector	455	337	391	259

Note: * Investigations undertaken are investigations commenced during the year plus outstanding investigations brought forward from previous years.

Source: *ICAC Annual Report*, available at <<http://www.icac.org.hk/eng/0/1/10/16.html>>.

Table 1.13: Successful rate of criminal appeal (in %) of convictions and sentencing at various levels of courts (2000-2003)				
	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
Successful rate of criminal appeal (in %) of convictions and sentencing at various levels of courts	N.A.	77.6%	71.2%	89.3%
Number of criminal appeal against convictions and sentencing	N.A.	58	66	84
Court of Appeal	N.A.	55	60	76
Court of Final Appeal	N.A.	3	6	8
Number of successful criminal appeal against convictions and sentencing	N.A.	45	47	75
Court of Appeal	N.A.	44	46	68
Court of Final Appeal	N.A.	1	1	7

Source: The Judiciary of the Hong Kong Special Administrative Region of the People's Republic of China, available at <<http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp>>.

Table 1.14: Number of cases handled by the Duty Lawyer Service (2000-2003)				
	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
Magistrates Courts	35432	36265	37770	41395
Adult court	34401	35153	36791	40601
Juvenile court	1031	1112	979	794
Coroner's Inquest at Eastern Office (commenced from 31 July 2000)	0	1	0	1
One way viewers identification parade	337	505	661	672
Hawker Appeal	4	3	1	0
Extradition proceedings	4	5	6	8

Source: The Duty Lawyer Service.

Subjective indicators

Table 1.15: Rating by citizen on the impartiality of the court in Hong Kong				
	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
Rating by citizen on the impartiality of the court in Hong Kong	6.91	6.39	6.93	6.78

Note: * 10 indicating absolutely yes, 0 indicating absolutely not, and 5 indicating half-half.

Source: Public Opinion Programme, available at < <http://hkupop.hku.hk/>>.

Table 1.16: Rating by citizen on whether Hong Kong is a society governed by the rule of law				
	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
Rating by citizen on whether Hong Kong is a society governed by the rule of law	6.59	6.28	6.71	6.51

Note: * 10 indicating absolutely yes, 0 indicating absolutely not, and 5 indicating half-half.

Source: Public Opinion Programme, available at < <http://hkupop.hku.hk/>>.

Table 1.17: % of population who know how to access the legal system (2004)						
	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

Source: An opinion poll conducted in mid-December 2004.

Table 1.18: % of citizens responding that they will be fairly treated if arrested (2004)						
	Definite-ly	Yes	Half-half	No	Definite-ly not	Don't know/ Hard to say
If you were arrested by the police, would you think that you would be treated fairly?	15.5	45.7	13.0	5.9	2.7	17.3

Source: An opinion poll conducted in mid-December 2004.

Table 1.19: % of those arrested and charged with a crime who allege had bad treatment by the police (2004)						
	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

Source: An opinion poll conducted in mid-December 2004.

Code:

Annex III

My Explanation for the score of the Rule of Law in Hong Kong:

Appendix 2: Weights and Scores from Each Assessor / Member of Comparison Group

Assessor Group

Code No	1. Basic requirement of law		2. Government under law		3. Rule against arbitrary powers		4. Equality before law		5. Impartial Enforcement of law		6. Accessibility to justice		7. Procedural fairness	
	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)
1	10	70	10	40	8	70	10	70	10	60	8	70	10	80
2	10	80	10	80	10	75	10	75	10	80	10	75	10	75
3	10	90	8	70	10	80	9	80	10	90	10	70	10	90
4*	10	85	10	75	10	70	10	65	10	70	10	77.5	10	70
5	10	90	10	90	8	90	7	90	10	100	9	90	10	100
6	10	70	10	60	10	70	10	70	10	70	10	65	10	80
7	8	65	10	40	8	60	10	60	10	50	8	65	8	65
8	8	90	10	75	10	25	10	80	10	75	8	85	9	90
9	9	90	9	90	8	80	9	90	9	90	9	80	8	90
10	7	90	10	85	10	70	8	85	9	95	8	95	8	85
11	10	85	10	85	7	70	10	70	10	90	10	70	10	70
12	7	85	9	95	8	75	9	90	7	80	6	70	9	90
13	9	85	8	80	8	80	9	70	10	75	10	60	10	90

* Assessor No 4 has given two sets of scores: one for the courts and one for the government. For our calculation, the averages of the two sets of scores are used.

Code No	1. Basic requirement of law		2. Government under law		3. Rule against arbitrary powers		4. Equality before law		5. Impartial Enforcement of law		6. Accessibility to justice		7. Procedural fairness	
	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)
14	9	70	8	70	9	70	8	80	8	80	9	65	9	65
15	6	80	8	70	8	70	9	70	7	60	5	90	10	80
16	10	20	8	50	10	60	8	60	10	70	10	50	10	70
17	10	75	7	90	9	60	10	70	8	75	7	60	9	90
18	5	70	6	55	7	60	7	55	7	55	6	60	5	60
19	10	60	10	60	10	80	10	80	10	60	10	60	10	80
Weighted Average (Relative Weight)	9.00 (0.1415)	78.82	9.12 (0.1434)	72.06	8.88 (0.1397)	70.59	9.18 (0.1443)	74.41	9.29 (0.1462)	75.00	8.71 (0.1369)	71.32	9.41 (0.1480)	80.00
Rule of Law Sub-index (Assessor)	74.66													

Comparison Group

Code No	1. Basic requirement of law		2. Government under law		3. Rule against arbitrary powers		4. Equality before law		5. Impartial Enforcement of law		6. Accessibility to justice		7. Procedural fairness	
	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)	Weight (1-10)	Score (0-100)
20	10	50	10	50	10	30	10	40	10	30	10	40	10	40
21	10	70	9	50	10	60	10	60	10	80	10	70	9	80
22	8	60	9	75	9	80	10	75	10	85	9	70	9	75
23	9	90	5	100	4	80	10	60	6	70	7	70	8	90
24	10	60	10	50	10	60	10	70	10	60	10	70	10	60
25	10	80	10	70	10	80	10	70	9	70	8	60	9	70
26	5	70	6	80	7	90	4	90	6	70	8	40	7	90
27	10	80	10	70	10	70	10	65	10	65	10	70	10	80
28	10	80	10	70	10	75	10	75	10	80	10	80	10	90
29	10	65	9	75	9	62	9	78	9	60	9	80	9	85
30	6	70	8	80	10	70	8	70	10	80	6	65	6	70
Weighted Average (Relative Weight)	9.22 (0.1426)	70.56	9.00 (0.1392)	68.89	9.44 (0.1460)	70.78	9.67 (0.1495)	69.22	9.33 (0.1443)	70.56	9.00 (0.1392)	66.11	9.00 (0.1392)	77.78
Rule of Law Sub-index (Comparison)	74.66													

Appendix 3: Explanations from Each Assessor / Member of Comparison Group*

Code: 1

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	70	5. Impartial enforcement of the law	10	60
2. Government under the law	10	40	6. Accessibility to Justice	8	70
3. Rule against arbitrary powers	8	70	7. Procedural Fairness	10	80
4. Equality before the law	10	70			

Explanation for the score of the Rule of Law in Hong Kong

Basic requirements of laws

I gave a high passing mark because I believe except in one criterion, general congruence of law with social value, the laws of Hong Kong has adhered to the principles stated.

It is in the area of copyrights that I believe the existing law has departed significantly from public opinion and as a result, there is widespread disrespect for the law. Copyright should be respected; however, in most common law jurisdictions, enforcement is a civil matter between copyright owners and violators. Copyright violation is not a criminal matter. The present copyright laws in Hong Kong departed significantly from other jurisdictions, yet there were few attempts to justify this departure to the public. The proposed amendment to the Copyrights Ordinance is following the same path. Although there are announcements about a proposed amendment, there are no attempts to specify to the public what will be the effects of the amendments.

Government under the law

I gave a failing grade in this criterion because of two tendencies of government officials. First deals with government officials' tendency to make public comments while the matter was before the courts. Specifically, I refer to certain comments made in respect of a recent case on whether the Court of Final Appeal should or should not grant the government's request to shorten the time for filing an appeal. Second, almost immediately after the High Court ruled that the legislation reducing government employees' salary was unconstitutional, officials announced publicly that the second round of salary reduction would proceed. While it is trite that until an

* Where appropriate, passages have been edited to protect the anonymity of the respondents.

appeal is granted, the High Court's decision represents the existing law in Hong Kong, the official's public announcement left the public with an impression that the government did not respect the court and the law or worse, that the government consider itself above the law.

Rule against arbitrary power & Equity before the law

I have no particular comment on these two criteria and I gave them high passing marks.

Impartial Enforcement of the law

I am satisfied with the existing process for judicial review; however, in the area of judicial independence the existing system leaves room for improvement. Of the 156 Judges and Judicial Officers in Hong Kong, less than half have security of tenure. In fact only those Judges of District Court level or higher have security of tenure. All other judicial officers may be dismissed (or their contract not renewed) at anytime. The lack of security leaves an impression of, if not actual, pressure for magistrates to tow the official line.

Accessibility to Justice

I gave a high passing grade in this area; I believe more resources should be given to the lower level civil tribunals.

Procedural fairness

I am satisfied with the status quo in this area.

Code: 2

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	80	5. Impartial enforcement of the law	10	80
2. Government under the law	10	80	6. Accessibility to Justice	10	75
3. Rule against arbitrary powers	10	75	7. Procedural Fairness	10	75
4. Equality before the law	10	75			

Explanation for the score of the Rule of Law in Hong Kong

1. This notes does not seek to set out all the explanation of the scores. It only seeks to highlight some of the more salient points.
2. The government's conduct of the litigation concerning the public listing of LINK (“領匯”) has given rise to the perception, which is not unjustified, that the government sought to bypass the due process of law in order to meet its own objectives.
3. The government recently goes back on its original stance on the duration of the term of the next Chief Executive to be elected in July 2005 and seeks from NPC interpretation of the relevant provisions in the Basic Law. The whole saga gives rise to the perception, which is again not unjustified, that the government simply ignores the rule of law and toes the mainland's line to suit its political needs.
4. Under the current legal aid regime, many litigants or potential litigants are not qualified for legal aid under the means test. And they cannot afford the legal expenses either. It is not unreasonable for them to think that they have been substantially deprived of the right to have access to justice and equality before the law.
5. The quality of legal service is occasionally a matter of concern. Injustice does arise if the lawyer in question is incompetent or even negligent. Suing him for the loss and damage caused often comes too late and too expensive.

Code: 3

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	90	5. Impartial enforcement of the law	10	90
2. Government under the law	8	70	6. Accessibility to Justice	10	70
3. Rule against arbitrary powers	10	80	7. Procedural Fairness	10	90
4. Equality before the law	9	80			

Explanation for the score of the Rule of Law in Hong Kong

1. In general, the laws of Hong Kong are under close scrutiny by the LegCo committees. There seems also adequate consultation with the Public. Where a new legislation is enacted, the propaganda to inform the public of the change is generally adequate. In fact, officials from policy bureaux are ready to attend forums to explain their positions.
2. There are occasions that the government may be too keen to implement their policy and deviates from the usual practice in controversial areas, e.g., the Link case, the reduction of civil service salaries.
3. There is no concrete evidence of arbitrariness, however, some decisions by the SoJ have attracted severe criticism when public figures are involved. While one respects the prerogative of SoJ, the reasoning in some cases is doubtful. It seems law enforcement agencies are constrained in exercising their powers. They have demonstrated highest degree of professionalism and respect to the basic rights of civilians.
4. The legal system is by and large fair to all. However, the law is still not sufficiently accessible to the lower income section of the society. They are still in a handicapped position. Legal costs are still high for many of them. Provision of legal representation in complex cases in the Labour or Small Claims Tribunals may be indicated.
5. Enforcement is generally sufficient. There are instances that the courts ruled against the government. Judicial independence is upheld. There is no report of any undue influence on Judges. Government officials and the public respect the Judiciary in general.

6. While there is no serious problem, the public needs more professional assistance in the early stage of a case. There should be more advice to the public before judicial process is initiated to resolve disputes. Legal aid services especially in the District Courts and the Magistrate Courts should be improved in quality and be available to more defendants.

7. The courts and their appeal procedures have safeguarded procedural fairness satisfactorily. However, the Judiciary is under great pressure to administer timely justice. The increasing workload has stretched the capacities of individual courts to their limits.

Code: 4

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	90 80	5. Impartial enforcement of the law	10	90 50
2. Government under the law	10	90 60	6. Accessibility to Justice	10	95 60
3. Rule against arbitrary powers	10	90 50	7. Procedural Fairness	10	95 45
4. Equality before the law	10	90 40	<i>Top score – court</i> <i>Bottom score – government</i>		

Explanation for the score of the Rule of Law in Hong Kong

I have given separate scores for the Rule of Law contributed by the Courts and by the Government in Hong Kong. The reasons are obvious. The Courts have proved to have redressed the balance repeatedly since 1 July 1997. It would be confusing to mix the two scores together in the survey, for it would not truly reflect the reality.

Code: 5

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	90	5. Impartial enforcement of the law	10	100
2. Government under the law	10	90	6. Accessibility to Justice	9	90
3. Rule against arbitrary powers	8	90	7. Procedural Fairness	10	100
4. Equality before the law	7	90			

Explanation for the score of the Rule of Law in Hong Kong

Firstly, the importance and success of the rule of law in Hong Kong is already widely recognized. Under the Basic Law, we have retained Hong Kong's common law, established the Court of Final Appeal and maintained a system of checks and balances among the executive government, legislature and the judiciary. It is our belief that our judiciary and legal profession are of a very high international standard. Senior judges from common law jurisdictions, including those from the U.K., Australia and New Zealand, currently sit on our Court of Final Appeal, The rule of law is thus a well established fact and one wonders why a fresh assessment is necessary.

Secondly, the questionnaire has referred to the work of the Government and the Judiciary. But there is no reference to the work done by the Legislative Council and the role which the legislature plays as part of our constitutional institutions. The omission of this aspect makes it difficult for any assessment to be complete.

Thirdly, you have set out seven criteria for undertaking the assessment. All these are important considerations, for example "Rule against arbitrary powers", "Equality before the Law" and "Procedural Fairness". So far as these criteria are concerned, they are all important. But it is doubtful how a quantitative rating could be ascribed to these individual criteria, and thereafter for a weighted average index to be generated. My question is that whilst all these criteria are important in their own right, one wonders how a quantitative score could be aggregated as they are all different considerations.

Perhaps you can give me a response to the above points. In the meantime, for what it is worth I enclose a completed questionnaire.

Code: 6

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	70	5. Impartial enforcement of the law	10	70
2. Government under the law	10	60	6. Accessibility to Justice	10	65
3. Rule against arbitrary powers	10	70	7. Procedural Fairness	10	80
4. Equality before the law	10	70			

Explanation for the score of the Rule of Law in Hong Kong

The rule of Law score in Hong Kong is deeply affected by one overriding factor. Under the one Country Two System, the interpretation of the Basic Law is in the hands of the National People's Congress which is also the highest political organ in China.

The two interpretations by the National People's Congress Standing Committee in 2002 and 2004 show that reasoned rulings based on legal and common law principles by the highest court of the land can be overturned and common sense readings of the plain words of the Basic Law can be twisted if there is the political need to do so. Equally worrying, there is an increasing tendency of people in authority or position of influence who like to pronounce on political correctness with some kind of semi official interpretation of the Basic Law.

Whilst the judiciary and the legal profession strive to uphold the rule of law, and the government also strives to do the same except where there are strong political reason to the contrary, it must always be remembered that rule of law is extremely fragile unless it is protected in a democracy or when respected by those in power. Hong Kong is yet to have real democracy and its rule of law score is pretty high except when it comes to matters which are of high political importance to those in power.

On *Basic Requirements of the Laws*, our statutory laws are carefully scrutinized and passed in an open process and the common law principles have evolved over a long tradition. Unfortunately when it comes to the Basic Law, there are continuous controversies as to whether it should be understood according to Mainland considerations or some other principles.

As to *the Government and the Law*, the score is lowest not only for reasons already indicated, but also because there are decisions or exercise of discretions which appear to run counter to the rule of law. Well known examples include the non prosecution of Sally Aw or the prosecution of some political activists. The Government also try to bypass the Legislative Council on matters of public finance in breach of the spirit if not the letter of Article 73 of the Basic Law.

On *Arbitrary Powers*, the government always prefers to resort to administrative measures or to draft laws granting officials wider power than necessary in the name of flexibility. It remains the work of a vigilant legislature to ensure that there are sufficient checks and balances.

On *Equality before the law*, the government has yet to change the law to ensure that the Chief Executive is made subject to the Prevention of Bribery Ordinance. It has also been repeatedly criticized for failing to pass the necessary laws to prohibit racial discrimination. Even though it is finally planning to do so, it back paddles on the need to include new arrivals from the Mainland.

On *Impartial Enforcement of the Law*, public confidence in the judiciary is fairly high. However there are occasional remarks from senior officials which are at the very least highly undesirable. In one recent judicial review application, the Court of Appeal was asked to drastically shorten the time limit for appeal so much so that one of the judges remarked that he felt as if a gun had been held to his head.

On *Accessibility to Justice*, quite a lot of litigants are still unable to get legal aid despite their inability to afford legal representation. Cost of litigation is high and ignorance of the law or legal procedure is prevalent. There are also complaints from litigants that the proceedings are conducted in English (albeit with translation) when they prefer their own native dialect.

On *Procedural Fairness*, Hong Kong does have high regard for due process except for the occasional cases like the interpretation by the National People's Congress or the aforesaid case where pressure was applied to limit the time for appeal.

Code: 7

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	8	65	5. Impartial enforcement of the law	10	50
2. Government under the law	10	40	6. Accessibility to Justice	8	65
3. Rule against arbitrary powers	8	60	7. Procedural Fairness	8	65
4. Equality before the law	10	60			

Explanation for the score of the Rule of Law in Hong Kong

1. Criteria: I consider all the factors essential. However, I have given a value of “10” to three of them and “8” to the others because in the context of Hong Kong, they are pivotal to the maintenance of the rule of law. For example, if the government obeys implicitly obey the law, the rule of law is safe. When the government chooses to put itself above the law, the rule of law cannot long survive. Likewise, if all are equal before the law, but the government is more equal than others, there will be no rule of law. The “impartiality enforcement” criterion creates a difficulty because it includes 2 parts: part (b) judicial independence, which is paramount but utterly different from part (a).

2. Score – brief explanation

Overall: We are looking at a scenario of rapid decline from an originally strong stage. Therefore there is still a good deal left.

- (1) The drafting & legislative processes have become weak at (c), (d), (f) & (h).
- (2) Nor only does the government’s act in requesting an Interpretation by the NPCSC seriously prejudices the rule of law, but also its conduct in financial matters.
- (3) There are many signs of retrogression into the “rule of law” and general lack of understanding of constitutional constraints on the use of power.
- (4) Derived from (2) and (3) above.
- (5) Part (a) is in tethers while part (b) is largely intact. The only score possible is 50%. This will give the wrong impression that judicial independence is poor. I suggest you separate the two. The courts “apply” not “enforce” the law.
- (6) Legal aid is full of problems, but on the whole still good.
- (7) On the whole still good.

Code: 8

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	8	90	5. Impartial enforcement of the law	10	75
2. Government under the law	10	75	6. Accessibility to Justice	8	85
3. Rule against arbitrary powers	10	25	7. Procedural Fairness	9	90
4. Equality before the law	10	80			

Explanation for the score of the Rule of Law in Hong Kong

Basic Requirements of Law such as Procedural Fairness may be supplemented by judges acting according to established principles under the Common Law system. However, the power of judges is limited, particularly, in face of political might. It is thus very important to have a responsible government accountable to the people and willing to subject itself to the Rule of Law without which the Rule of Law cannot survive.

The question of accessibility to justice is a different issue altogether. This issue involves financial and human resources necessary to sustain a healthy judiciary system. This very often is not a political issue but an economic issue and is thus more tolerable.

Code: 9

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	9	90	5. Impartial enforcement of the law	9	90
2. Government under the law	9	90	6. Accessibility to Justice	9	80
3. Rule against arbitrary powers	8	80	7. Procedural Fairness	8	90
4. Equality before the law	9	90			

Explanation for the score of the Rule of Law in Hong Kong

1. **Basic requirements of laws**

Using the criteria set out in Annex I, the compliance in my view is 90%. Statutes in Hong Kong are generally very well publicized through government publications e.g. gazettes, Ordinances, white paper, consultation paper etc. and the media. Laws in Hong Kong are generally very stable and predictable. Change in the law is usually ‘demand pull’, as a result of demand by the public or the need to meet changing circumstances. Law Reform Commission and the various Committees comprising of lawyers and representatives from the relevant sectors take on board major changes in legislation etc. The law are generally clear and unambiguous, given the ample opportunities for consultation and forum with the public, lobbying by interest groups, opinion expressed by academics, deliberation by LegCo members during the Bill Committee Stage. With regard to non-retroactivity, it is rare to see any legislation, criminal or otherwise enacted with retrospective effect.

2. **Government under the Law**

Again using the criteria set out in Annex I, Hong Kong has done very well too, from my observations. This may be due to the fact that any trespass of law will likely result in proceedings, criminal or otherwise against the trespasser. This is demonstrated by the increasing number of judicial reviews against government’s policy decisions (e.g. Linkreit case), paycut case, and the criminal cases against CHAN Kau-tai, a Chief Government Building Engineer recently convicted of bribery offences. Influential political figures like CHIM Pui-chung, LegCo Member like CHENG Kai-nam, a Senior Police Superintendent Brian Heard were prosecuted by the Department of Justice and convicted of various criminal offences by the court. There are also regular cases where the government is being sued for negligence, breach of contract, wrongful dismissal of civil

servants etc. This is a clear demonstration that there are breaches and yet they are dealt with according to the law.

3. **Rule against arbitrary powers**

From my own observation Hong Kong has done well too in this respect. Statutory powers come from statutes which will have been scrutinized by LegCo members with utmost care before enactment. No arbitrary powers without appropriate safeguards will normally be granted. There are bound to be abuse and wrongful exercise of administrative powers. Again any such abuse is subject to judicial review or civil suit by the aggrieved parties.

4. **Equality before the law**

4.1 The right to equality before the law is entrenched in the Basic Law. Article 25 of the Basic Law: All Hong Kong residents shall be equal before the law.

4.2 Freedom of expression, of the press, of publication, freedom of association, of assembly, of procession and of demonstration, and the right and freedom to form and join trade union, and to strike is guaranteed under Article 27 of the Basic Law, the mini constitution for Hong Kong. Any person aggrieved as a result of any breach may seek redress from court. Aggrieved party without means may seek help from public funds through Legal Aid. All accused of criminal offences triable in the High Court and District Court are eligible for legal aid. Only limited categories of offences triable in magistrates court qualify for Legal Aid. The Bar Association provide legal aid on pro-bono basis to those who are not qualified for legal aid. Considerations should be given to broaden legal aid to all criminal cases and in civil suits, e.g. in matrimonial, negligence claims etc.

5. **Impartial Enforcement of Law**

Please see para 2 above.

6. **Accessibility to justice**

For criteria 6(a) and 6(b) in Annex I, please see para 4 above. For 6(c), from my observation, never a place in the other parts of the world like Hong Kong that there are so many channels available for complaints against administrative action. The numerous newspapers, radio and other media are convenient channels. Official channels include the ICAC, CAPO, Equal Opportunities Commission,

phone in programmes in all Radios etc. The mass media provide a check and balance too.

7. **Procedural Fairness**

Independence of the judiciary in Hong Kong provides a safeguard for procedural fairness and fair trial. The jury system also acts as a further safeguard in criminal trials in the High Court. Compared with other parts of the world and in particular Asia, Hong Kong performs very well. There has been no known case of corruption of judges within last two decades. A clear demonstration of a 'clean judiciary'. Parties aggrieved by decision of lower courts enjoy rights of review or appeal to Court of Appeal and Court of Final Appeal. Composition of CFA judges include non-permanent judges brought in from other Common Law jurisdictions. Many litigants of international disputes prefer to litigate or adjudicate in Hong Kong. This is a clear vote of their confidence in the legal and judicial system in Hong Kong.

Conclusion

The foregoing does not mean the rule of law in Hong Kong is perfect, as nothing is perfect. The most important issue is whether there is an adequate system for check and balance. In my assessment, such a system is well established in Hong Kong.

Code: 10

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	7	90	5. Impartial enforcement of the law	9	95
2. Government under the law	10	85	6. Accessibility to Justice	8	95
3. Rule against arbitrary powers	10	70	7. Procedural Fairness	8	85
4. Equality before the law	8	85			

Explanation for the score of the Rule of Law in Hong Kong

Criterion 1: 90%

There is a high degree of transparency of the legislative process in Hong Kong targeting the meet the basic requirements of the law, which has been by and large successful.

Criterion 2: 85%

The government represents a constant source of lucrative construction/development projects. The allocation of the projects to the private sector would necessarily involve the exercise of governmental powers, which is not always seen to be free from all impressions of favouritism.

Criterion 3: 70%

It seems that the government has lost control of one of its most powerful law enforcement agencies in the gathering of evidence for criminal trials. There is no effective check-and-balance of the discretionary powers of the high officials of that agency in the deployment of investigative techniques which might involve an infringement on values protected by the law, eg., freedom of the press, privacy, legal professional privilege, etc. Unlike the police whose actions are subject to review by CAPO, there is no independent governmental body to receive complaints against the conduct of the officers of the agency in question.

Criterion 4: 85%

There should be greater equality before the law with regard to minority interest. One example is the legislative distinction in the age of permissible sexual intercourse/acts between homosexuals and heterosexuals (which is now a matter for judicial review before the court). It is unfortunate that the government would leave

the matter to the court and takes no initiative to remove from the statutes this apparent unequal treatment by the law.

Criterion 5: 95%

The courts in Hong Kong are independent and impartial in the enforcement of the law, as can be seen from recent judgments of our Court of Final Appeal.

Criterion 6: 95%

The awareness of the availability of the court process to challenge governmental actions has been heightened recently.

Criterion 7: 85%

There are doubts whether the law enforcement agencies of Hong Kong might have used unlawful means in the investigation of crime.

Code: 11

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	85	5. Impartial enforcement of the law	10	90
2. Government under the law	10	85	6. Accessibility to Justice	10	70
3. Rule against arbitrary powers	7	70	7. Procedural Fairness	10	70
4. Equality before the law	10	70			

Explanation for the score of the Rule of Law in Hong Kong

I feel that nearly all the listed criteria are very important, except rule against arbitrary powers.

It was unfortunate that HKSAR Government had inherited a set of laws, the Basic Laws, which were not drafted by the LegCo of Hong Kong. It was also a sad twist of fate that there were several factors or events, which were beyond the control of the HKSAR Government and which had undermined the confidence and trust of the people of Hong Kong in her ability to govern. As a result, when the grey areas contained in the BL, such as the government being executive led, article 23, the ROA, the interpretation power etc., began to surface, there were a lot of distrust in the masses. I believe some politicians have played on this element of distrust and politicise everything. As a whole, the basic requirements of laws are still present.

I have noticed that when some government departments were facing enforcement problems, instead of finding ways to solve them, they have sought to introduce laws or regulations, which would shift the onus to the members of public. Regulations related to building maintenance and small house policy readily came to mind.

The internal bickering within the Equality Commission has seriously undermined the image of the Commission, which, in the opinion of many people, had only done some superficial work on equality and discrimination.

Since the reunification of Hong Kong and mainland China, the DOJ had done very poorly in their handling of some prominent cases and had projected an image of double standard. It was OK for the rich and famous to do certain thing but ordinary people would not receive the same treatment.

I have noticed that many businessmen still prefer to sign contracts in Hong Kong when dealing with their partners in mainland China. They still have a great deal of trust in the rule of law and impartiality of the civil servants in Hong Kong.

Code: 12

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	7	85	5. Impartial enforcement of the law	7	80
2. Government under the law	9	95	6. Accessibility to Justice	6	70
3. Rule against arbitrary powers	8	75	7. Procedural Fairness	9	90
4. Equality before the law	9	90			

Explanation for the score of the Rule of Law in Hong Kong

1. **Basic requirements of laws**

During my bachelor degree study, I had two modules relating to the legal system in Hong Kong. Despite it was not an in-depth study, the content of it did generally cover some basic concepts of the rule of laws. Therefore I have quite good understanding of the basic requirements of laws.

2. **Government under the law**

Being in my job in the civil service for many years, I have very clear and thorough understandings of the legitimate authority of the government. During the discharge of my duties, I am able to exercise the powers under proper authority. The score I have given in this criterion is the highest amongst the others.

3. **Rule against arbitrary powers**

Once again, in my job, I am aware of the powers authorized to me and I do not have the arbitrary powers in the discharge of duties.

4. **Equality before the Law**

I understand very well on equality before the law. The legal system in Hong Kong adopts this rule very well and no element of discrimination has been observed. The score for this criterion is quite high comparatively.

5. **Impartial Enforcement of the Law**

In this criterion, I can get many legal cases easily from the media which facilitate my understanding of impartial enforcement of the law in Hong Kong.

6. **Accessibility to Justice**

I understand this criterion quite well. From time to time, I see some complaints against the Government's action and decisions from various political bodies or private organizations. For example, petition against the reclamation of Victoria Harbour, Link REIT etc.

7. **Procedural Fairness**

The procedural fairness has always been practiced during the discharge of duties. Even in the conduct of disciplinary proceedings, presumption of innocence, natural justice and basic rules of evidence to achieve justice have always been demonstrated.

Code: 13

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	9	85	5. Impartial enforcement of the law	10	75
2. Government under the law	8	80	6. Accessibility to Justice	10	60
3. Rule against arbitrary powers	8	80	7. Procedural Fairness	10	90
4. Equality before the law	9	70			

Explanation for the score of the Rule of Law in Hong Kong

1. Hong Kong adopts a common law system, which has been establishing for long time. Even though there still exists some minor rooms for further improvement, the basic requirements of laws have been quite good. All may voice their views to the Legislative Councillors, who may bring the public's opinions to the Legislative Council and draw the government's attention to such views. Everyone may also directly submit their views to the government in writing by letter, by email, etc.
2. The prosecution of some former civil servants (some even serving posts at high level) demonstrate government officials are treated like any ordinary person.
3. The recent prosecution of Kung Yu Sum (龔如心) is a good demonstration of this aspect, as contrary to the Department of Justice's decision of not to prosecute Wu Sin (胡仙) several years ago.
4. As wealthy persons may engage their favorite lawyers regardless of monetary consideration, they are in a better position to win a case in court. The system of legal aid cannot fully exercise its role to remedy this point. As a result of the means test, even though someone may be classified as being unable to fit the means test, they may not have sufficient financial means in fighting a case in court.
5. The good system of judicial review or appeal can support the impartial enforcement of law. But as a result of the fixing too many cases for a court on one day, some criminal judges tend to acquit the Defendants so as to decrease their workload even if only a slight or insufficient doubt in a case (they need to

write a full statement of finding once a defendant files a notice of appeal). It may be a result for diminishing the number of magistracies in Hong Kong!

6. The close of magistracies makes the courts no longer easily accessible. The listing of too many cases in a court results in refixing and long delays of cases and excessive costs. Some defendants may have no more money to engage private lawyer on new hearing day.
7. As far as I observe, the courts and tribunals in Hong Kong can highly satisfy the elements of procedural fairness.

Code: 14

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	9	70	5. Impartial enforcement of the law	8	80
2. Government under the law	8	70	6. Accessibility to Justice	9	65
3. Rule against arbitrary powers	9	70	7. Procedural Fairness	9	65
4. Equality before the law	8	80			

Explanation for the score of the Rule of Law in Hong Kong

1. **Basic requirements of laws**

Importance undisputed as otherwise the public could not scrutinize the existence and quality of the Rule of Law. Legal education and publicity on law grossly inadequate and not widespread enough amongst the public.

2. **Government under the Law**

The ideal is to have the executive, legislative and judiciary independent of each other. Yet there are rooms to suggest that government might readily get what they want through legislation and the Court might, in public interest rule and decide cases in a way consistent with government policies.

3. **Rule against arbitrary powers**

Power of executive branches especially law-enforcement agents are generally given quite wide powers leaving the exercise thereof to the sole discretion of the executive.

4. **Equality before the Law**

This is generally achieved subject of course to the usual and common unfairness faced by the poor and the underprivileged class.

5. **Impartial Enforcement of the Law**

This is generally achieved.

6. **Accessibility to Justice**

The poor and the underprivileged classes always complain of their poor access to legal representation of their desired quality, especially those sandwich classes who could not pass the means test to make them eligible for legal aid.

7. **Procedural Fairness**

This is provided in principle but still frequent complaints on their inadequacy in real life situation.

Code: 15

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	6	80	5. Impartial enforcement of the law	7	60
2. Government under the law	8	70	6. Accessibility to Justice	5	90
3. Rule against arbitrary powers	8	70	7. Procedural Fairness	10	80
4. Equality before the law	9	70			

Explanation for the score of the Rule of Law in Hong Kong

1. The Rule of Law provides an important foundation for the legal system. It refers to some of the fundamental principles of law that govern the way in which power is exercised in Hong Kong.
2. In upholding the Rule of Law, I opine that Procedural Fairness is utmost important element which underlies the Rule of Law and therefore the weighting should be 10. Procedural Fairness is very important because 'Justice should not only be done but should be manifestly seen to be done.' I opine that Justice has been seen to be done here in Hong Kong and I would give a score of 80% although citizen rating is only 60%.
3. Equality before the law is the second most important criteria. Weight given to this element is 9. I opine that the law must be the same for everybody and there should never be any difference in treatment regardless of your social standing in the community. That said, I would say a score of 70% reflects the present situation regarding equality.
4. The absence of arbitrary or executive power is the next important element otherwise law enforcement agencies would be seen to pervert the course of public justice. I would rank Rule against arbitrary power 8 out of 10 but a score of 70% would be appropriate in the circumstance.
5. That said, this brings us to the point that Government powers should be solely based and delimited by law. The potential of the Rule of Law for ensuring limited governmental power should be appreciated. For the citizen, the Rule of Law is protective of citizens, demanding that government acts in accordance to

law. Thus Government under the Law is equally important. Thus, I would rank it 8 out of 10 and would also give a score of 70%.

6. In order to maintain public confidence in the government, judicial review of executive actions to ensure that government action is in accordance with law is essential. Thus I would rank Impartial Enforcement of the Law after Government under the Law being 7 out of 10. The rating by citizen reflects a 60% score (see table 1.15) and I certainly agree with this score.
7. The need for clear and stable laws and the need for publication are essential to the legal system. Absence of any one of them would be destructive of Rule of Law. Thus I would weight the importance of the Basic requirement of Laws to be 6 with a passing score of 80%.
8. With regard to Accessibility to Justice, I would say that it is critical to the accessibility of law by the public. If a piece of legislation is not publicized, then members of the public affected by it may not be able to regulate the conduct by reference to it. Since most of the instrument has been publicized here in Hong Kong, it is relatively less important. Thus I would give a weighting of 5 with a passing score of 90%.

Code: 16

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	20	5. Impartial enforcement of the law	10	70
2. Government under the law	8	50	6. Accessibility to Justice	10	50
3. Rule against arbitrary powers	10	60	7. Procedural Fairness	10	70
4. Equality before the law	8	60			

Explanation for the score of the Rule of Law in Hong Kong

The Rule of Law in Hong Kong suffers from general decline in quality due to the following developments after 1997.

- A decrease in quality of judges because of the forced localization. Some judges in lower courts do not have the judicial temperament or the necessary faculty to perform their duties with the rule of law spirit.
- The complicated procedure (especially in civil proceedings) affects the efficiency of the courts as arbitrator of justice. Parties in legal proceedings often are lost in the middle of the proceedings. Due to this and the costs consequences, generally, lawyers (unless acting for big corporation or legal aids proceedings) actually shy from involvement in litigation.
- Whereas lower classes benefit from generous legal aid, middle class do not find the courts an efficient avenue for justice.
- Generally, as in other aspects, rule of law in Hong Kong worsens after 1997, not due to interference of China but adjustment while has not worked.

Code: 17

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	75	5. Impartial enforcement of the law	8	75
2. Government under the law	7	90	6. Accessibility to Justice	7	60
3. Rule against arbitrary powers	9	60	7. Procedural Fairness	9	90
4. Equality before the law	10	70			

Explanation for the score of the Rule of Law in Hong Kong

The scores are given on the basis of the description of the various criteria set out in Annex I, and do not necessarily reflect my personal view or understanding of the criteria.

1. **Basic requirements of laws**

Generally I consider that the majority of the components e.g. generality, publicity, stability etc. are present in our existing legal system. This is arguably one of the few remaining fine traditions rooted back from the colonial times and still preserved after the handover.

Inadequacies are identified in the areas of (d) clarity and (h) general congruence of law with social values. Complex legislations, e.g. Securities and Futures Ordinance, Employment Ordinance, and certain parts of Companies Ordinance, require better clarity and certainty. The standard of the law-draftsman can be improved to avoid unduly difficult sentence structure which is more often than not unjustified. Simple language should be adopted for the easier understanding by the public. Furthermore, the law-making/law-revision process can be more responsive to public opinion. How to provide a proper measure to gauge public opinion, of course, is somehow outside the legal regime.

2. **Government under the Law**

A high score is given under this category because (a) the parameters of government powers are, with exceptional cases often in connection with the Basic Law, by and large clearly laid down by law, and (b) occasions of abuse of the executive powers are infrequent. In instances of abuse, the Ombudsman as a system of redress is available to the public. Its effectiveness is however outside the scope of issue under examination.

3. **Rule against arbitrary powers**

Although generally the grant or exercise of arbitrary powers are not frequently detected, a relatively low score is given due to the questionable decision making process of the Secretary for Justice in exercising her discretion in prosecution in a number of cases in recent years.

4. **Equality before the law**

On the whole an individual does enjoy equality before the law in Hong Kong. However, as mentioned under criteria no. 3 above, the recent trend does cast a doubt as to whether some persons have particular privileges above the public. The insufficiencies of the legal aid system also hampered the score.

5. **Impartial Enforcement of the Law**

Personally I do have confidence in the overall judicial independence and the integrity of the judges in Hong Kong. The procedural twists and turns of the LINK saga are good lessons to be learnt by everybody though.

6. **Accessibility to Justice**

Over complexity in the rules and procedures has posed serious obstacles in the public's access to justice.

7. **Procedural Fairness**

A high standard of procedural fairness is present taking into account of the four stated elements.

Code: 18

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	5	70	5. Impartial enforcement of the law	7	55
2. Government under the law	6	55	6. Accessibility to Justice	6	60
3. Rule against arbitrary powers	7	60	7. Procedural Fairness	5	60
4. Equality before the law	7	55			

Explanation for the score of the Rule of Law in Hong Kong

1. **Basic Requirements of laws**

Following the long tradition of the English common law system adopted by Hong Kong over the last century, it can be said that Hong Kong has managed to maintain a status quo as far as the basic requirements of Laws are concerned.

2. **Government under the Law**

Whilst there have been notable changes in the Government's stance with regard to the Law, in particular on the laws relating to political and constitutional issues, a passing score is nevertheless given. There is however a growing tendency, not only among the public but also as shown by some top government officials, to confuse the concept of "Rule of Law" with "rule by law".

3. **Rule against arbitrary powers**

The situation in this regard is satisfactory.

4. **Equality before the Law**

Generally the situation in this regard has been satisfactory, but a certain degree of damage has been caused by the few controversial and widely-publicised cases of nolle prosequi during the past few years.

5. **Impartial Enforcement of the Law**

Ditto.

6. **Accessibility to Justice**

The situation in this area is satisfactory.

7. **Procedural Fairness**

There is room for improvement in this area.

Code: 19

Type: Assessor					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	60	5. Impartial enforcement of the law	10	60
2. Government under the law	10	60	6. Accessibility to Justice	10	60
3. Rule against arbitrary powers	10	80	7. Procedural Fairness	10	80
4. Equality before the law	10	80			

Explanation for the score of the Rule of Law in Hong Kong

In general, Hong Kong Government is successful and is committed to maintaining the rule of law in Hong Kong. The rule of law begins with individuals and their rights to seek the protection of the courts and it protects the freedom of individuals. In Hong Kong, everyone is equal before law and can be tried in courts. Individuals have the right to a fair and public trial by independent, impartial courts established by law and this is guaranteed in the Basic Law. Everyone has the right to legal representation and the right to legal assistance.

Nevertheless, there are some improvements to be made. Firstly, the publicity of basic equal rights is not wide enough to let the public know about their legal rights. Litigation is a costly means to the public to achieve justice in the eyes of the public. To some middle class people in Hong Kong for whom they are not entitled to legal aid, the Hong Kong Government should consider to provide loans / other means to them for instituting litigation if appropriate. The legal fees deter many of them to pursue their claims under the laws of Hong Kong. Further, the considerable long waiting time for the trials may sometimes cause injustice to parties of litigation. (Accessibility to Justice / Basic requirements of laws)

The judicial system in Hong Kong adopts common law system and is essentially judge-made law and is found in the judgments of the courts of the Hong Kong Government and other common law jurisdictions. Although it is legitimate for the NPC of the People's Republic of China to interpret laws in accordance with the Basic Law, the few incidents of the interpretations of the laws actually change the basis of judicial system that disputes should be tried in courts and laws are judge-made. The courts in those occasions do not have the powers to review the laws. (Government under the Law / Impartial Enforcement of the Law)

Code: 20

Type: Comparison					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	50	5. Impartial enforcement of the law	10	30
2. Government under the law	10	50	6. Accessibility to Justice	10	40
3. Rule against arbitrary powers	10	30	7. Procedural Fairness	10	40
4. Equality before the law	10	40			

Explanation for the score of the Rule of Law in Hong Kong

1. **Basic requirements of laws**

Regarding generality, the following are examples that may violate it. Children of Hong Kong people born in Mainland China are not granted the right of abode whereas those born in other countries are. The migrant domestic helpers are not granted the right of abode after 7 years of residence in Hong Kong while other migrant workers are. Although rape within marriage has made a criminal act same as other cases of rape, the definition of rape only points to intercourse, excluding other forms of sexual assault. Regarding non-retroactivity, there were several occasions when the police did not make charges to demonstrators at the scene but later selected some among all to charge against.

2. **Government under the Law**

Recently, there have been exposed cases when the government has set a minimum wage in contracting out services but has not held the sub-contractors liable to provide minimum wage to employees in further contracting out of the services.

3. **Rule against arbitrary powers**

By the Public Order Ordinance as well as other laws, the police is given the power to limit the activities of the demonstrators in exercising their rights.

4. **Equality before the Law**

There were a lot of unreported cases when victims of family violence and sexual assault sought help from police who did not take their cases. In some cases of family violence, the police placed onto the victim the burden of making a charge, instead of taking up the very responsibility of charging the law-breaker.

5. **Impartial Enforcement of the Law**

The interpretation of Basic Law on Article 24 in June 2000 by the Standing Committee of the National Peoples' Congress of the PRC had overridden the sentence of the Court of Final Appeal that violated the rule of judicial independence.

6. **Accessibility to Justice**

While sexual abuse victims are too vulnerable to the whole process of trial that the successful prosecution rate relatively low. Advocates for victims have called for the use of video link in the proceedings, but receive no positive action from the police. The insufficient victim support has deterred the victims to pursue justice. The inactive cases at different level of courts may probably mean delays in accessibility to justice. In 2003, close to one-third of all the complaints to the Ombudsman received were screened out due to restrictions on investigations. These cases of restrictions may imply a loophole in bringing forward complaints against the government.

7. **Procedural Fairness**

Migrant domestic helpers have found that interpreters, who have not known their dialects or languages well enough, have been employed to provide interpretation service at the trials. This hampers the courts to render fair trials.

Code: 21

Type: Comparison					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	70	5. Impartial enforcement of the law	10	80
2. Government under the law	9	50	6. Accessibility to Justice	10	70
3. Rule against arbitrary powers	10	60	7. Procedural Fairness	9	80
4. Equality before the law	10	60			

Explanation for the score of the Rule of Law in Hong Kong

The realization of the Rule of Law is dependent on different criteria, which can be reflected by numerous critical incidents and the inadequacy of institutional structures in the past few years, many significant social policies and proposed legislations also affect the Rule of Law and those problems with respect to each criterion can be observed as follows:

1. **Basic requirements of laws**

The interpretations of the Basic Law by the National People's Congress Standing Committee for the right of abode cases and the banning of the election of the Chief Executive and the Legislative Council, which were initiated either by the NPCSC itself or initiated by the SAR Government respectively, made the law unstable. In addition, some legislators were under great pressure of the central authority because of the undemocratic nature of the legislature, which made certain legislation impossible to be obeyed.

2. **Government under the Law**

The litigations concerning the right of abode case, the reduction of the remuneration of civil servants by legislation, the re-interpretation of the Basic Law, and even the opposition of lowering the public housing rent reflected the fact that the government officials tend to act ultra vires. This can also be found in the rise of the number of the judicial review cases.

3. **Rule against arbitrary powers**

In the case of Hunghom Peninsula and Cyberport, the Government officials exercised favorable discretions to certain enterprises. The fact that no open and fair vetting has been carried out perverts the law.

4. **Equality before the Law**

The absence of comprehensive legislation against all forms of legislation, including age, ethnic origin, social status, and even sexual orientation resulted in an unequal and unfair treatment of each citizen before the Law.

5. **Impartial Enforcement of the Law**

The appointment of the judicial offices remained comparatively independent and the courts judged each case without bias. However, as the executive was unable to settle the political disputes outside court, many controversial cases with serious public concern are inevitably heard in the courts. Such changes led the courts to become political arena and judges will be under a great risk of political pressure, which will create a big/tremendous (don't repeat threat) to impartial enforcement of the Law.

6. **Accessibility to Justice**

In the absence of additional manpower and financial resource, the increase of the caseload of courts and tribunals resulted in longer waiting time for the claimants and defendants, which means that justice cannot be achieved.

7. **Procedural Fairness**

Although the number of complaints against police reduced accordingly, the rate of fully investigated and substantiated allegations increased sharply. In addition, the general negative comments about the police officers by those arrested and charged with crime implied that the standard of the legal enforcement agency was in doubt and harmful to fair trial and natural justice.

Code: 23

Type: Comparison					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	9	90	5. Impartial enforcement of the law	6	70
2. Government under the law	5	100	6. Accessibility to Justice	7	70
3. Rule against arbitrary powers	4	80	7. Procedural Fairness	8	90
4. Equality before the law	10	60			

Explanation for the score of the Rule of Law in Hong Kong

The principle “The Law must be the same for every body” is so important for human beings because of the treatment is different regarding of their race, sex, political of profession then the total spirit of Common Law will be destroyed. I gave a “10” to “*Equality before the Law*” based on this point.

I also believe that *Basic Requirements of Laws* are on the top rank of importance. Once again the views are based on public interest. Laws must apply to general classes but not to specific persons or entitle and the law must be open and adequately publicized to all people. If Law is not executed in a fair way, then Law is not law but just tool for some people.

The reason I gave *Government under the Law* 100% score is because in Hong Kong, it is so obvious that government powers are so delimited by Law. The “LINK” case is such a good example, even one person is asking for judicial review, the government has to stopped all the plans. Here everybody can sue the government with lots of support.

Overall the standard of the rule of law in Hong Kong is satisfactory, especially when compare with our motherland China.

Code: 24

Type: Comparison					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	60	5. Impartial enforcement of the law	10	60
2. Government under the law	10	50	6. Accessibility to Justice	10	70
3. Rule against arbitrary powers	10	60	7. Procedural Fairness	10	60
4. Equality before the law	10	70			

Explanation for the score of the Rule of Law in Hong Kong

整體而言，我覺得香港政府及相關部門、執法者及專業人士仍有空間須要改善，加強不足之處。

觀乎政府在處理愉景灣的補地價事宜、公務員退休後的受聘監管制度、公安條例的不清晰及追溯權，律政司對一些控罪如遊蕩罪、公眾地方行為不檢等，未有清晰教育/講解控罪的內容，領匯上市的基本申訴權等等事件，反映出政府完全遵守法規行事，法律面前人人平等，執法/司法公平公義，法例清晰易明等。以廿一世紀及香港作為國際金融、開放的城市來看，上述問題根本應早早解決，不應在現階段出現。

另一方面，即使香港司法制度尚算理想，但投訴機制不透明，下級法院司法人員的晉升制度不清晰，大部份市民對自身的法律權利的認識不足，對執法者的執法仍抱有保留，下級法院累積個案眾多但人手比例都相反少，法律代表與市民比例仍見偏低，又豈能說公平的程序及訴諸法庭有相對信心取得滿分？

Code: 25

Type: Comparison					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	80	5. Impartial enforcement of the law	9	70
2. Government under the law	10	70	6. Accessibility to Justice	8	60
3. Rule against arbitrary powers	10	80	7. Procedural Fairness	9	70
4. Equality before the law	10	70			

Explanation for the score of the Rule of Law in Hong Kong

My assessment in the survey is primarily based on my daily experience in the courtroom.

1. Clarity and publicity

I think the laws of Hong Kong have a good quality of clarity, but it is only in professional terms. For lay people, without the help of legal professionals, understanding the law (both the statute and the judgments) is no easy task. Legal jargons and the way our legislation is drafted bar people from understanding the law. Fortunately we can still live happily without knowing what the law is actually about. Law abiding is a common feature amongst the population but the substance of the regulations has rarely been discussed. For enhancement of publicity, more coverage of court news would be valuable but our journalists usually have their eyes focused on the juicy side of the story.

2. Accessibility and Equality

People are generally more aware of their fundamental rights after the implementation of the Basic Law in 1997. More people resort to the court to seek redress and our judiciary has a very good level of accessibility. It is shown in the upsurge of cases in the past years, in terms of number and variety.

Yet, the legal cost is too which bar poorer people from lodging legal proceedings. Assistance from the legal aid service is very limited. Besides, the quality of duty lawyer service scheme has a strong bearing on the quality of justice in the magistracy level but I have strong reservations on the quality of the service, especially for the initial advice given when the case is first mentioned before the principle magistrate.

3. Impartial Enforcement

There have been criticisms on the prosecution policy of the Department of Justice. There are cases in which the decision of the Director of Public Prosecution raises concern of the public. I think before better explanations and rationale be given by the Department of Justice, the criticisms are fair.

Code: 26

Type: Comparison					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	5	70	5. Impartial enforcement of the law	6	70
2. Government under the law	6	80	6. Accessibility to Justice	8	40
3. Rule against arbitrary powers	7	90	7. Procedural Fairness	7	90
4. Equality before the law	4	90			

Explanation for the score of the Rule of Law in Hong Kong

The weighting of the various categories results inevitably from bias and subjectivity. My assignment stems from the assumption that the result of the implementation of the law matters much more than the law and the process themselves.

I give a modest score to “**Basic requirements of law**” because common law is intrinsically foreign to Hong Kong and the language of the law is a formidable barrier to the public understanding of the law. The bilingualisation has so far done little to improve it.

I give a fairly high score to “**Government under the law**” as there is in place a fairly developed system of norms and process as well as an administrative culture in support of this notion.

I give a very high score to “**Rule against arbitrary powers**” as there is a quite independent judiciary and a robust judicial review system, both in law and in practice in Hong Kong.

I also give a very score to “**Equality before the Law**” because Hong Kong has a reasonably tolerant culture in regard to minorities which compensates any normative deficiencies (of which there are not many).

I give a modest score to “**Impartial enforcement of the law**” based on the perception of a number of cases involving favouritism and collusion between the SAR government and business elites.

I give a low score to “**Accessibility to Justice**” because of the tremendous costs involved in the civil justice system, notwithstanding a development legal aid system.

I give a very high score to “**Procedural Fairness**” based on the sophisticated law and culture buttressing this notion.

Code: 27

Type: Comparison					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	80	5. Impartial enforcement of the law	10	65
2. Government under the law	10	70	6. Accessibility to Justice	10	70
3. Rule against arbitrary powers	10	70	7. Procedural Fairness	10	80
4. Equality before the law	10	65			

Explanation for the score of the Rule of Law in Hong Kong

In general, I would say Rule of Law has been upheld and respected in Hong Kong. This seems to be shared by the majority of the respondents as shown in Table 1.15 and 1.16. Therefore, I gave a high score to “**Basic Requirements of Laws**” and “**Procedural Fairness**”. However, several major incidents have badly shaken the confidence in Rule of Law. Namely, the reinterpretation of the Basic Law on the status of mainland children born of Hong Kong parents, and the recent decision of the NPC on the timing of universal suffrage in Hong Kong. These incidents left the impression that Hong Kong government can easily override judicial decisions and manipulate constitutional interpretations. Worse, one cannot help but regard the Central Government may exercise its power in an arbitrary manner and that the Government is above the law.

Other than the above, “**Equality before the Law**” and “**Impartial Enforcement of Law**” fare worst in my assessment. The fight for equality amongst ethnic minority, new immigrants from the Mainland, and homosexuals has been a long and slow struggle. The Government has made very minor progress in the past year. A different but related problem is that from Table 1.11, one notices that 8.2% of accused were not represented in criminal trials, which has implication on equality before the law.

From the statistics, the backlog of cases in courts is serious (Table 1.7). In addition, the discrepancy between application to Legal Aid Department and complaints to various bodies on the one hand, and the actual cases that are dealt with and investigated on the other hand was alarming. Though this could be explained by various factors, the problem cannot be ignored as it is directly related to “**Accessibility to Justice**”. Another similar issue is that only about 40% of judicial review cases were reported in the Judiciary website in 2003. The high successful

rate of criminal appeal also makes me wonder whether there is something fundamentally problematic in the trial stage (89.3% according to Table 1.13). As a result, I gave 70% to “**Accessibility to Justice**” and 80% to “**Procedural Fairness**”.

Code: 28

Type: Comparison					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	80	5. Impartial enforcement of the law	10	80
2. Government under the law	10	70	6. Accessibility to Justice	10	80
3. Rule against arbitrary powers	10	75	7. Procedural Fairness	10	90
4. Equality before the law	10	75			

Explanation for the score of the Rule of Law in Hong Kong

1. *Basic requirements of laws*

For the most part, Hong Kong does well on this criterion. Human rights provisions prevent the retrospective application of penal laws. Laws in Hong Kong are generally reasonable and do not impose impossible obligations. However, there are still too many common law criminal offences. Steps should be taken towards full codification since offences at common law are relatively inaccessible to the public. Criminal laws and procedures are not entirely congruent with modern societal values and beliefs. Obvious examples can be found in the sexual offences, national security laws, law of evidence, and others. Law reform tends to be slow.

2. *Government under the Law*

In non-constitutional matters, the government (and government agents) generally subjects itself to the law. The ICAC performs well in preventing corruption in the public (and private) domains. However, there remains serious concern with constitutional interferences by the National People's Congress Standing Committee (NPCSC) with the endorsement of the Hong Kong government. It occurred first with the right of abode issue in 1999 and more recently in relation to constitutional reform in 2004. These interferences have occurred in a manner inconsistent with democratic and rule of law values.

3. *Rule against arbitrary powers*

The police and ICAC still enjoy many coercive and overbearing powers. These powers enable law enforcement to question individuals, demand information (eg identity card), stop person and vehicles, search, compel cooperation, enter and search premises, seize items, etc. Many times, court authorization is not required before powers are exercised. Government has refused to implement

fully recommendations of the Law Reform Commission in respect of both wiretap evidence and adopting the UK's Police and Criminal Evidence Act 1984. There are serious concerns that many of these powers are being exercised arbitrarily by the police.

4. ***Equality before the Law***

Generally good but more needs to be done to eliminate discrimination on the grounds of race, ethnicity, place of origin and sexual orientation.

5. ***Impartial Enforcement of the Law***

Very good although there have been some questionable cases as to why the prosecution did not proceed (eg Sally Aw, Antony Leung, others).

6. ***Accessibility to Justice***

There are concerns with the increasing incidence of accused persons going to trial with out legal representation. Related concerns exist with the quality of representation, particularly in the lower courts. The cause of these problems is partly attributable to a flawed legal aid system.

7. ***Procedural Fairness***

Hong Kong's performance on this criterion is excellent.

Code: 29

Type: Comparison					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	10	65	5. Impartial enforcement of the law	9	60
2. Government under the law	9	75	6. Accessibility to Justice	9	80
3. Rule against arbitrary powers	9	62	7. Procedural Fairness	9	85
4. Equality before the law	9	78			

Explanation for the score of the Rule of Law in Hong Kong

I am aware that giving a score sheet for the Rule of Law in Hong Kong inevitably include some arbitrariness and subjectiveness, scores given are usually of my best knowledge and maybe instinct.

First, regarding the weighting, I think *Basic requirements of laws* stands above the others because of the vast sub-criteria under this criterion. There also involved some fundamental elements of laws, ultimately build the foundation of a strong legal system. Others are indispensable and mutually important in order to build a comprehensive legal system.

About the scores, highest scores are given to *Procedural Fairness* and *Accessibility to Justice*. We see that in a recent case regarding the Link, the CFA did not hasten the process ever though the Government has exerted some pressure on that. Generally speaking, Hong Kong has quite a well-established and comprehensive legal system that suggests Rule of Law is somehow upheld.

However, we see that recently there have been several cases contesting the arbitrary powers of police in particular. Such as the Falun Gong case and Public Order Ordinance (Leung Kwok Hung case). Of course, there are always suggesting that said Hong Kong's judicial independence is eroding, especially with proposals to cut judicial officers' salaries and also the interpretation made by the Standing Committee of NPC. Therefore, the lowest score is given to *Impartial Enforcement of the Law*, with a close margin for *Rule against arbitrary powers*.

Code: 30

Type: Comparison					
	Wgt	Score		Wgt	Score
1. Basic requirement of law	6	70	5. Impartial enforcement of the law	10	80
2. Government under the law	8	80	6. Accessibility to Justice	6	65
3. Rule against arbitrary powers	10	70	7. Procedural Fairness	6	70
4. Equality before the law	8	70			

Explanation for the score of the Rule of Law in Hong Kong

According to the document received, we should take into account 7 factors in evaluating the score of Rule of Law in Hong Kong.

Basic Requirement of laws

In general I would consider the law of Hong Kong had provided a satisfactory level of stability, clarity, publicity. People in Hong Kong had given a little more than half score to the HK's rule of law.

Government under the law and Rule against arbitrary powers

The best way of checking how law complying one government is, is to check on the way they deal with complaints. Although there are a lot of complaints, it seems that they had a good efficiency in concluding and solving them, which showed their sincerity in putting itself under the law.

But among the complaints that are screened out, they are almost due to the restrictions on investigation, for which the reasons are not shown and this is one of the weakness on this point.

Equality before the Law

Discriminations on sex, race, age, religion are not that serious in Hong Kong.

The access to the legal system is to a certain extent guaranteed. As will be mentioned below, the main problem of the accessibility is money and resources. Police are more than happy to inform you about your rights, etc.

And the existence of legal aid showed the government's intention to strive for this equality before the law.

Impartial Enforcement of the Law

Subjectively speaking, HK People feels that HK courts are, more likely than not, enforcing law impartially.

Accessibility to Justice and Procedural Fairness

Although there is trend that the number of judges is increasing, there are still a lot of cases being brought forward from last year, which can be seen as a sign of timeliness of having litigation. Justice delay is justice denied. Even if the citizen knows how to get access to courts, I would consider this delay made that access a very superficial one, as the ultimate aim of accessing the court is to have justice uphold. If this failed, then that equals no or bad accessibility.

Most of the Hong Kong people know they can employ a lawyer if they are involved in legal matters. The main concern is money. With the increase in the number of lawyers, it should be easier to find one and the cost of it should be more reasonable. And the increasing number of approved legal aid cases shows that less cost concern has on the litigant in HK as a whole.

People know pretty well where to complain and also what their rights are. This is shown in the increasing number of complaints over the years.

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