



# Fundamental Elements of the Rule of Law

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# Rule of law

- As a cornerstone of the Hong Kong society and an indispensable key to the success of Hong Kong
- Chief Justice Andrew Cheung (2021): Hong Kong is a society which is governed by the rule of law, in the sense that Hong Kong is subject to the laws made publicly and administered openly by the courts, which apply the laws equally to all persons and authorities within the jurisdiction.
- The United Nations has for some time made the promotion of the rule of law one of its priorities



# Importance of the rule of law

- World Justice Project's Rule of Law Index report: 'Effective rule of law reduces corruption, combats poverty and disease, and protects people from injustices... It is the foundation for communities of justice, opportunity, and peace – underpinning development, accountable government and respect for fundamental rights.'
- 'Everyday issues of safety, rights, justice, and governance affect us all.'
- UN Long-Term Sustainability Goal 16: 'Promote just, peaceful and inclusive societies'. Target 16.3 is defined to promote the rule of law at the national and international levels and ensure equal access to justice for all.



# Definition

- International community fails to come up with a uniform definition for the rule of law.
- Debates on the definition is divided between formal and substantive conceptions or the thin and thick definitions
  - The thin definition only requires the State to be subject to laws publicly made and publicly administered in the courts, where laws apply equally to all persons and authorities within the State.
  - The thick definition goes further to the content of the rule of law.
- Regarding the thick definition, the problem is that no universal consensus regarding fundamental rights and freedoms, however, international covenants such as ICCPR help to resolve the difficulty.



# Contents/Substance of the rule of law

- While there is no easy definition for the rule of law, the overarching principles of the rule of law are to some extent clear.
- Lord Bingham (The Rule of Law) identifies the core of the existing principle that ‘all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect in the future and publicly administered in the courts.’



# Four principles of the rule of law (WJP)

- The rule of law is a durable system of laws, institutions, norms, and community commitment that delivers:
  - **Accountability:** The government as well as individuals and private entities are accountable under the law
  - **Just Law:** The laws are clear, publicised, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property
  - **Open Government:** The processes by which the laws are enacted, administered, and enforced are accessible, fair and efficient
  - **Accessible and Impartial Justice:** Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve



# Former Chief Justice Andrew Li

- Three overarching principles under the rule of law
  - Everyone, both those who govern and those who are governed, is subject to the same laws;
  - Disputes between citizens and disputes between citizen and government are resolved impartially by an independent judiciary;
  - The rule of law involves the effective protection of human rights.



# Safeguarding the rule of law

- Equality before the law
- Respect for the rights of others
- Judicial independence





# Equality before the law

- Basic Law Article 25
- Dr Thomas Fuller: 'Be you ever so high, the Law is above you'
- Level playing field to ensure access to justice
- This engages the need to put in place systems to secure legal representation and adequate provision for legal aid, etc.



# Respect for the rights of others

- In the enforcement stage, due process must be observed and this will involve a balance of competing rights and interests
- Proportionality test: Apart from certain rights such as the prohibition against torture and cruel, inhuman or degrading treatment or punishment, are absolute, most rights are not absolute
  - Such restrictions must be prescribed by law — legal certainty
  - Restrictions must be for one of the express purposes specified in the law



# Judicial independence

- Safeguard the rule of law in practice: The existence of an independent judiciary
  - Independence from the parties and institutional independence
- Judicial tribunals should be independent and impartial and also that they should appear to be so.
- Ensuring that the law is applied fairly and consistently to all litigants regardless of their identity.
- Transparency (open justice): Public hearing and publication of court's reasoning in the judgments.



# Former Chief Justice Geoffrey Ma

- Six indicators of the rule of law in terms of judicial independence:
  - Transparency of the legal system
  - Access to outcome of court proceedings
  - Transparency of judicial decision
  - Independent system of judge appointment
  - Access to justice
  - Views of the legal profession



# Assessing the rule of Law

- Existing projects adopt perception-based methodology, which may not accurately/sufficiently reflect the rule of law situation
- Objective data would provide empirical evidence and enhance a fairer review of the rule of law practice
- UN 2030 Agenda for Sustainable Development stresses on the importance of objective data for sustainable development



# The rule of law in Hong Kong

- The rule of law governs the way in which power is exercised in HK.
- Basic Law ensures that the legal system in HK will continue to give effect to the rule of law by providing that the laws previously in force in Hong Kong shall be maintained, save for any that contravene the Basic Law and subject to any subsequent amendment by the HKSAR Legislature.
- Vision 2030 for the Rule of Law can help to promote the proper understanding and recognition of the rule of law through objective assessment: how the rule of law is practised in HK?



# Indicators

- Judicial independence
- Equality before the law and protection of the right to non-discrimination
- Accessibility of laws
- Efficacy of civil and criminal proceedings and dispute resolution system
- Prevention of corruption
- Prevention of abuse of government power
- Fundamental human rights



# Conclusion

- The rule of law assessment is not an easy work, requiring serious consideration of its target, assessment methods and rational framework.
- Hong Kong's continual success and prosperity as an international financial centre hinges on the rule of law.
- Objective assessment of the rule of law based on available data will be vital to the successful implementation and consolidation of the rule of law in the Hong Kong society.





THANK YOU!

