

Situating Hong Kong's 'Rule of Law' Internationally

Daniel Pascoe and Noam Zamir
School of Law, City University of Hong Kong

Vienna Journal on International Constitutional Law, forthcoming

ABSTRACT

The rule of law is often cast as the primary governance ideology of Hong Kong. Hong Kong is a capitalist, common law legal jurisdiction that had, at least until a recent political crackdown, strained to differentiate itself from authoritarian, socialist, mainland China over its northern border. This article explores government conceptions of the rule of law in Hong Kong, benchmarked against rule of law standards adopted by member states at the United Nations (UN). We argue that Hong Kong's 'official' rule of law definition is at odds with an evolving international consensus on the rule of law within domestic legal and political systems. This has especially been the case after 2005, with the strengthening of rule of law discourse at the UN General Assembly and the rule of law's increasing political contestation and weaponisation in Hong Kong. Compared with the contemporary consensus expressed at the UN, Hong Kong's rule of law definition, as favoured by the territory's executive, legislative and judicial branches, possesses a narrower ambit, but is also more finely articulated.

KEYWORDS

Rule of Law, Hong Kong, China, United Nations, International Rule of Law, Judicial Independence, Democracy, Human Rights

Situating Hong Kong's 'Rule of Law' Internationally

Of all the dreams that drive men and women into the streets, from Buenos Aires to Budapest, the 'rule of law' is the most puzzling - George P Fletcher, 1996¹

I. INTRODUCTION

How do local and international conceptions of the rule of law differ? Surprisingly little scholarship has so far addressed such a universal legal issue. Stepping into the breach, this article has three main aims. The first is to understand states' collective views on what the rule of law should entail for domestic legal systems. The second is to explore government discourse on the rule of law in Hong Kong, a domestic legal jurisdiction where the rule of law has long been central to public identity and governance. The third is to benchmark Hong Kong's longtime conception of the rule of law against the aforementioned international view. In undertaking this comparison, in this article we proceed to show that Hong Kong's 'official' rule of law discourse over the period 1997-2021 was at odds with an evolving international consensus on the rule of law within domestic legal and political systems. Although an ongoing political crackdown beginning in 2020 has eroded rule of law observance in Hong Kong,² at the time of writing rule of law still plays a central role in the territory's political ideology and public consciousness.³

Importantly, the situation in Hong Kong serves as a proxy for a larger rule of law dispute between East and West, and between autocracies and democracies.⁴ As such, the lessons from our findings reach far beyond Hong Kong and its parent state, the People's Republic of China (PRC), to inform the

¹ GP Fletcher, *The Basic Concepts of Legal Thought* (OUP 1996) 11.

² See World Justice Project, 'Hong Kong SAR, China' (*World Justice Project*, 2023) <<https://worldjusticeproject.org/rule-of-law-index/country/2022/Hong%20Kong%20SAR%2C%20China>> for this kind of assessment over time.

In a broader sense, the June 2020 promulgation in Hong Kong of a National Security Law drafted by the mainland Chinese legislature, the 2021 electoral reforms targeting pro-democracy candidates and the 2024 passage of domestic security legislation have each contributed to a perceived erosion of the rule of law in Hong Kong, depending on how the concept is defined. On recent changes to rule of law observance in Hong Kong, see Georgetown Center for Asian Law, 'Submission on Hong Kong Government Public Consultation Document: Safeguarding National Security: Basic Law Article 23 Legislation' (*Georgetown Law*, 27 February 2024) 4-5 <<https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2024/02/GCAL-HK-Article-23-Consultation-Submission.pdf>>; L Wong and TE Kellogg, 'Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis' (*Georgetown Law*, 2021) vi, 16 <<https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/02/GT-HK-Report-Accessible.pdf>>; A Barrow, 'Beyond the Courtroom: Lawyer Activism and Resistance in Hong Kong' in A Barrow and S Fuller (eds), *Activism and Authoritarian Governance in Asia* (Routledge 2023) 94.

Nevertheless, at the time of writing, on a global scale Hong Kong still remains relatively highly ranked within a widely-cited rule of law index: 'HK ranks high in rule of law index' (*GovHK*, 25 October 2023) <[³ E.g. E Lam, 'Focus on learning ABCs of rule of law' \(*The Standard*, 5 December 2023\) <<https://www.thestandard.com.hk/section-news/section/11/258445/Focus-on-learning-ABCs-of-rule-of-law>>; 'New SJ has full confidence in HK's rule of law' \(*rthk*, 3 July 2022\) <<https://news.rthk.hk/rthk/en/component/k2/1655992-20220703.htm>>; 'Rule of law "a brand to be capitalized on"' \(*The Standard*, 12 October 2023\) <<https://www.thestandard.com.hk/section-news/section/47395166/256905/Rule-of-law-'a-brand-to-be-capitalized-on>>.](https://www.news.gov.hk/eng/2023/10/20231025/20231025_222020_607.html#:~:text=Hong%20Kong's%20overall%20ranking%20remains,Administrative%20Region%20Government%20said%20today.>>.</p></div><div data-bbox=)

⁴ BYT Tai, 'Authoritarian Rule of Law in Hong Kong' in BC Jones (ed), *Democracy and Rule of Law in China's Shadow* (Hart 2021) 177.

global literature on the rule of law in its domestic and international incarnations, and more generally, scholarship which discusses the gap between states' international rhetoric within multilateral institutions and their domestic practices. Irrespective of the rule of law's future direction in Hong Kong, the implications from the comparison we make here will remain relevant as governments of all political stripes grapple with how to best define and implement such a famously nebulous concept.

Following the present introductory section (Part I), in Part II, the article continues with an exploration of whether there is an international consensus on what the rule of law means for domestic legal systems. We conduct this investigation by considering state practice as demonstrated in the decisions of the General Assembly (GA) and Security Council (SC). For comparative purposes, we also briefly examine the decisions of the International Court of Justice (ICJ), as the UN's principal judicial organ. The conventional wisdom is that the precise meaning of the rule of law varies significantly between domestic legal systems.⁵ Contrary to this understanding, Part II proceeds to show that states, particularly via their participation in UN GA resolutions, have to a large extent already collectively agreed on what the rule of law should mean in the domestic legal sphere.

Part III explores government conceptions of the rule of law in Hong Kong by assessing public statements from the executive, legislative and judicial branches of government. Our findings are based on the available, representative, discourse expressed between 1 July 1997 (the date of Hong Kong's Handover of Sovereignty from the United Kingdom to the People's Republic of China under the 'One Country Two Systems' arrangement) and 31 December 2021 (the end of the Hong Kong Special Administrative Region's (HKSAR) sixth Legislative Council term).

In Part IV, the article addresses our foremost aim by comparing Hong Kong's domestic rule of law discourse with that of the UN member states, noting relevant similarities and differences and accounting for both. Part IV demonstrates that, compared with contemporary international views expressed at the UN, Hong Kong's erstwhile rule of law definition possessed a narrower ambit, but was also more finely articulated. Part V then concludes the article with several policy implications.

A. Hong Kong, China, and the United Nations

At the outset, two justificatory questions arise. First, why focus the domestic side of our comparative research on the Hong Kong Special Administrative Region of the People's Republic of China and not any other jurisdiction? Although domestic-international comparisons of the rule of law might arise in a myriad of national contexts, Hong Kong is a fitting case study for the purpose of comparing a domestic discourse on the rule of law vis-à-vis an international discourse, because of the central position that the rule of law possesses locally. The rule of law is often touted as the primary governance ideology of Hong Kong, a capitalist, common law jurisdiction that has, at least before a recent political crackdown, strained to differentiate itself from authoritarian, socialist, mainland China over its northern frontier. While many jurisdictions claim to adhere to the rule of law, the overt political and

⁵ D Clark, 'The Many Meanings of the Rule of Law' in K Jayasuriya (ed), *Law, Capitalism and Power in Asia* (Psychology Press 1999) 31-32; J Waldron, 'The Rule of Law' (*Stanford Encyclopedia of Philosophy*, 22 June 2016) <<https://plato.stanford.edu/entries/rule-of-law/>>; R Stein, 'What Exactly is the Rule of Law?' (2019) 57 *Houston Law Review* 185, 186; R Peerenboom, 'Varieties of Rule of Law' in R Peerenboom (ed), *Asian Discourses of Rule of Law* (Routledge 2003).

cultural centrality of the rule of law in Hong Kong makes it one of the world's most important sites for such analysis.⁶

Moving to the second question – considering that post-Handover Hong Kong is a Special Administrative Region of a UN member state (the PRC) and not a UN member state itself, in what sense is a comparison between rule of law views expressed at the UN and in Hong Kong useful? More generally, how is the rule of law as conceived of by a consensus of sovereign states within multilateral institutions relevant to *any* domestic legal and political system?

Our answer is twofold. With the current ideological and trade conflict between the PRC and the US/UK (increasingly labelled by some media commentators as fomenting a ‘new Cold War’),⁷ the rule of law has become an increasingly politicised and contested area of governance. For both democracies and autocracies, the rule of law increasingly serves as one of the ‘master narratives’ of governance in the ideal state.⁸ Here, both (Chinese and Western) strategic rivals wish to claim that they each better promote a rule of law system, albeit by their own definition.⁹ Under these conditions, the collective views of UN member states are invaluable as an ‘objective’ measure of the rule of law acceptable to all or most national jurisdictions, whether they are former British colonies with an associated common law legal tradition, or not.¹⁰

⁶ Hong Kong is not the only important potential case study. Post-authoritarian societies in political and legal transition (such as Eastern European countries in the 1990s) and present-day ‘illiberal democracies’ such as Singapore, Rwanda, India and Turkey also deserve comparative rule of law scrutiny.

⁷ e.g., P Cockburn, ‘The UK and US are starting a new Cold War with Russia and China - so what are these governments trying to hide?’ *The Independent* (London, 17 July 2020) <<https://www.independent.co.uk/voices/russia-china-uk-donald-trump-cold-war-coronavirus-vaccine-hacking-a9624826.html>>; J Hewett, ‘The new cold war with Russia and China’ (*The Financial Review*, 3 March 2022) <<https://www.afr.com/policy/foreign-affairs/the-new-cold-war-with-russia-and-china-20220303-p5a1fl>>.

⁸ C Jones, *Lost in China?: Law, Culture and Identity in Post-1997 Hong Kong?* (Cambridge University Press 2015) 258; A Bedner, ‘The Promise of a Thick View’ in C May and A Winchester (eds), *Handbook on the Rule of Law* (Edward Elgar Publishing 2018) 45; V Taylor, ‘The Mythology of (Rule of) Law’ (2019) 11 HJRL 331, 334.

⁹ Jones (n 8) 258; C May and A Winchester, ‘Introduction to the Handbook on the Rule of Law’ in C May and A Winchester (eds), *Handbook on the Rule of Law* (Edward Elgar Publishing 2018) 2.

¹⁰ B Fassbender, ‘What’s in a Name? The International Rule of Law and the United Nations Charter’ (2018) 17 Chin. J. Int. Law 761. After observing that the ‘rule of law’ maxim originates in the English common law, Fassbender proceeds to state (at 763):

[The set] of principles generally recognized as together representing the rule of law is not based on the assumption that the UN concept must comply with the English tradition. To the contrary, the UN is free to define and to develop the concept as it thinks best, in the light of its purposes and principles and the present conditions of international affairs ... it even seems indispensable for the United Nations to modify and adjust a concept derived from Western tradition to the views and beliefs of non-Western cultures and civilizations.

The most appropriate comparator for Hong Kong's rule of law discourse is thus not the rule of law in its post-1997 parent state the PRC,¹¹ nor in Hong Kong's former colonial power the UK,¹² but rather the rule of law's definition as expressed in multilateral fora. Comparing Hong Kong's governmental rule of law discourse with that expressed in the most widely representative international organisations avoids a value-laden, hierarchical, assessment in what is a post-colonial (and, for some, a neo-colonial) setting in Hong Kong.

We also believe that a local-multilateral comparison is instructive as it serves to test the PRC's domestic policies against the country's international rhetoric. It is important to examine whether the PRC has adhered to the moral commitments it has made internationally, vis-à-vis Hong Kong, the latter being a polity falling within the PRC's territory since 1 July 1997. Although it is not the aim of this article to measure rule of law observance or compliance on the ground in Hong Kong,¹³ any significant divergence between the international consensus on the rule of law's definition (of which the PRC formed part) and the public rhetoric voiced by Hong Kong's three branches of government would be a cause for concern. Since 1997, if the PRC's diplomatic corps have made international commitments to a particular vision of the rule of law, then its government officials on the ground in Hong Kong (including Hong Kong's Chief Executive, Cabinet ministers, Legislative Councillors, and senior judges) should not openly espouse a contrasting definition.¹⁴ Recent political developments in Hong Kong also suggest that narrow definitions of the rule of law that are not in line with the international consensus as expressed at the UN may have significant practical ramifications. The rule of law is not a merely semantic concept but one whose implementation on the ground affects the lives of a state's citizens.¹⁵

II. THE DOMESTIC RULE OF LAW AT THE UNITED NATIONS

Scholarship on the 'international rule of law' reflecting the rulebound behaviour of nation state actors at international law is by now well established.¹⁶ In contrast to the rule of law in its original domestic setting, the 'international rule of law' outlines the rule of law's definition and operation at the global

¹¹ On comparisons between the rule of law in post-1997 Hong Kong and the rule of law in mainland China, see e.g., M Duhalde, 'The rule of law: Hong Kong vs China - How far apart are the two systems in how they apply the rule of law?' *South China Morning Post* (Hong Kong, 20 August 2019)

<<https://multimedia.scmp.com/infographics/news/world/article/3023351/rule-of-law/?src=article-launcher>> and JE Thomas, 'Rule of Law with Chinese Characteristics: An Empirical Cultural Perspective on China, Hong Kong and Singapore' (2014) 22 APLR 115.

¹² There is surprisingly little academic literature comparing the rule of law in post-1997 Hong Kong with that of the UK.

¹³ See n 2.

¹⁴ The same applies to the rule of law within the PRC itself, although more detailed discussion is beyond the scope of this article. For relatively recent scholarship focusing exclusively on the rule of law in mainland China, see T Kellogg, 'Rule of Law in Asia: The Case of China' in C May and A Winchester (eds), *Handbook on the Rule of Law* (Edward Elgar Publishing 2018), X Zhai, 'Law in the Shadow of the Political' in BC Jones (ed), *Democracy and Rule of Law in China's Shadow* (Hart 2021) and D Clarke, 'Order and Law in China' [2022] Ill. LR 541.

¹⁵ Peerenboom (n 5) 6, 33, 36.

¹⁶ See e.g., C Feinäugle (ed), *The Rule of Law and its Application to the United Nations* (Hart Publishing 2016); S Chesterman, 'An International Rule of Law' (2008) 56 Am J Comp Law 331; I Hurd, 'The International Rule of Law: Law and the Limit of Politics' (2014) 28 Ethics Int. Aff. 39; R McCorquodale, 'Defining the International Rule of Law: Defying Gravity?' (2016) 65 ICLQ 277; J Waldron, 'The Rule of International Law' (2006) 30 Harv J. Law Public Policy 15.

level, including but not limited to the UN context. These attempts to define the ‘international rule of law’ take into account the special features of the international system, such as a lack of courts with compulsory jurisdiction,¹⁷ or mutual free will among states.¹⁸ Scholars who have documented the main differences between domestic and international versions of the rule of law tend to argue that the development of this ‘international rule of law’ reflects the way in which states use international law to justify and pursue their own policies.¹⁹ More recently, some scholars have attempted to define an expanded ‘international rule of law’ that goes beyond the confines of nation states and can be applied to all the participants in the international system, such as ‘international organizations, corporations and armed groups’.²⁰

Much less research, however, has considered multilateral views on the *domestic* rule of law within the UN’s constituent member states.²¹ Notwithstanding the limited academic inquiry to date, examination of member states’ collective views on the domestic rule of law is important for several reasons.

First, as noted in Part I, the collective views of UN member states are important as these are the only consensus definitions of the domestic rule of law, at its core a governance philosophy, that are directly adopted by sovereign states. These views provide an ‘objective’ measure of the rule of law acceptable to all or most national jurisdictions.

Second, unlike surveying numerous diplomatic missions or systematically reviewing domestic policy publications on the rule of law, decisions made at the UN and its principal organs provide the best opportunity to see what states say and do in practice, by participating in international fora. Examining states’ views as expressed in the decisions of the GA and SC provides an opportunity to assess whether there is a widely accepted international practice on what the rule of law means in relation to domestic systems. At the very least, state practice via the various GA declarations and UN decisions concerning the rule of law can be viewed as soft law,²² which may become binding over time in the international sphere.²³

¹⁷ McCorquodale (n 16) 298.

¹⁸ Hurd (n 16) 41; Chesterman (n 16) 350.

¹⁹ See e.g., Hurd (n 16) 39; McCorquodale (n 16) 278; K Gorobets, ‘The International Rule of Law and the Idea of Normative Authority’ (2020) 12 Hague J. on the Rule of Law 227, 245-247.

²⁰ See e.g., McCorquodale (n 16) 292, 299; C Feinäugle, ‘The rule of law and its application to the United Nations’ in C May and A Winchester (eds), *Handbook on the Rule of Law* (Edward Elgar 2018) 206.

²¹ Two rare examples which focus on this topic are Fassbender (n 10) and E Selous, ‘The Rule of Law and the Debate on it in the United Nations’ in C Feinäugle (ed), *The Rule of Law and Its Application to the United Nations* (Hart Publishing 2016).

²² For the purposes of this paper, we refer to soft law as ‘instruments or rules that have some indicia of international law but lack explicit and agreed legal bindingness.’ See K Raustiala and A-M Slaughter, ‘International Law, International Relations, and Compliance’ in W Carlsnaes et al (eds), *Handbook of International Relations* (Sage 2002) 551.

²³ Soft law has indeed impacted various fields of international law. One prominent example is environmental law, which has, in part, emerged based on ‘soft’ norms. See P-M Dupuy, ‘Soft Law and the International Law of the Environment’ (1991) 12 Mich. J. Int’l L. 420; A Boyle ‘Soft Law’ in L Rajamani and J Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd ed, OUP 2021).

In that sense, our method of ascertaining states' views on the rule of law is similar to the approach of the ICJ in examining state practice and *opinio juris* in customary international law. In the *Military and Paramilitary Activities in and against Nicaragua* case, the ICJ noted that:

opinio juris may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions ... The effect of consent to the text of such resolutions ... may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.²⁴

In the same vein, in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the ICJ stated that:

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of *opinio juris*.²⁵

Finally, we also believe that the examination of states' views via UN decisions holds value as a preliminary indication of whether there is a customary international rule and/or general principle of law in relation to the rule of law. Such a customary rule or general principle, if established, would bind both China and its Special Administrative Region of Hong Kong.

As the UN Special Rapporteur on General Principles of Law, Marcelo Vázquez-Bermúdez, recently recognised:

general principles of law formed within the international legal system may be identified ... by ascertaining that a principle has been widely incorporated into treaties and other international instruments, such as General Assembly resolutions.²⁶

While it is beyond the scope of this article to definitively establish the present existence of such international custom or general principles on the rule of law, decisions made at the UN level already show that states consider the rule of law as universally applicable within the domestic sphere and that its content includes rulebound governance, compliance with law, an independent judiciary, democracy and respect for human rights. That is to say, UN member states have already imbued the rule of law with specific content. To track the emergence of this consensus view, we should start at the beginning – namely, with the UN Charter.

A. *The UN Charter*

The UN's founding document, which came into being in 1945, does not mention the rule of law explicitly. However, the language in the UN Charter does serve as an important precursor to later resolutions. For example, in the Charter's Preamble, the UN's stated functions include 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. Another example, contained in the Preamble and also found in Article 1, is the UN's stated commitment to human rights. However, these traces are still far from the central role that the UN ascribes to the rule of law today.

²⁴ *The Republic of Nicaragua v. United States of America* (Merits) [1986] ICJ Rep 100, [188].

²⁵ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 254-255, [70].

²⁶ M Vázquez-Bermúdez, 'Second report on general principles of law' UN Doc A/CN.4/741 (9 April 2020), [122].

B. The UN General Assembly

In contrast to the UN Charter, the rule of law was explicitly included in the General Assembly's Universal Declaration of Human Rights of 1948,²⁷ where the third paragraph of the Declaration's preamble states that 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that *human rights should be protected by the rule of law*' [emphasis added]. This does not denote human rights as integral to the rule of law itself, but rather, as a value that the rule of law ought to protect.

After 1948, the rule of law, as with other governance norms, escaped further mention at the UN due to Cold War disagreements and other multilateral priorities. The next notable development took as long as 22 years. In 1970, the GA adopted, by consensus, the 'Friendly Relations Declaration' (Resolution 2625 (XXV)). In the preamble of that Resolution, the GA recalled 'the paramount importance of the Charter of the United Nations in *the promotion of the rule of law among nations*' [emphasis added].

The 1970 Declaration appears to focus on the behaviour of states in a rule of law context, rather than that of individuals and governments in the domestic sphere.²⁸ Indeed, most recent scholarship on the 'international rule of law' has made frequent reference to the 1970 Declaration.²⁹

While the Universal Declaration of Human Rights of 1948 and the Friendly Relations Declaration of 1970 are undoubtedly important resolutions, they do not elaborate on the rule of law's precise *content*, especially in a domestic context. It was not until decades later, after the collapse of the Soviet Union, that the UN's most representative organ attempted to flesh out a clear understanding of the rule of law.

On 8 September 2000, the GA returned to the rule of law in the United Nations Millennium Declaration, which was again adopted by consensus, without a vote. There, all the heads of state and government of member states collectively resolved to:

strengthen *respect for the rule of law in international as in national affairs* and, in particular, to ensure *compliance by Member States with the decisions of the International Court of Justice, in compliance with the Charter of the United Nations*, in cases to which they are parties [emphasis added].

In the context of rule of law in national affairs, the heads of states declared they:

will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.

After three decades of silence on the topic at the GA, the United Nations Millennium Declaration further operationalises the rule of law in two ways. First, the Declaration explicitly refers to the rule

²⁷ Adopted 10 December 1948, with 48 votes in favour and 8 abstentions. China (represented by the Republic of China) voted in favour of the resolution.

²⁸ Fassbender (n 10) 773.

²⁹ For discussion, see e.g., Feinäugle (n 16); Chesterman (n 16); Hurd (n 16); McCorquodale (n 16); Waldron (n 16).

of law within domestic jurisdictions ('national affairs') for the first time.³⁰ Moreover, member states implicitly tied the domestic rule of law to the promotion of democracy (commonly defined as government by the people, for the people).

Second, later in the Declaration Member States resolved 'to strengthen the International Court of Justice, in order to ensure justice and the rule of law in international affairs'. The Declaration does not define the rule of law's content in further detail, other than to link *compliance* with decisions of the International Court of Justice and with the UN Charter itself to the rule of law. However, we can infer from the Declaration's explicit link between the rule of law in national and international affairs, compliance with *domestic* laws and court rulings, too, forms part of the UN member states' intended definition.

The next notable development can be traced to the 2005 World Summit Outcome, which was adopted by the GA by consensus on 16 September 2005. This document refers to the rule of law several times. Importantly, the document goes on to explicitly link the rule of law with democratic governance and human rights (i.e. enforceable moral principles to achieve human dignity). Member states recommitted themselves to:

actively protecting and promoting *all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing* and that they belong to the universal and indivisible core values and principles of the United Nations. [emphasis added]

While the rule of law was not elaborated in detail, it was closely grouped together with human rights and democracy. This linkage has since become one of the main features of the multilateral rule of law discourse as expressed by states at the UN.

On 24 September 2012, the GA adopted its most comprehensive resolution on the rule of law to date in the 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels'. The 2012 Declaration, again adopted by consensus, repeats the statement of the 2005 World Summit Outcome that 'human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations'. Furthermore, the 2012 Declaration acknowledged the importance of the rule of law to 'human rights and fundamental freedoms' and the 'independence of the [national] judicial system'. In addition, the declaration provides that 'the rule of law applies to all States equally [...] and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.'

The importance of the 2012 Declaration cannot be understated. It reemphasises the point that the rule of law applies to all states and leaves no doubt that UN member states consider adherence to the rule of law as a moral obligation. Moreover, the Declaration's linkage between the rule of law, democracy and human rights mirrors that of the 2005 World Summit Outcome. It suggests that states consider the rule of law to require substantive moral content within national laws, going well beyond law-based governance and equality before the law as procedural meanings of the rule of law.

³⁰ Fassbender (n 10) 774.

The explicit linkage of human rights, democracy, and the rule of law has continued in more recent resolutions, although no further elaboration has been forthcoming. For example, in GA resolution 76/117 (9 December 2021), adopted by consensus, the GA reaffirmed that:

human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.³¹

C. The UN Security Council

The rule of law has been frequently referred to by the SC in various decisions as early as 1996,³² and it was also debated at the ministerial level in 2003,³³ 2004³⁴, 2006,³⁵ 2010,³⁶ 2012,³⁷ and 2014.³⁸ Nevertheless, in contrast to the GA, states have refrained from adopting any meaningful articulation of the rule of law in domestic jurisdictions in the decisions of the SC.

On the whole, the SC's resolutions on the rule of law have been characterised by calls for states to be subject to and to adhere to international law, rather than for governments and individuals to be subject to and to adhere to domestic laws. In contrast to the GA resolutions discussed above, the SC has refrained from linking the concept of rule of law to that of democracy and human rights.³⁹

While there may be various explanations for the differences between states' narrow views of the rule of law at the SC level and states' richer views of the rule of law as part of the GA, the most likely account concerns the SC's distinct role in maintaining international peace and security.⁴⁰ Indeed, Cheesman has argued that the mandates of international peacekeeping missions authorised by the SC tend to equate the rule of law with maintaining 'law and order' and not more.⁴¹ The SC's mandate is certainly not linked to promoting particular governance models over the long-term. It is therefore understandable why members of the SC have focused more on the importance of adhering to law, rather than on the precise moral *content* of law.

³¹ See similar text in GA Res. A/RES/75/141 (22 December 2020); GA Res. A/RES/73/207 (20 December 2018); GA Res. 72/119 (7 December 2017).

³² See UN Security Council Res. 1040 (29 January 1996), [2]:

The Security Council ... Expresses its fullest support for the efforts of the Secretary-General and others, in support of the Convention of Government, to facilitate a comprehensive political dialogue with the objective of promoting national reconciliation, democracy, security and the rule of law in Burundi.

³³ UN Doc. S/PV.4833 (24 September 2003); UN Doc. S/PV.4835 (30 September 2003).

³⁴ UN Doc. S/PV.5052 (6 October 2004) and UN Doc. S/PV.5052 (Resumption 1). See also UN Doc. S/PRST/2004/34 (6 October 2004).

³⁵ UN Doc. S/PV.5474 (22 June 2006) and UN Doc. S/PV.5474 (Resumption 1).

³⁶ UN Doc. S/PV.6347 (29 June 2010) and UN Doc. S/PV.6347 (Resumption 1).

³⁷ UN Doc. S/PV.6705 (19 January 2012) and UN Doc. S/PV.6705 (Resumption 1). See also UN Doc. S/PV.6849 (17 October 2012) and UN Doc. S/PV.6849 (Resumption 1).

³⁸ UN Doc. S/PV.7113 (19 February 2014) and UN Doc. S/PV.7115 (21 February 2014).

³⁹ Fassbender (n 10) 783-784.

⁴⁰ *ibid.* Another unverified possibility is the presence of the PRC and Russia, two increasingly authoritarian states, as permanent members of the SC who are able to shape the Council's agenda.

⁴¹ N Cheesman, 'Law and Order as Asymmetrical Opposite to the Rule of Law' (2014) 6 HJRL 96, 97.

D. *The International Court of Justice*

Judgments of the ICJ have, to date, only mentioned the phrase ‘the rule of law’ three times. In the 1985 *Continental Shelf (Libyan Arab Jamahiriya/Malta)* judgment,⁴² the Court described predictability in judicial decision-making as a key consequence of rule of law adherence. The other two cases (*Asylum (Colombia v. Peru)* in 1950⁴³ and *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* in 1989) both contrast the rule of law with arbitrary action by governments, with the latter case citing the former.⁴⁴ The *Asylum* case went on to describe ‘wilful disregard of due process of law’ as an example of the arbitrariness prohibited in rule of law societies.⁴⁵ The latter two cases add what commentators have labelled ‘procedural’ aspects to the rule of law, rather than ‘substantive’ aspects.⁴⁶ For the latter, we can turn to the GA resolutions mentioned above, especially those from 2005, 2012, 2017 and 2018.

E. *Summary*

In light of the various decisions by the three UN organs examined above, we observe that the domestic rule of law has become an increasingly important collective concern of UN member states. From not even a direct reference to the rule of law in the 1945 Charter, the discourse has developed significantly from the 2005 World Summit Outcome onwards.

Of course, it is evident that the rule of law remains to some extent vaguely defined at the UN level. The detailed and often-cited definition of the rule of law provided by the former Secretary-General Kofi Annan in a 2004 report on transitional justice in conflict and post-conflict societies⁴⁷ has not been adopted or cited by the GA and SC,⁴⁸ although it has been adopted by various UN actors within their individual mandates.⁴⁹

Nevertheless, it would be a mistake, we believe, to conclude that the rule of law is a rhetorical and ultimately meaningless concept at the UN level. Although it is beyond the scope of this article to definitively determine whether the rule of law can be considered part of customary international law

⁴² Judgment of 3 June 1985, [45].

⁴³ Judgment of 20 November 1950, 284.

⁴⁴ Judgment of 20 July 1989, [128].

⁴⁵ Judgment of 20 November 1950, 284.

⁴⁶ May and Winchester (n 9) 8-9.

⁴⁷ See UN Doc. S/2004/616 (23 August 2004), [6]. Here, the ‘rule of law’ refers to:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

⁴⁸ Early drafts of the 2012 Declaration included the 2004 definition of the Secretary-General (ibid). However, subsequent negotiations pared down this definition to its core elements. See M Sadowski, ‘The Rule of Law, the Rule of Conflict: Hong Kong and Democracy - Past and Present Revisited’ (2019) RQDI 19, 26.

⁴⁹ See, for example, the joint publication of the United Nations Department of Peacekeeping Operations and the Office of the United Nations High Commissioner for Human Rights, ‘Rule of Law Indicators: Implementation Guide and Project Tools’ (United Nations, 2011) <https://peacekeeping.un.org/sites/default/files/un_rule_of_law_indicators.pdf>.

or a general principle of law, the text of the GA's various declarations mentioning the rule of law shows a clear willingness to apply the concept universally, to all member states. Moreover, these various declarations and other references by the different UN organs to the rule of law should be regarded as indicating core principles concerning the rule of law that are accepted by the international community.

In other words, putting aside the exact status of the rule of law as a customary law rule or as a general principle of law, UN member states have clearly resolved that all their members, irrespective of systems of law and government, must maintain the rule of law within their respective domestic spheres. But what does it mean to respect the rule of law domestically? In terms of content, states have expressed a collective view that the rule of law, at a minimum, requires independent judicial decision-making, compliance with law by individuals and governments, plus a commitment to the protection of human rights and to democracy. The latter two commitments are particularly significant. As summarised by the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence in 2012:

the United Nations system, throughout all its organs, has clearly opted for a rich understanding of the notion [of the rule of law] that refers to human rights, including a wide catalogue of political rights and, among them, democratic rights, the promotion of development and good governance.⁵⁰

Critics may still argue that a rule of law with such woolly content is difficult to put into practice. To some extent, they are correct. However, definitional vagueness cannot overshadow the fact that UN member states have consistently chosen throughout the years to adhere an understanding of the rule of law as a 'thick' concept, which requires far more than merely an equal application of the law and to govern predictably by law, rather than by personal whim.⁵¹ The fact that member states have decided not to adopt an exhaustive definition of the rule of law such as that put forward by the UN Secretary General in 2004 may simply indicate a preference for flexibility, giving leeway to states to apply the rule of law in accordance with their own unique characteristics. Indeed, if it is to be a universal feature of domestic legal systems, the rule of law as a 'thick' concept must be capable of engagement with a wide range of legal and political traditions,⁵² including different definitions of democratic governance and states' relative prioritisation of civil, political, economic, social or cultural human rights. It is this very flexibility which forms a key part of the UN definition.

This section has highlighted the UN's evolving consensus on the rule of law in domestic legal systems. Can this multilateral conception of the domestic rule of law be meaningfully benchmarked against individual state definitions, primarily expressed for domestic audiences? As the following Part on Hong Kong demonstrates, we argue that it can.

⁵⁰ UN Doc. A/67/368 (13 September 2012), [12].

⁵¹ See n 84 for detail on the traditional 'thick' and 'thin' conceptions of the rule of law in academic scholarship.

⁵² See Fassbender (n 10) 788; Feinäugle (n 10) 213; N Arajärvi, 'The Rule of Law in the 2030 Agenda' (2017) 10 HJRL 187, 190.

III. HONG KONG AND THE RULE OF LAW

As with its postcolonial economic rival Singapore,⁵³ it is often said that Hong Kong's main governance 'ideology' is the rule of law.⁵⁴ Beginning in the 1960s and continuing past the Handover of Sovereignty from the United Kingdom to the PRC in June 1997, the rule of law has acquired a local status in Hong Kong as a rhetorical 'master narrative', to which political actors from all stripes are invested.⁵⁵ Reference to the 'rule of law' in the public discourse accelerated in Hong Kong in the leadup to the Handover, and the phrase has barely been out of the news since.⁵⁶ Indeed, rather than being a governance philosophy employed only by elites, scholars have identified the rule of law as part of the Hong Kong public's unique 'identity'.⁵⁷ Irrespective of the tightening local political environment since 2020,⁵⁸ it is still the rule of law, more than anything else, that is commonly said to distinguish capitalist, common law Hong Kong from the socialist PRC,⁵⁹ the latter now Hong Kong's parent state.

Nevertheless, the rule of law often confounds in the Hong Kong context. Most Hong Kong residents know that their society places the 'rule of law' at the centre of its governance paradigm, but many will not be able to define the concept if asked.⁶⁰ The rule of law is everywhere, but to some

⁵³ See J Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (Cambridge University Press 2012) 42, 284.

⁵⁴ E Ip, *Law and Justice in Hong Kong* (3rd edn, Sweet & Maxwell 2019) 117, 135; HKSAR Government, 'DPP's speech' (18 March 2002) <<https://www.info.gov.hk/gia/general/200203/18/0318164.htm>>; L Goodstadt, 'Prospects for the Rule of Law: The Political Dimension' in S Tsang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (Palgrave Macmillan 2000) 183; Jones (n 8) 23.

⁵⁵ WM Sin and YW Chu, 'In the Name of Law: Legality and Morality in Postcolonial Hong Kong' (1999) 27 *Int. J. Sociol. Law* 185, 193; C Jones, 'Politics Postponed: Law as a Substitute for Politics in Hong Kong and China' in K Jayasuriya (ed), *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (Routledge 1999) 40.

⁵⁶ WM Sin and YW Chu, 'Whose Rule of Law: Rethinking (Post-)Colonial Legal Culture in Hong Kong' (1998) 7 *Soc. Leg. Stud.* 147, 148; A Chen and A Cheung, 'Debating Rule of Law in the Hong Kong Special Administrative Region 1997-2002' in R Peerenboom (ed), *Asian Discourses of Rule of Law* (Routledge 2003) 273; Goodstadt (n 54) 180; C Lau et al, 'HK Justice Secretary Defends Rule of Law' (*South China Morning Post*, 5 August 2022) <<https://www.scmp.com/video/scmp-originals/3187551/perceptions-are-important-new-hong-kong-justice-secretary-defends>>.

⁵⁷ Chen and Cheung (n 56) 273; Jones (n 8) 24, 254; L Pang, 'Civil Disobedience and the Rule of Law: Hong Kong's Umbrella Movement' in T Chen (ed), *Studies in Global Asias* (University of Minnesota Press 2016) 176.

⁵⁸ See n 2 on recent political and legal changes in Hong Kong.

⁵⁹ Ip (n 54) 127; BYT Tai, 'The Rebirth of Hong Kong's Rule of Law' in Ying-jeou Ma (ed), *Chinese (Taiwan) Yearbook of International Law and Affairs* (Vol 38, Brill 2020) 116.

⁶⁰ Sin and Chu (n 56) 149; Pang (n 57) 179. The latter article suggests that obedience to the law is the uninformed definition favoured by the Hong Kong public. See Lee and Lo (n 70) 861-862 for a summary of previous public opinion surveys on the rule of law in Hong Kong.

A more recent newspaper article describes the results of a public survey which instead favours a view of the rule of law as protective of civil liberties: see B Tai, '香港法治重生 是夢還是真?' [Is the rebirth of the rule of law in Hong Kong a dream or a reality?] *Ming Pao* (Hong Kong, 6 August 2020) <<https://news.mingpao.com/ins/%e6%96%87%e6%91%98/article/20200806/s00022/1596551068720/%e9%a6%99%e6%b8%af%e6%b3%95%e6%b2%bb%e9%87%8d%e7%94%9f-%e6%98%af%e5%a4%a2%e9%82%84%e6%98%af%e7%9c%9f-%ef%bc%88%e6%96%87-%e6%88%b4%e8%80%80%e5%bb%b7%ef%bc%89>>.

Similarly, Jones (n 55) 52 argues:

The legacy of the 1970s was that even the lowliest member of Hong Kong society had some sense of rights, some idea of the right to fair trial, the right not to be bossed around, the right to due process and

extent nowhere, at the same time. When pressed, members of the public might identify that, in the abstract, the rule of law demands that no-one is above the law in Hong Kong, thereby securing the equality of all citizens, whether powerful or powerless, before the law.⁶¹ Certainly, this essential component of the rule of law's definition remains relatively uncontroversial among Hong Kong's three branches of government.⁶² But, apart from the law's equal applicability to all individuals and entities, how else have Hong Kong's government decision-makers conceived of the rule of law? This section, Section III, sheds light on the rule of law discourse emanating from Hong Kong's executive, legislative and judicial branches over a quarter-of-a-century timespan. While there were some ideological differences between Hong Kong's governmental decision-makers, overall, we can identify a common rule of law theory reflective of each branch's public statements during the period 1997-2021. Unlike the gradually expanding multilateral definition expressed at the UN, Hong Kong's local rule of law maintained essentially the same content over a 25-year period.

A. *The Executive*

Hong Kong's is often labelled an 'executive-led' government.⁶³ The speeches and pronouncements of the Chief Executive and his Cabinet ministers (particularly the Secretary for Justice)⁶⁴ to the public and in response to questions from the Legislative Council are where the clearest ideas can be found as to Hong Kong's prevailing rule of law paradigm.

For the most part, during the period 1997 to 2021, members of Hong Kong's executive government defined the rule of law as creating obligations to *obey* and to *enforce* the law on one hand, and as requiring *judicial independence* on the other. The rule of law's axiomatic meaning in Hong Kong remains that the law applies to all subjects equally, whether individuals or state entities.⁶⁵ However, according to the executive, those subjects also have an obligation to comply with the law and must be met with the law's certain enforcement by prosecutors, the Hong Kong Police Force, the Independent Commission Against Corruption, plus other law enforcement bodies.⁶⁶ Convictions for criminal

legal redress. Hong Kong people's grasp of rule of law may amount to little more than this, but it is based on a deep-seated intuition[.]

⁶¹ Chen and Cheung (n 56) 264; H Kuan, 'Support for the Rule of Law in Hong Kong' (1997) 27 HKLJ 187, 199.

⁶² A view summarised by: R Harris, 'Tung Promises an Independent Judiciary' *The Sydney Morning Herald* (21 June 1997); HKSAR Government, 'Rule of law intact' (11 March 1999) <<https://www.info.gov.hk/gia/general/199903/11/0310254.htm>>; LegCo Member's Motion, 2002/12/12 (Elsie Leung Oisie).

⁶³ E.g., A Cheung, 'Executive-Led Governance or Executive Power 'Hollowed-Out' – The Political Quagmire of Hong Kong' (2007) 15 AJPS 17; J Creery, 'Justice sec. says Hong Kong has an "executive-led" political system in row over separation of powers' (*Hong Kong Free Press*, 7 September 2020) <<https://hongkongfp.com/2020/09/07/justice-sec-says-hong-kong-has-an-executive-led-political-system-in-row-over-separation-of-powers/>>.

⁶⁴ The Secretary for Justice, an appointed Cabinet-level position, is head of the Department of Justice and concurrently serves as Hong Kong's chief prosecutor and the government's chief legal adviser.

⁶⁵ DS Law, 'Alternatives to Liberal Constitutional Democracy' (2017) 77 Md. L. Rev. 223, 236.

⁶⁶ 'Govt opposes US report' (15 October 2020) <https://www.news.gov.hk/eng/2020/10/20201015/20201015_195559_411.html>; 'Key Points to Know about the Draft Law on National Security for Hong Kong' (*China Daily: Hong Kong Edition*, 24 June 2020) <<https://www.chinadailyhk.com/article/134748#Key-points-to-know-about-the-draft-national-security-law>>; HKSAR Government, 'SJ's Speech at Ceremonial Opening of the Legal Year 2013' (14 January 2013) <<https://www.info.gov.hk/gia/general/201301/14/P201301140584.htm>>.

offences must result in punishment and these punishments carried out to their fullest extent.⁶⁷ Given Hong Kong's status as a centre of international arbitration, for the executive, the rule of law also dictates that arbitral awards must be tightly enforced.⁶⁸

The first component of the executive's definition (equality before the law) is often lionised in the commercial context in Hong Kong. Equality before the law signals that Hong Kong is a reliable place to do business.⁶⁹ However, the next component (sometimes termed 'law and order')⁷⁰ has justified the restriction of civil liberties,⁷¹ and the apparent fettering of prosecutorial discretion.⁷² Consider a December 2020 government press release criticising US views on the treatment of 12 young Hong Kongers who tried to flee by boat to Taiwan to escape arrest:

The Hong Kong SAR Government reiterate[s] that anyone who violates the law should be responsible for his or her own behaviour and face justice, which is something any society that upholds the rule of law should do.⁷³

This is just one example of the 'law and order' interpretation of the rule of law by the executive, which has gained more prominence since recent incidents of civil unrest in Hong Kong (in 2014, 2016 and 2019-2020).⁷⁴

A 'law and order' interpretation of the rule of law is particularly demonstrated by the executive's continuing objection to leniency for any lawbreaking participants in Hong Kong's most recent bout of civil unrest. From mid-2019 to early 2020, alongside the arrest of more than 10,000 residents involved in anti-government protests, came calls to grant an amnesty to all who were remanded in custody,

⁶⁷ 'DoJ responds to comments on case' (2 December 2020)

<https://www.news.gov.hk/eng/2020/12/20201203/20201203_103456_108.html>; n 73 and associated text, n 77 and associated text.

⁶⁸ HKSAR Government (n 66).

⁶⁹ A Ku, 'Negotiating Law, Rights, and Civil Autonomy: From the Colonial to the Post-Colonial Regimes' in A Ku and N Pun (eds), *Remaking Citizenship in Hong Kong: Community, nation and the global city* (Routledge 2004) 141. See, e.g., HKSAR Government (n 62).

⁷⁰ Cheesman (n 41) 97; MYK Lee and YL Lo, 'Contesting Visions of Hong Kong's Rule of Law and Young People's Political Discontent' (2020) 29(6) *Social & Legal Studies* 858, 860.

⁷¹ Pang (n 57) 178; Rice J, 'Reinterpreting the Rule of Law in Hong Kong' (2002) 3(1) *Asia Pac. J. Hum. Rights Law* 40, 64.

⁷² 'Govt opposes US report' (n 66).

⁷³ 'Govt opposes US official's remarks' (19 December 2020)

<https://www.news.gov.hk/eng/2020/12/20201219/20201219_153432_053.html?type=category&name=nationalsecurity>.

⁷⁴ The unrest in 2014 was connected to proposals to elect the Chief Executive by universal suffrage, and became known as the 'Occupy' or 'Umbrella' Movement. In 2016, an anti-mainland-China and anti-police protest became known, in typical Hong Kong fashion, as the 'Fish Ball Riot'. The largest scale civil unrest began in mid-2019, with protests against a proposed law allowing extradition to mainland China, which morphed into a larger anti-government demonstration. In each of these cases, some of the protests turned violent, resulting in assaults, property damage and most infamously a short occupation of Hong Kong's Legislative Assembly on 1 July 2019. Rule of law views in response have varied from justifying civil disobedience (e.g. BYT Tai, 'Civil Disobedience and the Rule of Law' in M Ng and J Wong (eds), *Civil Unrest and Governance in Hong Kong: Law and Order from Historical and Cultural Perspectives* (Routledge 2017)) to asserting that deliberately disobeying the law detracts from the rule of law 'in a civilised and orderly society' (HKSAR Department of Justice, 'LCQ4: Rule of law' (26 November 2014) <https://www.doj.gov.hk/en/community_engagement/press/20141126_pr.html>).

charged or ultimately convicted. This became known as the 2019-2020 protest movement's 'fourth demand' (of five).⁷⁵ Nevertheless, Hong Kong's Department of Justice stated that dropping charges against such persons would violate the rule of law.⁷⁶ The Chief Executive expressed the same view in relation to Article 48(12) of the Hong Kong Basic Law (Hong Kong's mini constitution), which allows for the possibility of pardon after conviction.⁷⁷

Nevertheless, the executive's rule of law definition does not begin and end with 'law and order'. Within speeches and public statements, key executive decision-makers in Hong Kong also commonly tend to define the rule of law as incorporating *judicial independence* from the two political branches of government.⁷⁸ According to this component of the rule of law, the judiciary must be free to resolve disputes impartially, according to pre-existing legal principles, without influence from the executive or the legislature.

In this context, Hong Kong's Secretaries for Justice have on occasion attempted to distinguish judicial 'adjudication' from 'interpretation' of the Hong Kong Basic Law, given that the latter function is vested by Article 158 in the Standing Committee of the National People's Congress (NPCSC) in Beijing, a political body exercising the legal interpretative function common to socialist legislatures.⁷⁹ In a 1999 speech, the first HKSAR Secretary for Justice, Elsie Leung, stated that 'adjudication on' and 'interpretation of' the Basic Law are separate concepts:

⁷⁵ T Wong, 'Hong Kong protests: What are the "five demands"? What do protesters want?' *South China Morning Post: Young Post* (Hong Kong, 20 August 2019) <<https://www.scmp.com/yp/discover/news/hong-kong/article/3065950/hong-kong-protests-what-are-five-demands-what-do>>; K Cheng, 'Explainer: Hong Kong's Five Demands – amnesty for all arrested protesters' *Hong Kong Free Press* (Hong Kong, 13 April 2020) <<https://hongkongfp.com/2019/12/25/explainer-hong-kongs-five-demands-amnesty-arrested-protesters/>>. The anti-government protesters' 'five demands' were the withdrawal of the government's extradition bill allowing extradition of some criminal suspects to mainland China, an investigation of alleged police brutality towards anti-government protesters, retracting the classification of anti-government protesters as 'rioters', amnesty for arrested anti-government protesters, and universal suffrage for Hong Kong's legislative and executive branches.

⁷⁶ '傳特赦被捕示威者 林鄭：若不檢控違法治精神' ['Reports of pardoning arrested demonstrators - Carrie Lam: "not prosecuting harms the spirit of the rule of law"'] (*Sky Post*, 6 November 2019) <<https://skypost.ulifestyle.com.hk/article/2491404/%E5%82%B3%E7%89%B9%E8%B5%A6%E8%A2%AB%E6%8D%95%E7%A4%BA%E5%A8%81%E8%80%85%20%E6%9E%97%E9%84%AD%EF%BC%9A%E8%8B%A5%E4%B8%8D%E6%AA%A2%E6%8E%A7%E9%81%95%E6%B3%95%E6%B2%BB%E7%B2%BE%E7%A5%9E>>.

⁷⁷ Cheng (n 75). See D Pascoe and N Zamir, 'An amnesty and pardon scheme, properly framed, must be part of a political solution to end Hong Kong's protest crisis' (*South China Morning Post*, 28 November 2019) <<https://www.scmp.com/comment/opinion/article/3039444/amnesty-and-pardon-scheme-properly-framed-must-be-part-political>> and A Dziedzic and J Yam, 'Amnesties in Hong Kong: Preliminary Discussion Paper' (*Centre for Comparative and Public Law, University of Hong Kong*, 2019) 4-5 on amnesties and the rule of law in Hong Kong.

⁷⁸ Harris (n 62); 'In Full: New Hong Kong justice minister Teresa Cheng says rule of law "not compromised"' (*Hong Kong Free Press*, 8 January 2018) <<https://hongkongfp.com/2018/01/08/full-speeches-hong-kongs-chief-justice-justice-secretary-start-legal-year/>>; HKSAR Government, 'SJ says rule of law is cornerstone of Hong Kong's success' (2 December 2010) <<https://www.info.gov.hk/gia/general/201012/02/P201012020170.htm>>.

⁷⁹ D Pascoe, 'Hong Kong's National Security Law: A Socialist Legal Transplant?' (2022) 10(1) *The Chinese Journal of Comparative Law* 28, 39-40.

We have to distinguish the final power of adjudication with the final power of interpretation ... It's an illusion that that legislative interpretation amounts to interference, no rule of law, no autonomy, and no 'one country, two systems'.⁸⁰

In a 2003 press release, a government spokesperson supported this position, claiming that allowing a political body to exercise the power of final legal interpretation did not contravene the rule of law, so long as that interpretative power has been previously spelt out in the law itself:

The rule of law is well and alive [sic] in Hong Kong ... The power of interpreting the Basic Law, *as stipulated in the Basic Law*, is vested in the Standing Committee of the National People's Congress.⁸¹ [emphasis added]

Controversy over NPCSC interpretations of the Hong Kong Basic Law, which began with Court of Final Appeal (CFA) cases over the residence rights of mainland-born children of Hong Kong permanent residents in the late 1990s and early 2000s, have continued to the time of writing, with five Basic Law interpretations issued by the NPCSC thus far. Hong Kong's highest court, the CFA, has no choice but to abide by these binding interpretations as it resolves disputes under the Basic Law. Detractors of the interpretation system, which have included former CFA Chief Justice Geoffrey Ma, believe that allowing the NPCSC to 'overrule' the CFA's interpretations of Basic Law provisions damages the rule of law in the territory.⁸² Hong Kong's various Secretaries for Justice, as described above, have taken a different view, albeit using a contrived logic. The result is that the rule of law as judicial independence, so prominent within the academic literature,⁸³ has a narrower ambit for Hong Kong's executive government. According to this view, political interpretation of constitutional provisions, where already authorised by law, is compatible with the independent judicial role within the rule of law.

Aspects of the formalistic, 'thin' conception of the rule of law, as conceived of by legal scholars,⁸⁴ have also found their way into statements by Hong Kong's executive decision-makers. Despite her

⁸⁰ Rice (n 71) 64; HKSAR Government, 'Opening statements by SJ' (13 October 1999) <<https://www.info.gov.hk/gia/general/199910/13/1013119.htm>>. See also HKSAR Government, 'Response to European Parliament Report on Hong Kong' (26 March 2003) <<https://www.info.gov.hk/gia/general/200303/26/0326206.htm>>.

⁸¹ HKSAR Government (n 80).

⁸² '馬道立：釋法將影響香港法治' ['Jeffrey Ma: 'judicial interpretations will affect the rule of law in Hong Kong'] *South China Morning Post* (Hong Kong, 10 April 2013); R Cullen, *The Rule of Law in Hong Kong* (Civic Exchange 2005) 25.

⁸³ E.g., Bedner (n 8); G Helmke and F Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' (2009) 12 *Annu. Rev. Polit. Sci.* 345; R Peerenboom, *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press 2009).

⁸⁴ The 'thin' conception of the rule of law is purely procedural (DS Law and C-C Lin, 'Constitutional Inertia and Regime Pluralism in Asia' (SSRN, 18 August 2018) 16 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3133913>). It focuses on the way in which law is created and applied, including whether law has been publicly promulgated by an appropriate body or actor, its clarity, its prospectivity, its general applicability and predictability in its application and enforcement.

The 'thick' conception of the rule of law expands beyond procedures to consider legal outcomes: whether the presence of substantive rights makes the law a 'good' or 'bad' one. In addition to the way that law is created and applied, law must have a moral content deriving from natural law, from religion, or from international human rights (Chen and Cheung (n 56) 273-275; P Solomon, 'Law and Courts in Authoritarian States' in J Wright (ed), *International Encyclopedia of the Social & Behavioral Sciences* (2nd edn, Elsevier 2015) 432; Rajah (n 53) 37-40). Bedner (n 8) 39 observes that, after

controversial position on the interpretation of the Basic Law, described above, Secretary for Justice Elsie Leung also outlined a textbook ‘thin’ version of the rule of law in a 1997 speech.⁸⁵ In 2020, Secretary for Justice Teresa Cheng stated that the rule of law means that law ‘can be understood, is stable, and predictable.’⁸⁶ Responding to questions by legislators in 2020 and 2021, the Chief Secretary for Administration stated that ‘due process’ and ‘clarity of the law’ were essential elements.⁸⁷ Nevertheless, the executive government’s view remains relatively narrow, and has never incorporated substantive legal content into the rule of law. When compared with rule of law definitions articulated by members of the British colonial executive in the leadup to the 1997 Handover of Sovereignty, the lack of reference to human rights content by the HKSAR’s leadership is particularly noticeable.⁸⁸

In Hong Kong, the rule of law carries an undeniably positive connotation for governance, as it does throughout the world.⁸⁹ It is therefore unclear whether members of the executive have been deliberately and publicly circumscribing their definition for political gain (particularly to persuade towards public order on the streets), or whether they genuinely espouse a different, narrower, definition, recognising that the rule of law’s meanings are contested worldwide. Adopting the rule of law in its fullest extent, complete with both its ‘thick’ and ‘thin’ conceptions,⁹⁰ would still permit strong compliance and enforcement rhetoric and would maintain business confidence, albeit at the ‘cost’ of human rights limiting legal content and the government being chosen by and directly accountable to the people. The latter step, in particular, is clearly beyond the constitutional and political ambit of Hong Kong’s ‘flawed democracy’ or ‘hybrid regime’, with only a minority of legislators directly elected by the public and the Chief Executive selected by a committee of between 800 and 1500 elites.⁹¹ Local pro-China politicians’ increasingly frequent use of mainland Chinese phrases like

starting with a ‘thin’ conception: ‘the watershed between thin and thick versions of the rule of law depends on the inclusion of [only] one or two elements. The first is ... democracy, the second the substantive one of human rights.’

⁸⁵ Goodstadt (n 54) 184.

⁸⁶ E Liu, ‘We must define rule of law before we hope for it’ (*China Daily: Hong Kong Edition*, 10 May 2020) <<https://www.chinadailyhk.com/article/130037#We-must-define-rule-of-law-before-we-hope-for-it>>.

⁸⁷ LegCo Government Motion, 2020/12/9 (Matthew Cheung Kin-chung); LegCo, 2021/06/16 (Matthew Cheung Kin-chung).

⁸⁸ See e.g., ‘A-G Rejects Attack on Rule of Law’ *South China Morning Post* (13 July 1995); C Patten, ‘Synergy of Robust Rights and Robust Development’ *The Sydney Morning Herald* (24 November 1993). Nevertheless, further back in the colonial period, a master-subordinate ‘law and order’ conception of the rule of law held sway within the British administration (Ku (n 69) 142; M Ng, ‘Rule of Law in Hong Kong History Demythologised: Student Umbrella Movement of 1919’ in M Ng and J Wong (eds), *Civil Unrest and Governance in Hong Kong: Law and Order from Historical and Cultural Perspectives* (Routledge 2017) 23). The ‘human rights’ content to the rule of law in Hong Kong only became widely accepted in the 1980s (Chen and Cheung (n 56) 272).

⁸⁹ Sadowski (n 48) 22. Q Wu, ‘How has China formed its conception of the rule of law? A contextual analysis of legal instrumentalism in ROC and PRC law-making’ (2017) 13 *Int. J. Law in Context* 283; J Rice, ‘Hong Kong’s Migrant Workers and Their Impact on the Rule of Law Narrative’ (2015) *J. Appl. Philos.* 221, 222.

⁹⁰ See n 84.

⁹¹ ‘HK plunges 12 positions in democracy index’ *The Standard* (Hong Kong, 3 February 2021) <<https://www.thestandard.com.hk/breaking-news/section/4/164934/HK-plunges-12-positions-in-democracy-index>>; Ho K, ‘Hong Kong falls to 88th in int’l democracy index as think tank cites civil service exodus’ (*Hong Kong Free Press*, 3 February 2023) <[https://hongkongfp.com/2023/02/03/hong-kong-falls-to-88th-in-intl-democracy-index-as-think-tank-cites-civil-service-exodus/#:~:text=Hong%20Kong%20placed%2088th%20among,2006%20when%20the%20indicator%20began.](https://hongkongfp.com/2023/02/03/hong-kong-falls-to-88th-in-intl-democracy-index-as-think-tank-cites-civil-service-exodus/#:~:text=Hong%20Kong%20placed%2088th%20among,2006%20when%20the%20indicator%20began.;)>; BYT

to ‘rule in accordance with law’ and to ‘administer in accordance with law’,⁹² alongside the western-derived ‘rule of law’, does tend to suggest a deliberate manipulation, or at least a selective reading, of the latter concept to suit establishment political goals.

B. The Legislature

The Legislative Council (LegCo), Hong Kong’s legislature, features members both directly and indirectly elected by the public. Although the meaning of the rule of law has been discussed in LegCo debates as far back as 1983,⁹³ the frequency of references to the ‘rule of law’ and its definitions at LegCo has increased markedly since 1997, commensurate with public anxieties over Hong Kong’s political direction, and associated government rebuttals.

Up until the end of its 2021 term, LegCo’s membership was split between pro-establishment (or pro-PRC) legislators and pro-democracy legislators. Thereafter, electoral reforms passed by the PRC’s National People’s Congress in 2021 mandated that only patriotic candidates could henceforth take part in elections for LegCo and the Chief Executive. In practice, this resulted in the outlawing of pro-democracy politics in Hong Kong, leaving only pro-establishment/pro-China candidates remaining.

Yet during the period 1997-2021, the rule of law’s meaning and observance within Hong Kong was subject to fierce legislative debate. Following the Handover of Sovereignty, LegCo members’ views on the rule of law were often split along political lines,⁹⁴ albeit it is difficult to ascertain consistent patterns in the language employed, with many intra-bloc disagreements over what the rule of law entails. As Table 1 indicates, the only components that attracted a broad consensus across the political spectrum were equality before the law and compliance with the law, the latter sometimes described as ‘respect for the law’ in Hong Kong. In addition, judicial independence, although mentioned far more often by pro-democracy camp legislators, would likely find little opposition from pro-establishment lawmakers as a key feature of the rule of law, should the specific debate arise again.⁹⁵ Broadly representative of LegCo’s bipartisan core position up to the end of 2021 was a speech by Kenneth Leung, representative of the accountancy functional constituency, in December 2014:

the most primary level of rule of law is compliance with the law [but] the principle of the rule of law consists of various factors: First, there is a law to go by; second, the law is basically able to protect the people ... third, an independent judicial system; fourth, officials who have public powers enforce the laws with an impartial and just attitude; and fifth, everyone is equal before the law[.]⁹⁶

Tai, ‘Authoritarian Rule of Law in Hong Kong’ in BC Jones (ed), *Democracy and Rule of Law in China’s Shadow* (Hart 2021) 155.

⁹² Ip (n 54) 129; C Maden, ‘In Carrie Lam’s letter, Hong Kong’s rule of law is sacrificed to state paranoia’ (*Hong Kong Free Press*, 6 June 2020) <<https://hongkongfp.com/2020/06/06/in-carrie-lams-letter-hong-kongs-rule-of-law-is-sacrificed-to-state-paranoia/>>.

⁹³ See LegCo Debate, 1983/10/27 (John Joseph Swaine).

⁹⁴ Pang (n 57) 178.

⁹⁵ See e.g., Hong Kong Legislative Council, ‘Measures to promote the rule of law and judicial independence, and to enhance confidence in Hong Kong’s legal system’ (LC Paper No. CB(2)1698/99-00(03), 2000).

⁹⁶ LegCo Debate, 2014/12/04 (Kenneth Leung).

Within these parameters, pro-establishment politicians tend to emphasise master-subordinate ‘law and order’, placing heavy emphasis on the law’s applicability to all citizens without exception, on public compliance with the law, and on the *enforcement* of the law through coercive measures to achieve public order and safety. Emblematic of this position was a speech by pro-Beijing lawmaker Wong Ting-kwong, of the import/export functional constituency, in December 2019: ‘In a society which upholds the rule of law, all people must act in accordance with the law and the enforcement of laws must be strict, instead of engaging in empty talk.’⁹⁷

Across the aisle, pro-democracy politicians, unsurprisingly, tended to incorporate human rights and freedoms into the rule of law narrative. Human rights were commonly invoked in the abstract by lawmakers, rather than being individually described, with occasional exceptions being the right to a fair trial and related due process rights.⁹⁸ Demonstrative of this approach was a speech by Dennis Kwok Wing-hang, representative of the legal functional constituency, in November 2018:

The rule of law does not exist in a vacuum; its existence is dependent on the protection of liberal democratic values, on checks and balances, transparency, respect for individual rights, due process and freedom.

Surprisingly, pro-democracy lawmakers also frequently linked *compliance* with law to the rule of law, albeit in close conjunction with the rule of law requiring legal constraints upon governmental powers. For pro-democracy legislators, the compliance typically under threat was compliance with the law by executive government agencies and officials, in contrast with compliance by private citizens, which tended to be emphasised by the pro-establishment side.

When compared with equality before the law, judicial independence, compliance and even human rights, *electoral democracy* received substantially less legislative attention as a purported component of the rule of law from either side of politics in the Hong Kong legislature from 1997 to 2021. This mirrors the position of Hong Kong’s executive decision-makers, described above.

Just as intriguing are LegCo members’ stated rule of law elements that are less commonly found in the prevailing academic literature. In their speeches, several legislators from the pro-democracy camp placed the independence of the legal profession and of public prosecutors, access to justice, and legal aid for the indigent at the centre of their rule of law definition.⁹⁹ Emblematic of this approach was a speech made by Margaret Ng, representative of the legal functional constituency, in October 1998:

The rule of law requires us to safeguard the independence of the ... legal profession, independence in the decision to prosecute or not to prosecute, the greatest extent of independence possible in legal aid services, and the attention to maintain the highest quality so as to back up this independence.

In a socioeconomically unequal society where dissent against government policies was, until the National Security Law’s passage in 2020, often expressed in the courtroom or on the streets, rather

⁹⁷ LegCo Debate, 2019/12/11 (Wong Ting-kwong).

⁹⁸ See Table 1.

⁹⁹ For a rare example from the academic literature, see May and Winchester (n 9) 8-9.

than at the ballot box,¹⁰⁰ situating access to legal services within the rule of law’s ambit was not unexpected. Notably, on democratic legislators’ wishes to see independent prosecutorial decision-making as part of the rule of law, the executive tended to agree. Secretary for Justice Teresa Cheng, the government minister ultimately responsible for public prosecutions, stated likewise on two separate occasions in 2019 in response to questions from legislators.¹⁰¹

A summary of LegCo members’ pronouncements on the components of the rule of law between the Handover of Sovereignty (1 July 1997) and the end of the most recent LegCo session (31 December 2021) is as follows, bearing in mind that some legislators have made reference to the rule of law’s definition more often than have others.¹⁰² As is evident, the rule of law and its constituent elements were far more important political concerns for the pro-democracy camp than for the pro-establishment camp:

TABLE 1: Hong Kong Legislators and the Rule of Law’s Content (1997-2021)

Purported Rule of Law Content	Pro-Establishment Camp Mentions	Pro-Democracy Camp Mentions	Total Mentions by Content
Equality Before the Law	5	14	19
Judicial Independence, Separation of Powers	2	15	17
Compliance, Respect for the Law	7	10	17
Constraints on Government Power	1	15	16
Human Rights and Freedoms, Generally	3	10	13
‘Thin’ Definition, generally (e.g. Clarity, Accessibility, Prospectivity)	1	8	9
Due Process, Procedural Justice, Fair Trial	1	6	7
Access to Justice, Legal Aid	0	6	6
Enforcement, Punishment	3	2	5
Electoral Democracy	1	3	4
Judicial Review	0	3	3
Independence of the Legal Profession, Independence of Prosecutors	0	3	3
Other	1	6	7
Total Mentions by Political Alignment	25	101	126

C. The Judiciary

The rule of law, as a legal-political doctrine, has also been elaborated upon within superior court judgments and the extra-judicial public speeches by senior members of Hong Kong’s judiciary. In

¹⁰⁰ P Gordon, “City of Protest: A Recent History of Dissent in Hong Kong” by Antony Dapiran’ (*Asian Review of Books*, 24 June 2017) <<https://asianreviewofbooks.com/content/city-of-protest-a-recent-history-of-dissent-in-hong-kong-by-antony-dapiran/>>.

¹⁰¹ LegCo Oral Questions, 2019/12/11 (Teresa Cheng Yeuk-wah); LegCo Members’ Motions, 2019/12/19 (Teresa Cheng Yeuk-wah).

¹⁰² Among the most frequent commentators have been Margaret Ng (member of the Legal Functional Constituency, 1998-2012), Ronny Tong (New Territories East 2004-2015) and Dennis Kwok (Legal Functional Constituency 2012-2020). Notably, all three were practising lawyers before becoming lawmakers.

what is a politically fragmented society, the judiciary is often described as Hong Kong's most trusted and competent branch of government.¹⁰³

In common with the views of the executive government, most legislators, and according with conventional public understandings, the rule of law for Hong Kong judges incorporates a fair legal process, and the equality of all parties before the law.¹⁰⁴ Beyond that, the following is what Hong Kong's appellate level judges instilled into the rule of law's meaning by way of public statements, whether judicial or extra-judicial, during the period 1997-2021. The relevant judicial statements we assessed via a systematic review of all reported caselaw in Hong Kong, reports which focus primarily on cases from the Court of Appeal (CA) and the CFA.

Sir Anthony Mason, during his time as a non-permanent justice of the CFA, stated extra-judicially that:

[T]he rule of law embraces the constitutional or statutory protection of human rights and fundamental freedoms ... the rule of law is one of the fundamental assumptions on which the Basic Law was framed.¹⁰⁵

Similarly, a majority of the CFA which included Justice Mason, declared in 2005:

in a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed upon them.¹⁰⁶

That the rule of law is linked to the protection of human rights was most recently reiterated by the CA in 2015 in the *Wong Yuk Man* case, concerning the criminal conviction of a pro-democracy legislator for unlawful assembly. In that case, the court held that the:

only way to ensure that measures concerning human rights are properly implemented and to protect the interests of the underprivileged groups is to fully put into effect the spirit of the rule of law.¹⁰⁷

To date, the most multi-faceted pronouncement on the rule of law by a justice of Hong Kong's highest court came in a 2012 public speech by former Chief Justice Andrew Li:

First, under the rule of law, everyone, both those who govern and those who are governed, is subject to the same laws... Secondly, disputes ... are resolved fairly and impartially by

¹⁰³ JMM Chan, 'A Shrinking Space: A Dynamic Relationship between the Judiciary in a Liberal Society of Hong Kong and a Socialist-Leninist Sovereign State' (2019) 72(1) *Current Legal Problems* 85, 118 n 95; EW Cheng, 'United Front Work and Mechanisms of Countermobilization in Hong Kong' (2020) 83 *The China Journal* 1, 18; M Hui, 'Beijing Is Breaching Hong Kong's Final Line of Defense: Its Judiciary' (*Quartz*, 29 December 2020) <<https://qz.com/1944464/hong-kongs-judges-are-its-final-line-of-defense-from-beijing/>>.

¹⁰⁴ As summarised by: Liu (n 86); A Cheung, 'Closing Remarks' (Speech at the Hong Kong Legal Week 2020 - The Inaugural Rule of Law Congress, 3 November 2020) <[https://www.hkcfa.hk/filemanager/speech/en/upload/2254/Closing%20Remarks%20for%20the%20Inaugural%20Rule%20of%20Law%20Congress%20\(3.11.2020\).pdf](https://www.hkcfa.hk/filemanager/speech/en/upload/2254/Closing%20Remarks%20for%20the%20Inaugural%20Rule%20of%20Law%20Congress%20(3.11.2020).pdf)>.

¹⁰⁵ A Mason, 'The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong' (2007) 37 *HKLJ* 299, 300-301.

¹⁰⁶ *Leung Kwok Hung and Others v HKSAR* (2005) 8 *HKCFAR* 229, [16].

¹⁰⁷ *HKSAR v Wong Yuk Man* [2015] 1 *HKLRD* 132, [332].

an independent judiciary... Thirdly, the rule of law involves the effective protection of human rights.¹⁰⁸

Most importantly, Li's understanding of the rule of law was firmly shaped by the need for an independent judiciary – meaning that the bench is independent from influence and criticism from the executive branch.¹⁰⁹

When resolving disputes, the courts themselves have concurred on the need for judicial independence as a rule of law component.¹¹⁰ In 2021, current Chief Justice Andrew Cheung stated that judicial independence forms an important component of the rule of law.¹¹¹

The most recently retired Chief Justice, Geoffrey Ma, has criticised Hong Kong government requests for interpretations of the Basic Law by the NPCSC for the same reason: they undermine the judiciary's role in finalising disputes.¹¹² Ma's understanding of the rule of law also incorporates human rights. In his farewell speech in 2021, Ma provided freedom of assembly, procession, association and of the press as relevant examples of rights and liberties protected by the rule of law. Moreover, enforcement of the law evidently extends not only to the coercion of the population, but also to controlling overbearing agents of the state.¹¹³

The various statements by Chief Justices Li and Ma, cited above, must admittedly be taken with a grain of salt: they were made upon retirement, in public speeches, rather than on the bench. The two former judges must have felt a greater freedom to define the rule of law in a way that implicitly critiques equivalent executive government definitions upon leaving public service. Yet, it is notable that their statements are generally in line with the decisions of the Hong Kong courts.¹¹⁴

Of all the rights and liberties that the Hong Kong judiciary has placed within the rule of law's ambit, the common law right to challenge administrative decision-making through *judicial review* 'has become a metaphor for the rule of law',¹¹⁵ according to former CFA Justice Kemal Bokhary. A five-

¹⁰⁸ '李國能在香港大學談 rule of law' [Andrew Li Kwok-nang talks about the rule of law at the University of Hong Kong] *Sing Tao* (Hong Kong, 13 November 2012). See also HKSAR Government, 'CJ's Speech at Ceremonial Opening of the Legal Year' (13 January 2003) <<https://www.info.gov.hk/gia/general/200301/13/0113127.htm>>.

¹⁰⁹ *ibid.*

¹¹⁰ e.g., *Democratic Republic of the Congo v FG Hemisphere Associates LLC* [2011] 4 HKC 151, [82]-[84], [114]-[116]; *In Re Chiu Tat-Cheong, David and Chiu Te-Ken, Deacon* [1992] 2 HKLR 57, 70. See also *Michael Reid Scott v The Government of the Hong Kong Special Administrative Region* [2003] HKCU 1235, [95].

¹¹¹ 'Rule of Law in Good Shape, Says CE' (*RTHK*, 19 November 2021) <<https://news.rthk.hk/rthk/en/component/k2/1620604-20211119.htm>>.

¹¹² 馬道立：釋法將影響香港法治' [“Jeffrey Ma: ‘judicial interpretations will affect the rule of law in Hong Kong’”] (n 66).

¹¹³ C Buddle, 'Geoffrey Ma's timely reminder on the rule of law' *South China Morning Post* (Hong Kong, 9 January 2021) <<https://www.scmp.com/comment/opinion/article/3117078/geoffrey-mas-timely-reminder-rule-law>>.

¹¹⁴ Cf. Law (n 65) 238-239 who is critical of the Hong Kong judiciary as a group of:

judges who prattle on self-righteously about the 'rule of law' (but with nary a word about how laws made by an unelected legislature and enforced by an unelected chief executive could possibly provide a basis for such sanctimony).

¹¹⁵ *Thang Thieu Quyen v Director of Immigration* [1998] 2 HKLRD 179, [20]. This right is also present in the Basic Law, article 35.

strong bench the CFA, including Justice Bokhary, stated in a 2013 judgment that ‘the foundation of judicial review is the rule of law’.¹¹⁶ Several justices at lower court levels have made a similar point. For example, in 2015, Justice Pang in the Court of First Instance (CFI) stated in *HKSAR v Wong Yuk Man* that enhancing ‘the decision-making process of the government so that a citizen can effectively challenge an administrative decision [is] also within the domain of the rule of law.’¹¹⁷ That judicial review is such a central component of the rule of law in Hong Kong has even been supported, surprisingly, by high-ranking members of the executive, whose decisions are sometimes the ones being challenged.¹¹⁸ One Chief Executive,¹¹⁹ plus two Cabinet-level officials (a former chief secretary¹²⁰ and a former secretary for justice¹²¹) have in public statements each linked judicial review to the principle that no person or government entity is above the law. The latter is, of course, a widely accepted component of the ‘rule of law’, including in Hong Kong.

None of this is to say that the judiciary has completely ignored the ‘law and order’ aspect of the rule of law, so favoured by Hong Kong’s executive and pro-establishment lawmakers. The first judicial reference to *obedience* to the law as a part of the rule of law came as long ago as 1964, during the British colonial period.¹²² Justice Bokhary, often regarded as a rights-conscious judge, has also defined the rule of law as incorporating obedience to the law in his published writings.¹²³ Former Chief Justice Li, another judge favouring a human rights content to the rule of law,¹²⁴ proclaimed much the same in a 2014 newspaper editorial, focusing particularly on protesters’ defiance of court orders.¹²⁵ Justice Au of the CFI held, in a case about the 2014 Occupy protest movement, that the rule of law ‘must include and embrace the notion that every resident and the government alike should *obey and comply* with the law ... every resident of Hong Kong are governed by and bound to the operation of the law’.¹²⁶ In 2019, the vice president of the CA stated in a decision that ‘[f]or any society that has as its cornerstone the rule of law, public order is an essential constituent element’.¹²⁷ In October 2020 Justice Coleman in the CFI held that ‘it is fundamental to the rule of law that orders of the court are obeyed ... such

¹¹⁶ *C and Others v Director of Immigration and Another* [2013] HKCFA 21, [77].

¹¹⁷ *HKSAR v Wong Yuk Man* [2015] 1 HKLRD 132, [332].

¹¹⁸ By comparison, judicial review has oddly not attracted much support as a rule of law element among Hong Kong legislators. See Table 1.

¹¹⁹ HKSAR Government, ‘Chief Executive’s speech in San Francisco’ (22 July 1999) <<https://www.info.gov.hk/gia/general/199907/22/0722048.htm>>.

¹²⁰ The Chief Secretary for Administration is the second highest ranking public official in Hong Kong, behind the Chief Executive.

¹²¹ HKSAR Government (n 80).

¹²² *Ruby Moy and Others v Chan Luen Ying and Another* [1964] HKLR 579, 585-586.

¹²³ K Bokhary, *Habeas Crocodylus* (Sweet & Maxwell 2019) 59.

¹²⁴ See n 108 and associated text.

¹²⁵ ‘Editorial: Occupiers should leave’ *Ming Pao* (Hong Kong, 20 November 2014).

¹²⁶ *Chiu Luen Public Light Bus Company Limited* [2014] 6 HKC 298, [139], emphasis in original.

¹²⁷ *Tang Ho Yin* [2019] 3 HKLRD 502, [22]. See also *HKSAR v Leung Tin Kei* [2020] 4 HKLRD 462, [68]-[72].

orders are not guidelines'.¹²⁸ A clear and unsurprising trend is evident here. The Hong Kong courts feel that the rule of law is most threatened when it is their own orders being challenged on the streets.

D. An Official 'Hong Kong Rule of Law'?

What can we deduce via the discourse emanating from Hong Kong's three branches of government, described above? Was there a consensus 'Hong Kong rule of law' doctrine or viewpoint during the period 1997 to 2021?

It is initially evident that, like the different organs of the United Nations, Hong Kong's branches of government do not always speak with a single voice. Nevertheless, there is a broadly identifiable Hong Kong rule of law definition covering the period 1997 to 2021, exhibiting a clear core and a series of embellishments on the periphery. Three core components of the definition that were common between all three branches were equality before the law, judicial independence, and compliance and enforcement. Notably, each are relevant to the *institutions* interpreting and giving effect to law, rather than in prescribing legal content; and each were as relevant in 2021 as they were in 1997.

Beyond these commonalities however, Hong Kong's official position tended to diverge along political lines. Pro-democracy legislators as well as members of the judiciary preferred a broader definition encompassing a just law protecting human rights and freedoms, whereas pro-establishment legislators instead limited their definition to an institutional one, and even circumscribed the judicial role to accommodate political interpretation of the Basic Law by the NPCSC. In some respects, this divergence resembles the difference between the traditional 'thick' and 'thin' definitions of the rule of law in academic scholarship.¹²⁹ The differences between these 'liberal' and 'conservative' conceptions of the rule of law in Hong Kong clearly accorded with the extent to which relevant government decision-makers wished to align Hong Kong's governance with prevailing authoritarian practices in mainland China. With the effective outlawing of pro-democracy politics in 2020-2021, the clear implication is that Hong Kong's governmental rule of law consensus will converge with that of mainland China in the coming years.¹³⁰

Even prior to 2020, the majority political view, as espoused by the executive and by pro-establishment lawmakers, already came close to denoting Hong Kong as a 'rule *by* law' regime rather than as fostering a 'rule *of* law' society¹³¹ – albeit one with an independent judiciary to maintain business confidence.¹³² In this conception, as long as 'bad' laws come into being in the prescribed way, as long as the public complies with 'bad' laws, as long as the executive enforces 'bad' laws consistently against all parties, and as long as the judiciary independently interprets the meaning of

¹²⁸ *Secretary for Justice v Cheng Lai King* [2020] 5 HKLRD 356, [79] (imploping protesters to challenge injunctions in the courts if they perceived these injunctions as unfair). See also *Chiu Luen Public Light Bus Company Limited* [2014] 6 HKC 298, [140]-[141].

¹²⁹ See n 84.

¹³⁰ See n 11.

¹³¹ Chen and Cheung (n 56) 260.

¹³² S Tsang, 'Commitment to the Rule of Law and Judicial Independence' in S Tsang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (Palgrave Macmillan 2000) 11-12, 16. Rajah (n 53) 7-13, 42-43 labels this kind of arrangement as 'authoritarian Rule of Law'. See also Tai (n 4).

‘bad’ laws (Standing Committee interpretations aside), the rule *of* law in Hong Kong will be maintained.

Defining the rule of law in a contested political sphere undoubtedly carries with it a degree of instrumentality. Law, especially legislation, is instrumental in pursuing government policies, whereas shaping the rule of law’s very definition also serves an instrumental function in maintaining a political regime’s domestic and international legitimacy.¹³³ As just one implication for future research, the conservative position voiced by Hong Kong’s pro-establishment politicians since 1997 may lead scholars to query the differences between a procedurally-centred rule of law (more or less aligned with the traditional ‘thin’ conception) and a ‘rule *by* law’ regime, whereby an authoritarian government utilises law and legal language as instruments to realise repression.¹³⁴ Is the only difference the political setting within which laws are passed and applied? Does a value-light but consistently-enforced set of laws that nominally imposes constraints upon government power pass for ‘rule of law’, if subject to easy amendment by the very same actor, hence still permitting arbitrary decision-making?¹³⁵ We suggest that the key distinction is this: most authoritarian ‘rule *by* law’ regimes will trumpet the rule *of* law in ‘thin’ terms that clears the way to pursue a repressive ideological agenda by simply following procedural standards on enactment, interpretation and enforcement. But not all scholarship exhorting a ‘thin’ definition of the rule of law serves, conversely, to promote authoritarianism.¹³⁶

IV. COMPARING THE HONG KONG AND UNITED NATIONS RULE OF LAW DISCOURSES

The Hong Kong governmental rule of law view is clearly different from the international consensus view as expressed by states through their participation in decisions of the UN. With the notable exception of pronouncements at the SC, we see that UN member states increasingly favour a ‘thick’ understanding of the rule of law; human rights and democracy have, in a general sense, been linked to the rule of law within multiple GA resolutions that have been adopted by a global consensus. By contrast, in Hong Kong, both the executive and pro-establishment legislators have since 1997 advanced a rule of law in what closely resembles its formalistic ‘thin’ conception, which does not include human rights and democracy, so as to maintain the political status-quo and to avoid extrinsic constraints upon lawmaking, while still extolling the rule of law ‘brand’ to external parties. Even the more expansive definitions that were favoured by Hong Kong’s judiciary and pro-democracy legislative bloc failed to give any weight to democracy as a political system, although they did mention human rights either specifically or in the abstract.

¹³³ Rajah (n 53) 42-50; Kellogg (n 14) 490.

¹³⁴ See Cheesman (n 41) 103-105; Tai (n 4) 151, 166.

¹³⁵ See R Peerenboom, *China’s Long March toward Rule of Law* (Cambridge University Press 2009) 8, 10; Clark (n 5) 28.

¹³⁶ For similar arguments, see Bedner (n 8) 37, 40-43; L Thio, ‘Rule of Law Within a Non-Liberal “Communitarian” Democracy’ in R Peerenboom (ed), *Asian Discourses of Rule of Law* (Routledge 2003) 181-182, Peerenboom (n 5) 5-10, and C Sypnowich, ‘Utopia and the Rule of Law’ in D Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (Bloomsbury Publishing 1999) 187-194. Bedner (n 8, at 40) suggests that the western, liberal, governance tradition still accommodates a ‘thin’ rule of law featuring an independent judiciary. On the other hand, a ‘thin’ rule of law in ‘those states whose organisation is not based on the *trias politica*, such as China and Vietnam’ would not.

It is thus democracy that was the biggest point of difference between the UN and Hong Kong definitions. Instead of the rule of law as incorporating a requirement for democratic governance, as the GA has repeatedly and consensually resolved in the 21st century, in 2014 then Hong Kong Chief Executive Leung Chun-ying stated that the two concepts are entirely separate from each other.¹³⁷ In 1998, long before Hong Kong's political controversies reached boiling point, the chief secretary and later pro-democracy activist, Anson Chan, made a similar proclamation.¹³⁸ While debates over the necessity of electoral democracy to a 'thick' rule of law persist at the theoretical level,¹³⁹ to find senior political figures so openly contradicting a multilateral consensus definition developed over time at the UN appears unusual.

Why this marked difference between the domestic conception of the rule of law as viewed by states at the UN and the erstwhile Hong Kong governmental equivalent? Here we suggest the most persuasive explanation, which focuses on the operability of the rule of law across two very different settings.

In contrast to Hong Kong, which does not have full democracy, the majority of UN member states are now bona-fide electoral democracies, around 60 percent at last count.¹⁴⁰ It is not surprising that democratic states perceive democracy to be essential to the rule of law. Moreover, even authoritarian nations attempt to publicly claim democratic status in international fora, despite their contradictory domestic practices. Many are also keen to proclaim their own respect for and fulfilment of the rule of law, given its positive association with governance. For some states in the undemocratic minority, the GA's consensus position represents a normative standard to aspire to in the future; others (especially smaller states) are susceptible to lobbying and economic coercion from the democratic majority, whereas a third group likely participates in the consensus to bolster its international standing, despite not truly 'believing' in the content of the relevant (non-binding) resolutions.¹⁴¹ A fourth group may argue over the definition of 'democracy' in each resolution, conflating public acquiescence, consultative channels or economic equality with electoral democracy.¹⁴² Regardless of their own motivations and their domestic practices, the vast majority of UN member states seek to outwardly buy into the modern 'master narratives' of governance: democracy, human rights and the rule of law.¹⁴³

¹³⁷ '立法會 3 時起清場 特首：追求民主須回歸法律' ['Legislative Council begins clearing at 3 o'clock: democratic pursuits must return to legal means'] *South China Morning Post* (Hong Kong, 15 December 2014). Compare the remarks made in 1998 by the first HKSAR Chief Executive, Tung Chee-hwa: 'people equate democracy with universal suffrage and, yes, this is quite right. But let me say this, that democracy is also about the rule of law' (Goodstadt (n 54) 182). Here, Tung appears to have been ascribing the rule of law as a component of democracy, rather than vice-versa.

¹³⁸ Goodstadt (n 54) 182.

¹³⁹ e.g., see Clark (n 5); Bedner (n 8); May and Winchester (n 9); J Ferejohn and P Pasquino, 'Rule of Democracy and Rule of Law' in J Maravall and A Przeworski (eds), *Democracy and the Rule of Law* (Cambridge University Press 2003).

¹⁴⁰ D Desilver, 'Despite global concerns about democracy, more than half of countries are democratic' (*Pew Research Centre*, 14 May 2019) <<https://www.pewresearch.org/fact-tank/2019/05/14/more-than-half-of-countries-are-democratic/>>.

¹⁴¹ D Pascoe and S Bae, 'Idiosyncratic voting in the UNGA death penalty moratorium resolutions' (2021) 25(6) *The International Journal of Human Rights* 974, 977-979; Kellogg (n 14) 490.

¹⁴² A Chang, Y-H Chu and B Welsh, 'Southeast Asia: Sources of Regime Support' (2013) 24 *Journal of Democracy* 150, 150; A Kendall-Taylor, N Lindstaedt, E Frantz, *Democracies and Authoritarian Regimes* (OUP 2019) 27-29.

¹⁴³ Peerenboom (n 135) 1; Cheesman (n 41) 97-98; W-C Chang and DS Law, 'Constitutional Dissonance in China' in G Jacobsohn and M Schor (eds), *Comparative Constitutional Theory* (Edward Elgar 2018) 484, 487.

By contrast, as one of Hong Kong's 'founding myths',¹⁴⁴ the rule of law is not just for diplomatic show. This legal transplant from the United Kingdom must be defined in a way that can be realistically fulfilled in the local context,¹⁴⁵ with the erstwhile continuation of British colonialism and modern survival of the PRC's One Country Two Systems framework partly dependent on its realisation. Hong Kong has a statutory Bill of Rights, human rights mentioned explicitly in its mini constitution, very low levels of corruption, a judiciary free from political interference,¹⁴⁶ and a generally conformist, law-abiding public. What it has never had, whether under the British colonial administration or now as a part of the PRC, is full electoral democracy. Therefore, it is not surprising that the rule of law as encompassing democracy has not been endorsed by the different branches of the Hong Kong government.

Aside from this principal difference between the international view of the rule of law and that of Hong Kong's government decision-makers, there are three other minor discrepancies that are nonetheless worth noting. The first is that while both the international view of the rule of law and the Hong Kong conception regard judicial independence as a core feature, in Hong Kong, judicial independence tends to be defined in a more limited fashion. The predominant Hong Kong position regards binding political interpretation of constitutional provisions as compatible with the independent judicial role within the rule of law.¹⁴⁷ Adopting this definition, some authoritarian states with socialist-derived legal systems could plausibly claim to be fulfilling a 'thin' rule of law or could aim to do so in the future.¹⁴⁸

The second difference is that the Hong Kong rule of law, at least as it has been defined by the executive and judiciary, incorporates remedies (namely, judicial review of administrative decision-making) whereas the international consensus definition makes no mention at all of remedies for government illegality. The explanation for this discrepancy presumably lies in the fact that legal actions (generally) and judicial review (specifically) are a substitute for political participation via electoral politics in Hong Kong,¹⁴⁹ along with street protests and demonstrations before 2020.¹⁵⁰ In common with some courts in authoritarian mainland China,¹⁵¹ judicial review 'substitutes for' electoral democracy as a component of the rule of law in Hong Kong, as one of the key means of

¹⁴⁴ C Munn, 'The Rule of Law and Criminal Justice in the Nineteenth Century' in S Tsang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (Palgrave Macmillan 2000) 19-20; C Jones, 'A Ruling Idea of the Time? The Rule of Law in Pre- and Post-1997 Hong Kong' in G Luk (ed), *From a British to a Chinese Colony?* (Institute of East Asian Studies, University of California, Berkeley 2017) 113-116, 123, 126.

¹⁴⁵ Ku (n 69) 649; Chen and Cheung (n 56) 273; Jones (n 8) 22.

¹⁴⁶ Although see JMM Chan, 'National Security Law 2020 in Hong Kong: One Year On' (*SSRN*, 4 January 2022) 9-15 <<http://dx.doi.org/10.2139/ssrn.3956272>> on the new challenges to judicial independence brought by the National Security Law since 2020.

¹⁴⁷ Chen and Cheung (n 56) 260.

¹⁴⁸ Cf. Bedner (n 8) 40 .

¹⁴⁹ Jones (n 55) 47; H Zhu, 'Beijing's "Rule of Law" Strategy for Governing Hong Kong' (*China Perspectives*, 20 March 2019) 29 <<https://doi.org/10.4000/chinaperspectives.8686>>; DS Law, 'Judicial Comparativism and Judicial Diplomacy' (2015) 163(4) *University of Pennsylvania Law Review* 927, 1007-1008.

¹⁵⁰ Gordon (n 100).

¹⁵¹ M Shapiro, 'Courts in Authoritarian Regimes' in T Ginsburg and T Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 328; Peerenboom (n 135) 7.

holding government accountable. The other reason for this difference over remedies is the difficulty of the (now) 193 member GA agreeing to anything but a woolly, consensus, definition of the rule of law, free from legal-technical doctrines.¹⁵²

The final point of difference in the detail is the Hong Kong legislature's novel invocation of an independent legal profession, independent prosecutors, legal aid and access to justice as key components of the rule of law. Similar reasons likely explain the absence of these elements within the international consensus definition: legal actions and activism substituting for accountability via the ballot box in a 'flawed democracy' or 'hybrid regime', plus a need for the UN definition to accommodate a wide variety of legal systems. Legal aid, access to justice and remedies for exceeding governmental power would each be worthy additions to future GA resolutions on the rule of law, but only if worded as such, in generality. At the UN level, the rule of law's definition must retain its flexibility to remain relevant to a majority of the organisation's member states.

V. CONCLUSION

In this article we have examined rule of law definitions applicable to domestic jurisdictions from the perspective of UN member states, and from Hong Kong's three branches of government. We have demonstrated that states' views on the domestic rule of law, primarily evidenced through UN GA resolutions, have advanced over time, in particular from the 2005 World Summit Outcome onwards. Unexpectedly, there is now a clear international consensus on the applicability of the rule of law in domestic legal systems. Moreover, while the rule of law's content remains somewhat vaguely defined at the UN level, member states collectively consider that the rule of law requires, at a minimum, an independent judiciary, public and governmental compliance with law, democracy and respect for human rights. While the UN definition necessarily remains flexible, its existing content is strongly reminiscent of a 'thick' rule of law definition outlined by academic scholarship.

In turn, the developing international consensus on the rule of law can be used as a benchmark to examine how individual states express their own rule of law ideals. Hong Kong is not the only important potential case study here.¹⁵³ Future research may also draw upon UN member states' collective views to examine states' actual compliance with the rule of law on the ground, as well as the definitional differences between 'rule of law' and 'rule by law' governance. The UN GA's evolving consensus clearly challenges a minimalist position that law need only be equally applicable, consistently obeyed and enforced, and impartially adjudicated, to constitute 'rule of law' governance.

In this article we have demonstrated that, unlike the gradual international development of the rule of law's definition for domestic jurisdictions, Hong Kong's governmental rule of law discourse remained reasonably consistent between the Handover of Sovereignty in 1997 and the end of the sixth Legislative Council term in 2021. Nevertheless, over this period the Hong Kong view was more finely articulated as to the rule of law's components. Whereas the international consensus expressed at the UN evinces more breadth, Hong Kong's erstwhile governmental consensus espoused more depth. While the latter finding is unsurprising, given the need for the UN definition to apply, aspirationally at least, to more than 190 states, the former observation on breadth is unexpected. If anything, a definition obtained by global consensus we would expect to be much 'thinner' in scope than a

¹⁵² Fassbender (n 10) 788; Arajärvi (n 52) 190.

¹⁵³ See n 6.

definition favoured by a jurisdiction that, at the time of writing, is still highly ranked within global rule of law indices,¹⁵⁴ and within which the rule of law has long formed part of the unique local identity.

In further detail, we found four main differences between the multilateral consensus on the rule of law and the 1997-2021 governmental rule of law discourse in Hong Kong. Most important is electoral democracy, which is present in the former but not in the latter. The absence of democracy in the original Hong Kong rule of law discourse partly explains why the political crackdown on democracy since 2020 has not been perceived by the Hong Kong government as hampering the rule of law. Nevertheless, critics of recent democratic backsliding in Hong Kong under Chinese rule¹⁵⁵ may find the comparison between the international view of the rule of law and Hong Kong's governmental rhetoric useful. Although Hong Kong does not govern its own foreign relations, its parent state since 1997, the PRC, has repeatedly formed part of the GA's global rule of law consensus. By including democracy and human rights within this consensus, the GA's rule of law definition approaches the substantive, 'thick' version favoured by some academic scholarship, as opposed to the formalistic 'thin' version increasingly promoted by authoritarian 'rule by law' states. The fact that the PRC has adopted different rule of law positions at the UN as for its own domestic system(s) serves as another reminder of the frequent gap between diplomatic pronouncements in multilateral settings and domestic practices, particularly in the human rights field.¹⁵⁶

The second difference between the two sets of discourses is that while judicial independence is regarded as part of the rule of law both by a consensus of states and in Hong Kong, in the HKSAR judicial independence is understood to accommodate binding political interpretations that may even 'overrule' appellate court decisions, in accordance with the socialist legal tradition. The third key difference is judicial review as a remedy for government overreach, which was exclusively present in Hong Kong's pre-2021 domestic discourse. The fourth difference is access to justice, along with independent lawyers and prosecutors. Again, these elements are only found in the Hong Kong domestic discourse.

Despite these notable differences, there are also close similarities between Hong Kong's rule of law and the views of states as expressed in UN decisions. At the core of the rule of law, as framed by both the domestic and multilateral institutions analysed here, are widespread public compliance with the law, predictable rule-bound governance and the formal independence of the judicial branch from the political branches which create and enforce the laws. Although the rule of law's definition has since 1997 been subject to increasing political manipulation in Hong Kong, on these latter three components at least, Hong Kong's own rule of law discourse serves to strengthen the multilateral consensus view, and vice-versa. Each component attracted support across the political spectrum and across different branches of government in Hong Kong, which before 2021 was no mean feat.

We, the authors, hope that this examination of differences and similarities will be useful in improving the rule of law in Hong Kong to the extent that Hong Kong's government wishes to follow

¹⁵⁴ See n 2.

¹⁵⁵ *ibid.*

¹⁵⁶ See e.g., B Boockmann and A Dreher, 'Do Human Rights Offenders Oppose Human Rights Resolutions in the United Nations?' (2011) 146 *Public Choice* 443; E Hafner-Burton and K Tsutsui, 'Human Rights in a Globalizing World: A Paradox of Empty Promises' 110 (2005) *Am. J. Sociol.* 1373; O Hathaway, 'Why do Countries Commit to Human Rights Treaties?' (2007) 51 *JLCR* 588.

the accepted international view. The comparisons we have provided in this article will also prove useful for states proposing and debating future changes to the rule of law's content at the UN level. In particular, an evolving international consensus on the rule of law may, in the future, seek to incorporate some of the unique depth that Hong Kong's official definition became known for. And even if its definitional evolution stalls at the UN, the rule of law provides another example of the often-sharp distinction between states' diplomatic pronouncements and their domestic rhetoric. In an ideal world, these ought to closely align.