THE RULE OF LAW AND CORPORATE INSOLVENCY IN SIX ASIAN LEGAL SYSTEMS

Roman Tomasic and Bahrin Kamarul

1. INTRODUCTION

While the notion of rule of law is ultimately used as a polemical term, rather than as an analytical one, it is an aspirational ideal for legal reformers in many Asian states (Tomasic, 1995; Cotterrell 1996; Ghai, 1986). While its open texture deprives the rule of law concept of any particular specificity, the doctrine constitutes an important part of the rhetoric of recent business and commercial law reform undertaken by Asian governments seeking to modernise their legal systems. This paper examines insolvency law and practice in six Asian jurisdictions, and, based on a socio-cultural study* of the perceptions and practices of leading insolvency practitioners, officials and business people, the paper explores specific manifestations of 'rule of law' as reflected in the character and operation of insolvency regimes in six Asian legal systems. We look in particular at insolvency practice in China, Taiwan, Hong Kong, Singapore, Malaysia and Indonesia. The research involved the conduct of fieldwork in each of these six legal systems. This consisted in the collection of relevant legal materials on each jurisdiction and the conduct of interviews with key insolvency practitioners and officials; A total of 115 in-depth interviews were conducted (see further, Tomasic and Little, 1997: 5-7).

It is clear from this research that the doctrine of the rule of law has a wide variety of meanings. Also, legal practices in the six legal systems studied, often depart from Western notions of the rule of law in many significant respects. In some jurisdictions, insolvency law forms part of a new commercial law which justifies executive control and management of the economy and private business activities. In most jurisdictions, judicial independence is not securely institutionalised, there is a high level of avoidance in recourse to formal insolvency law by indigenous businesses, and there is widespread reliance on extra-legal, informal and even illegal processes to resolve corporate insolvencies. This paper seeks to explain the conceptual diversity of the rule of law as found in Asia and the resort to practices not in keeping with the Western concept of the rule of law. This reflects the impact of Asian legal ideologies, cultural values and social and governmental institutions on an essentially Western legal doctrine. This has often meant that the idea of the rule of law has been reformulated in Asia into rule by law, as has most clearly happened in China and Singapore. The paper further suggests that any analysis of the rule of law in Asia must take into account the diversity of Asian cultural, social and political contexts and the legally pluralistic character of these jurisdictions.

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Sometimes, the cultural values such as the Confucian ethic, run counter to values inherent in the rule of law idea.

2. RULE OF LAW IN NON-WESTERN LEGAL SYSTEMS

The rule of law is generally considered as a "good thing", although it remains 'one of those essentially contested concepts every theorist, advocate and political protagonist wants to claim for her or his own' (Lustgarten 1988: 25). Cotterrell suggests that the rule of law concept implies not just specific political contexts or institutional structures but an appeal to transcendent ideals (Cotterrell 1996). He identifies the moral essence of rule of law as consisting of the values of equality, individual autonomy, and security. Whatever its specific content, it has been suggested that the rule of law doctrine continues to be the widely echoed aspiration of legal systems and it has become regarded by many as the new natural law ideal which all legal systems should strive to achieve (Tomasic 1995: 471). As a tool for analysing the legal process, particularly in Asian and African contexts, Cotterrell, for example, suggests two dimensions of the rule of law. First, that law is 'not only reliably enforced but also general in application, applied uniformly to all cases within its terms. It is, therefore, predictable and calculable in its general consequences, permitting a sphere of freedom to the citizen'. And, secondly, that the courts function to 'provide security against arbitrary exercises of discretionary power by government' (Cotterrell 1996). Jones, on the other hand, suggests that rule of law implies that law is 'autonomous, general, public and positive' (Jones 1994). Where the rule of law exists, '[a]dministration is separate from legislation. Generality in legislation and uniformity in adjudication establishes formal equality and shields the citizens from arbitrary state power. The law is applied without regard to person, class or status' (Jones 1994: 207).

The above suggestions highlight aspects of AV Dicey's characterisation of the rule of law, including, first, the absolute supremacy or predominance of regular law in contrast to prerogative, discretionary or arbitrary powers and, secondly, the existence of equality of all subjects before the ordinary law, and thirdly, that the state and its officials would ultimately be subject to the ordinary law of the land (see discussion of Dicey's characterisation in Tomasic 1995). However, a key issue in this regard is the manner in which rule of law ideas can be mobilised in a legal system. It is one thing to provide rules which are equally enforced and general in character. But an equally important question concerns who it is that can effectively mobilise these rules. This question is essential if we are to avoid an abstract approach to such rules. Ultimately, a thorough-going expression of the rule of law idea depends upon the existence of a civil society in which significant constraints are not placed on the mobilisation or application of law. On this basis, very few societies would qualify as being good illustrations of the operation of the rule of law ideal.

But, it is doubtful whether a comprehensive system of legal rules binding state agencies and citizens alike to prevent government absolutism, has ever been a primary basis of social order, Western or non-Western. The rule of law doctrine functions more as a legitimising ideology for existing legal institutions than as providing the basis of actual practice and of substantive equality before the law (Cotterrell 1992; Tomasic 1993). Even in Western legal systems, where it had historically been most highly

developed, the rule of law is continually being undermined by unfavourable changing economic and social conditions (Newman 1986; Cotterrell 1996). In Africa and Asia, the idea of the rule of law is an imported doctrine. Consequently, the assessment and interpretation of the extent to which the rule of law is practised in Asian and African states should be examined in the context of changing social and cultural conditions.

The rhetoric of the rule of law is commonly adopted as a hallmark of legal development and modernity in many Asian and African states and this is reflected in the use of insolvency laws in the six Asian legal systems discussed here. Corporate insolvency laws in these jurisdictions have their origins in, or have been strongly influenced by, European insolvency laws. Many provisions relating to insolvency in Indonesia are based on laws enacted by the Dutch. The Malaysian, Singapore, and Hong Kong corporate insolvency regimes have been adopted from English and Australian sources. Taiwan's insolvency law is modelled on the now reformed Western-based insolvency laws of mainland China which themselves have German origins. And, the recently enacted Chinese insolvency laws have been strongly influenced by Western concepts and principles. In all these jurisdictions, the idea of the rule of law, which include such notions as 'equality of treatment of all creditors', 'protection of individual creditors' rights' and 'fair distribution of assets between creditors', has formed a part of the rhetoric of administration and practice of insolvency law. These principles, however, are not a good indication of the character of insolvency laws in these jurisdictions, nor are they reflected in the actual practice of insolvency administration. Indigenous cultural, ideological, political and institutional factors have strongly influenced and shaped the nature of Asian commercial law generally (Kamarul 1995), and professional practice of insolvency administration in these jurisdictions, in particular.

As many writers have observed, the recent rise of the modern state and market-driven economies in Asian states has not generally been accompanied by the development of the rule of law, understood as limiting the arbitrariness and power of the state, in the legal systems (Ghai 1986; Jones 1994; Tomasic 1995). Even in rapidly growing economies based on capitalism and liberalised markets, such as those of East Asia, the spread of the rule of law, defined as protecting individual and private rights against the state, has not taken place. It has been argued that recent economic growth in several East Asian states has not been accompanied by the institutionalisation of rule of law norms in their commercial legal regimes (Jones 1994). First, East Asian cultures have mediated the reception of these norms and the supposed relationship between the growth of capitalism and formal rational law. The spectacular economic success of Hong Kong, Singapore, Taiwan, South Korea and China, has instead been based on a cultural emphasis on family relationships and business networks, as opposed to legal institutions. There is an emphasis upon collectivist values which put business and social interests before those of the individual, and a reliance on informal networks of relationships to protect and promote business interests. Secondly, there is the influence of a positive ideology of law, in which law is seen as a 'powerful and indispensable directive instrument of government policy, actively used on an extensive scale to reshape social and economic conditions and even popular attitudes' (Cotterrell 1988: 6). Consequently, commercial and business activities in East Asian states are associated more with a combination of 'rule by law'

and 'interactional law' regimes rather than with Western ideas of 'rule of law' (Jones 1994). The prerogative of the state to direct and control economic activities in order to promote economic development is seldom challenged (Gillespie 1997). Thirdly, the doctrines of separation of powers and independence of the judiciary have not been constitutionally entrenched or institutionally established in many Asian states. The judiciary is either subjected to direct executive control or is severely constrained in its operations by political and administrative factors (Hassell 1997; Tomasic 1995).

Finally, there is continuing reliance on traditional and informal legal processes, rather than on formal law, in the protection of rights and the enforcement of duties and liabilities (Gray 1991; Antons 1995; Winn 1994). Gray, for example, contrasted the formal legal system with the 'informal model' of the legal process (Gray 1991). The formal legal system is characterised by clear and binding standards, even and effective enforcement of the law, and an impersonal and predictable way of resolving disputes, while, the informal legal process reflects uncertainty in legal standards, uneven and inconsistent enforcement of the law and an ad hoc and personalised resolution of disputes. In many Asian countries, the legal systems are better understood in terms of an 'informal legal process'. A consensus of reciprocal expectations based on shared views of right and wrong commonly govern business activities and positive law is often superfluous (Jones 1994). And, 'even in fields of law that were newly introduced and had no basis whatsoever in the traditional law...people continued to circumvent the adapted rules and to use informal practices that over time became so firmly established that they could be described as an "informal legal system" ' (Antons 1995:111).

3. THE STATE'S OVERRIDING ROLE IN ASIAN CORPORATE INSOLVENCY LAW AND PRACTICE

The imposition of constitutional limits on the legitimate powers of the state and government is one important ideal of the 'rule of law' (Shapiro 1993). These limits aim at protecting the citizens and private organisations from the exercise of arbitrary power by the state and government. The reality in many Asian constitutional systems, however, is the tendency for the law to legitimise the dominance of the state. This is even so in Asian legal systems with a strong rule of law heritage such as Singapore and Hong Kong. Non-state interests and rights are subordinated to the prerogative of the state (Hassell 1997). Such primacy is justified by a variety of ideologies, such as, socialism in China, state ideology of *Pancasila* in Indonesia, and, in Singapore, by a blend of Confucianism and Western ideas (Simone and Feraru 1995). State dominance is commonly reinforced by the ideology of 'developmentalism', in which, law vests government with the authority to direct, manage, and control private organisations in order to promote economic development (Johnson 1982; Seidman and Seidman 1994; Ghai 1986). Rather than the rule of law, a common feature of Asian legal systems is the 'rule by law' (Jones 1994), in which law is not autonomous but 'decisively subordinated to the achievement of the desired political or economic result in each particular situation' (Unger 1976: 233; see also Gillespie 1997). Many Asian legal systems are 'statist' in character. Civil society is not autonomous or independent; rather it is

managed and regulated by the state (Jayasura 1996). Statist ideology justifies 'an extensive role for the state in redistributing national assets, setting economic objectives, regulating foreign transactions, providing an effective national defence, and directing the national development effort' (Simone and Feraru 1995: 236).

Absolute sovereignty of the state is not reconcilable with complete adherence to the rule of law, as these ideas logically contradict each other. As the German theorist Franz Neumann argued:

> Both sovereignty and the Rule of Law are constitutive elements of the modern state. Both however are irreconcilable with each other, for the highest might and highest right cannot be at one and the same time realised in a common sphere. So far as the sovereignty of the state extends there is no place for the Rule of Law (Newman 1986:4).

Under the rule of law, '[t]he government itself must be bound by substantive law, not only by the constitution, but as far as possible by the same laws as those that bind other people. We should be very wary when we find governments giving themselves the power to do things to people that people may not do to one another' (Walker 1996: 265). Judicial independence in a legal system is one critical element in safeguarding against executive dominance and ensuring equal treatment of disputants before the courts. It involves a judiciary which does not take sides in disputes; consistency and equal treatment of persons in the administration of law; and a machinery capable of implementing and enforcing the law impartially and honestly (Walker 1996).

The character and practice of insolvency law in the six Asian jurisdictions examined here contain varying degrees of statism, where states give themselves powers that private individuals are not given. Private interests and individual rights are subordinated to the overriding claim of the state to regulate and control economic activities. Where these overriding formal powers are not given, governments informally dominate private interests and rights by virtue of their superior political power and ownership of significant productive enterprises. The judiciary's role in safeguarding private interests against the state is severely constrained in many jurisdictions.

Of the six legal systems discussed in this paper, statism is most highly developed in the insolvency law and practice of the PRC. China's commercial law is generally statist in character and state dominance in its insolvency law and practice reflects this fact. One major aim of insolvency law is to make government business enterprises more efficient and market-oriented through government control and direction. Consequently, the state is formally dominant and administratively powerful in China's insolvency law and practice. In addition, the judiciary's role in administering insolvency law is subject to government policy and control. In Singapore, however, the state's dominant role takes a different form. Its insolvency law does not give the state formal powers of controlling business enterprises. Corporate insolvency is administered in a legalistic and universalistic fashion, very much in accordance with English common law principles. But the Singapore government's strong administrative, economic and political control of business and commerce, results in its exercising a major influence on the governance of corporations generally, and of insolvency, in particular. In Taiwan, on the other hand, the state is frequently an important stakeholder in corporate insolvency. Although most

enterprises consist of numerous family-owned and private businesses, the state owns many large business corporations. But, because the state often has a major interest in corporate insolvencies, Taiwanese government policies and interests frequently distort the administration of corporate insolvency .

In Malaysia and Hong Kong, however, formal provisions of insolvency law reflect a more *laissez faire* philosophy, in which, insolvency is regarded as essentially a private matter. In both jurisdictions the law is administered in a strict legalistic fashion, reflecting the profound influence of British common law practices. Government intervention in insolvency matters, however, is not uncommon in both jurisdictions, but only under special circumstances. In Malaysia, there is public ownership of some important business enterprises and, in addition, the government has sometimes intervened in the insolvency process to maintain stability in significant areas of industry. In Hong Kong, while there is no significant public ownership of business enterprises, the government has occasionally intervened in corporate insolvency to maintain business and financial stability. And, finally, in Indonesia, while the state has little or no formal role in corporate insolvency, there is widespread interference in insolvency matters by stakeholders who possess political and governmental influence. As creditors, Indonesian government agencies have priority over private creditors. Indonesian courts are relatively weak institutions and are open to bribery, corruption and political influence.

Let us now look more closely at the role of the state in regard to insolvency laws in each of our six legal systems.

People's Republic of China

Chinese laws governing corporations generally refer to at least two different notions of rule of law. One, is a 'political' or prescriptive notion, in which, the rule of law is seen as a command of the state under which the company and its various stakeholders must comply with the rules, policies and regulations of the state. Secondly, there is a notion which focuses upon various individual rights which are immune to the overriding command of the state (Tomasic 1995). Tomasic argues that the political notion of rule of law predominates in Chinese company law administration. This is even more so in regard to the application of the China's 1986 Enterprise Bankruptcy Law. China's new commercial laws, to a large extent, are used to generalise and institutionalise Communist Party and state economic reform policies and measures (Chen 1995). Consequently, the authoritarian concept of the rule of law and the primacy of government and bureaucratic control over insolvency matters are strongly reflected in contemporary Chinese bankruptcy law and practice.

The insolvency regime in the PRC is currently governed by the law of the People's Republic of China on Enterprise Bankruptcy (For Trial Implementation) 1986 (1986 Bankruptcy Law) which took effect on 1 November 1988. The 1986 Bankruptcy Law applies to state owned enterprises only. Non-state-owned enterprises may be subject to the Company Law which contains winding-up provisions in Chapter 8, (which took effect on 1 July 1994), and the Civil Procedure Law Ch 19 (which was promulgated in 1990) (Wang and Tomasic 1994). There are also a number of local insolvency regimes, and in the case of the Shenzen Special Economic Zone, a system of regional bankruptcy courts. In addition, the

Supreme People's Court of China has issued an opinion regarding the implementation of the national 1986 Enterprise Bankruptcy Law. This Opinion supplements the 1986 Bankruptcy Law. Insolvent foreign enterprises are subject to the provisions of the Code of Civil Procedure (Ch 19) and special foreign investment enterprise bankruptcy and liquidation regulations in Shenzen SEZ, Beijing, Shanghai and Tianjin. However, there is still no PRC bankruptcy law which governs individual bankruptcy or the insolvency of partnerships, although this this may be enacted in the next year or two.

The 1986 Bankruptcy Law was reflected an effort to move China from a central command economy to a socialist market economy. It aims to provide the State with increased capacity to impose greater efficiency in the management of state-owned-enterprises (SOEs). As one member of the Drafting Committee for the new Bankruptcy Law said to us, 'Economic development is the main purpose...How to improve and modernise state-owned and collective enterprises is the main purpose of our bankruptcy law'. However, all this is occurring against a backdrop of an ongoing attempt to maintain social stability by avoiding unemployment which would be caused by unrestrained closure of SOEs through the application of the 1986 Bankruptcy Law. Consequently, the law places the interest of the State above private and individual interests. As one local government lawyer put it, insolvency law 'is really there to protect the State, which cannot be *parens patriae*, as the SOE no longer owns all'. The law also aims 'to protect employees of SOEs, according to one international commercial lawyer. And, as an interviewee from an international accounting firm said to us, '[t]he main purposes from the PRC authorities point of view is the allocation of remaining assets [of the bankrupt enterprise], especially if it involves SOE assets'.

Chinese government policy and planning directives often intrude into insolvency practice. As one member of the Drafting Committee of the new Bankruptcy Law said to us:

> In China, law has sovereignty in theory, but in practice, in the operations of the State, government and State policy are above the law. These policies have effect as by-laws. Some policies have been used for a long time and are subconsciously followed by the people, rather than the law.

Judicial administration of insolvency law in China is subject to government direction. As a lawyer in a Guanzhou law office said to us, '[b]ankruptcy cases are not decided by the Courts — they are really decided by the government. Bankruptcy cases in the PRC have to be approved by the government. The government directs the courts not to accept bankruptcy petitions'. One member of the Drafting Committee of the new Bankruptcy Law said that 'the policies of the government are effectively by-laws in China. You have Central Government policy and exceptions at the local government level. Most local government have their own rules...There is no clear policy about uniform administration across China'. And, finally, preferential treatment is given to State-owned-enterprises 'so as to protect the prosperity of the state', according to a Chinese law professor expert in this area.

Singapore

The development of post-colonial Singapore has been greatly influenced by aspects of colonialism which emphasise strong executive power (Tan, Min and Seng 1991). Singapore attained sovereign statehood in 1965 when it left the Malaysian Federation. The state in Singapore has been described as a "strong state" (Simone and Feraru 1995). Under the leadership of the People's Action Party (PAP), Singapore's 'administrative state' has managed to invite foreign investment without becoming its captive, to keep the rising middle-class quiescent, to control labour unions, and to keep political opponents incapable of challenging the PAP's dominance. The ruling ideology is a mixture of Confucian principles of collectivism, consensus, and hierarchy and Western notions of individual freedoms. Concerns for order and economic growth are paramount under this ideology.

Singapore's corporate insolvency laws are found in the Companies Act of Singapore. Its Companies Act was originally based on the companies legislation of Victoria, Australia, which, in turn, had a largely English prototype. Insolvency law provides an important means for the government to impose discipline on firms participating in Singapore's market economy. As one Singapore-based lawyer put it, '[t]he conventional reason is to control the operation of firms — to discard those that are not competitive so as not to cloud the market'. In discharging this role, the Singapore government 'is offensive, aggressive, pragmatic and very nimble, it is an able and dedicated group, due to the condition of a city state. A major insolvency here which would impact upon people's perception of Singapore would be watched closely by the government', according to a partner in a large legal firm. The Singapore government has responded quickly to reform insolvency law in order to maintain confidence in Singapore's business environment. One litigator in a large local law firm recalled that following the collapse of Pan Electric in 1985 'there was a stock broking crisis with domino effects from back to back deals. A year or so later [the Singapore government] introduced judicial management to stop future industries from going into decline in the same way'.

Singapore's government intervention into corporate insolvency, however, is less direct than that by the Chinese state. According to one barrister, the Singapore government intervenes, 'in the sense that government policy is not to condone roguish or irresponsible behaviour on the part of the businessmen. The government tries to bail out small firms which are challenged by large multinationals'.

Insolvency administration by Singapore's judiciary, however, is relatively legalistic, consistent and free from corruption. As a partner in an accounting firm said, insolvency administration in Singapore is consistent and uniform. The reason is 'not so much [Singapore's] size, it's the overall pervasive governmental attitude here that creates uniformity'. The courts are generally tough on offenders against insolvency law. A partner in an international legal firm described how a 'debtor is barred from being a director if they are linked to two corporations that have gone insolvent'. A local lawyer noted, however, that:

> The state is quite selective and will prosecute harshly in some well publicised cases to set an example. Large private companies subject to mismanagement are less likely to be subject to prosecution due to bad publicity. You prosecute selectively and fearlessly to set an example in politically appropriate cases.

Taiwan

Taiwan's recent industrialisation has been based on a combination of the ideology of 'statism', in which the state has ownership of many large business enterprises, and 'familism', the ideology of small-scale and privately-owned enterprises (Simone and Feraru 1995: 236). State ownership of some large enterprises influence the operation of insolvency law in Taiwan. The law, consisting of the Bankruptcy Law of 1935 and the Company Law of 1929, is based on earlier (European based) mainland Chinese models. It was not until 1966 that the 1929 Company Law was amended to provide a system of company reorganisation. Minor changes have also been made to the provisions of the Bankruptcy Law in 1937, 1989, and 1993.

In Taiwan, insolvency law 'is there to primarily facilitate debt collection', according to a partner in an international accounting firm. But because many large enterprises are state-owned, these enterprises enjoy a practical advantage over privately-owned businesses. As one local lawyer put it, '[t]here is no legal privilege, but maybe there is some practical privilege'. Government intervention to rescue large private corporations from dissolution is also quite common, particularly in the banking and financial sectors, but more generally in 'industries which support Taiwan'. For example, one corporation was supported because 'the brand value it has for Taiwan is tremendous'. Another example, given by an attorney in Taipei, was the government's rescue of an electronic company.

But, the court system in Taiwan is not highly regarded. The low esteem in which the Taiwanese judiciary is held is described by a local partner in an accounting firm who said to us that:

> The court system here is not very well regarded. The general perception is that the well to do and well connected will win a case against a guy who is not as well off. People see the courts as biased, even if this may not be the case. People see results that are quite hard to believe. There is no consistency in the interpretation of evidence or of the law.

As a result, few cases of insolvency go before the courts.

Malaysia

The Malaysian Companies Act 1965 (Revised 1973) regulates insolvency in Malaysia. The law is based on the pre-1986 UK law on bankruptcy. The Malaysian law has 'no other public purpose than the pursuit and recovery of debt' said a local lawyer in a national legal firm. The use of insolvency law is primarily tactical. As another local lawyer said, '[b]anks choose bankruptcy as a method of debt collection because the threat of insolvency is an effective tactic. Whilst not the fastest technique, it is a common and effective legal tactic in the recovery of debts'.

The Malaysian government, however, has intervened recently to rescue insolvent companies in the housing construction and insurance industries. One local lawyer said that, '[t]hese development companies are closely monitored to ensure the protection of members of the public who have paid deposits under the instalment payment schemes...Bank Negara Task Force intervenes to revive the project'. And more recently, 'an insurance company recently had to pay back 70c in the dollar thanks to government intervention', said one foreign accountant.

In insolvency administration, the Malaysian courts are relatively free from government interference. This is illustrated, for example, by their

approach in dealing with the government's claims as a creditor in insolvency. As a local accountant said:

> The Civil Law Act is the overriding act that gives the government priority. However, the courts are now upholding the Company Act and the judges have watered down the priority given to the government. For example, see Isabella De Silva's victory in *Lee Cheng Chye v Customs* (1995) where the government's commercial claim was not given priority. As a result of this decision the government must rely on the Companies Act for priority.

The Malaysian courts' strict legalism in insolvency law is illustrated by a barrister who said: '[E]mployees are preferred creditors at law. There have been a string of cases which favour employees. Certain judges will bend over backwards to favour employees'. There is also general agreement among interviewees that in Malaysian courts 'the *pari passu* principle applies generally according to law'. This requires that all creditors with equivalent legal rights will be treated equally.

Hong Kong

Hong Kong's corporate insolvency laws are to be found in Part V to X of the Hong Kong Companies Ordinance, Ch 32. These provisions can be traced back to 1929 United Kingdom legislation, although various amendments to particular sections have occurred over the years. The most substantial of these amendments can be traced back to 1948 United Kingdom legislation. Also, a new corporate rescue regime is currently being introduced. Compared to China and Singapore, Hong Kong's bankruptcy law has operated in a more *laissez faire* environment. There is a widely held view that 'there ought to be minimum government regulation of business'. With regard to insolvency law, the generally accepted view is that the primary role of Hong Kong's law is the protection of creditor and debtor interests and of the community of private business. As one expatriate lawyer in a Hong Kong legal firm told us, '[t]he purpose is twofold: (i) debtor protection; and (ii) as a means of recovering debt. It is a weapon to hold over people's heads'.

The policy aims of Hong Kong's law were described by a senior official in the Official Receiver's Office as follows: '[c]orporate insolvency law in this country is an extension of the business protection principle to the business community. A business community must have an effective insolvency system or rogues will get away with it'. Direct intervention by the government into insolvency cases is, however, rare. As one local accountant recalled, '[t]he government will not seek to prop up companies but there will have been direct government involvement in the mid-80s, for example, like the Overseas Trust Bank, the BCCI case, etc'.

The judiciary in Hong Kong (until Hong Kong's transfer to China) reflects its British heritage. Judges are independent of the executive and the law is applied consistently and uniformly in Hong Kong. As one expatriate lawyer put it, 'because it is too small a place, English law governs it and there is very little local custom remaining'. An eminent local banker in Hong Kong said that, 'I have not heard of cases where people do not respect the law'. Another interviewee said: '[w]e use the British legal system and creditors receive exactly the same treatment under our system. Secured creditors, government and workers get priority'. However, judicial administration of insolvency law mainly involves foreign businesses. The Chinese do not make as much use of formal insolvency law and the courts

to resolve debt recovery. As one foreign solicitor said, '[t]he traditional Chinese approach [is one of] aversion to the legal system'.

Indonesia

Indonesian bankruptcy and insolvency law originated in a special Bankruptcy Ordinance enacted by the former Netherlands-Indies government for the population groups of Europeans and Foreign Orientals (Chinese). The law followed closely the law of bankruptcy then operating in the Netherlands and was promulgated in 1906. Due to the fact that there was a strict segregation between different legal groups in the Netherlands Indies, based on colonial constitutions, most Indonesians came into contact with Western-based laws, such as insolvency law, only very recently (Antons 1997).

At the formal level, bankruptcy law in Indonesia has no significant role as a means of economic and fiscal management by the State. The major use of Indonesian insolvency law is tactical. It provides private creditors with a stronger leverage to secure the recovery of their assets. However, as a creditor, the Indonesian government, through its Ministry of Finance, often collects its debts ahead of other creditors. A local lawyer described how the 'BUPN, an agency of the Ministry of Finance, uses its superior powers, for example, foreclosure without judgement, to give the government an advantage, even over secured creditors'. It is the policy of the BUPN, which was set up for the purpose of settling debts owed to the state, that state-owned companies have priority over other creditors. The BUPN can confiscate property to discharge debts in a similar way to seizure of assets of debtors under Judgment Debt orders. The low regard in the business community for the Indonesian court system has meant that it is rare for an insolvency related matter to be litigated; litigation is usually a sign that informal mechanisms have failed.

The attitude of Indonesian courts was summed up by a foreign banker when he said that 'judges are corrupt and the government always wins'. Courts and judges are subject to the control and management of the Ministry of Justice. There are high levels of uncertainty and inconsistency in the enforcement of insolvency law. Inconsistent enforcement of law is explained by a local lawyer to be the result of Indonesia's 'patriarchal system and culture'. With regard to the principle of equal treatment, for example, one foreign banker said that, '[t]he *pari passu* principle [of equality of creditors] is adhered to by foreign lenders, but whether local companies see it that way is doubtful. As foreigners, we will come out second best'. A local banker summarised a common view when he suggested that 'if you are close to the inner circle you may get a form of protection and often state banks may be required to do things that they would not normally do in like commercial situations'.

4. "MARGINALISATION" OF FORMAL INSOLVENCY LAW

One feature of many non-Western legal systems is a high degree of 'marginalisation' of formal law in the conduct of business and commerce (Jones 1994; Ghai 1986; Winn 1994; Diamond 1971; Nelken 1984; Unger 1976). Instead, there is much reliance on customary usages and traditional practices. In addition, unlawful and coercive means of recovering debt are frequently resorted to by creditors to ensure debt recovery. Jones argued

that businesses in East Asian states rely more upon informal network of relationships rather than the law to protect their interests (Jones 1994). Some breakdown in traditional Chinese collectivist values in business is however occurring in response to sociopolitical intervention. But, according to Jones, 'interactional law' rather than formal bureaucratic law is relied upon to govern business relationships. Consequently, a feature of business and commerce in the East Asian economy is its domination by personal networks of business people, particularly of Chinese origin (Naisbitt 1995; Redding 1990). Overseas Chinese are a network of networks in East and South-east China, and this system is described as follows:

> All the key players among the ethnic Chinese know each other. Their businesses stay singularly apart, but they work together when necessary. They are intensely competitive among themselves, and exclude outsiders, especially those not of the same family, village or clan. When a crisis arises or a great opportunity presents itself, they will close ranks and cooperate (Naisbitt 1995: 15).

While Western law contributes to the regulation of business activities in Asia, it is often not significantly relied upon by indigenous populations. As Antons concluded in an examination of Asian law, 'Western law can neither be seen as the legal basis of Asian society because of its rather insignificant use by indigenous populations for the regulation of their affairs, nor as totally unimportant, because of its impact as an administrative instrument in the process of development and the link to international trade that it provides' (Antons 1995: 112).

Of the six Asian jurisdictions studied here, formal insolvency law is most highly marginalised in Indonesia and Taiwan. In these jurisdictions, traditional and informal means, including illegal methods of resolving insolvencies, are widely used. In Hong Kong, insolvency law is used mainly by foreign enterprises but rarely by Chinese businesses. Cultural and traditional values are a strong influence in the law's marginalisation within Hong Kong's Chinese community. In Malaysia and Singapore, however, the formal insolvency process is much more used and accepted by business enterprises. Traditional and informal methods of resolving insolvencies still linger in the Chinese and Malay communities, but a practical and professional approach has developed strongly in Malaysia and Singapore. In the PRC, however, it is government policy to promote insolvency law as a means of managing and controlling the transition of the Chinese economy into a socialist-market economy. This has resulted in insolvency law's increasing (but still limited) use in China. But there is still resistance to the adoption of the new insolvency law, reflecting Confucian and Communist values and traditional practices. Consequently, traditional means of resolving debt disputes are still widespread in China.

Let us look more closely at this question in relation to each of our six legal systems.

People's Republic of China

In the People's Republic of China, inspite the promotion for increased use of insolvency law by the government as a means of regulating and controlling corporations, there is resistance to its widespread application. As a local government lawyer observed: '[f]or the past ten years traditional Chinese culture has been at variance with these very Western types of law. When you come down to the implementation of the laws you see this'. A foreign accountant also said, of insolvency law, that:

In reality there will be many under-the-table or informal deals done that will deal with a lot of the debt situation. There is not much of a legal system in China, and it will be a rule of men rather than a rule of law, as the legal system in China takes years to develop.

The result is, according to a director of a Law Office in Guangzhou, that '[t]he law itself is very Western but in practice it is a mixture of Chinese tradition and Western ideas'. Traditionally, bankruptcy has been looked upon as 'bad luck'. Bankruptcy in Chinese means 'broke fortune'. According to Chinese tradition, 'if a father owes a debt, the son is responsible for his father's debt. In feudal society, even a grandson is responsible for his grandfather's debt...A grandson may even have a debt or obligation before he is born under the feudal system', said a senior official from the Commission of Legislative Affairs, Standing Committee of the National People's Congress. 'Traditionally, Chinese treat friendship as more important than individual interests', said one academic lawyer. A second influence is Confucianism. As a local lawyer suggested, 'Confucianism encourages balance and harmony. Unless there is no other choice, people will try to keep their friendships and relationships intact. As a result, it is difficult to declare bankruptcy in China.'

Socialist attitudes have also inhibited the acceptance of the new insolvency law. The influence of traditional and communist attitudes to debt was described by a foreign accountant as follows:

Because during the past 40-50 years there has been a Communist system in China people do not believe that corporations can go bankrupt as it suggests Communism can be bankrupt...The Confucian ideal is to seek for balance and to seek the middle way — they don't want to see something as extreme as the bankruptcy of a SOE. There is a fear of losing face and they don't want to be seen as managerial failures.

The settlement of bankruptcies is 'very commonly through the use of connections. Companies in the PRC are often far more powerful than the courts, and so it is difficult for the courts to do anything' said a legislative drafter in Beijing. A member of the Drafting Committee of the new Bankruptcy law observed that 'non-legal means are used a great deal. For example, compensation outside the court provisions is found in section 83 ... In addition, in re-organisation proceedings we leave a large amount of room for parties to negotiate outside court'. And as a foreign accountant suggested, 'non-legal means are used all the time. They are preferred as the legal system is so immature in China. They prefer to settle things through the use of relationships'.

Taiwan

Turning to Taiwan, it has been suggested that the relational structure of traditional Chinese society has survived in a modified form which blends elements of the modern legal system into networks of relationships. According to Winn:

The interaction of law and society in Taiwan might more accurately be characterised as "the marginalisation of law", a process which the ROC legal system plays a significant role in Taiwanese society but is often displaced by a more fundamental source of social organisation — fluid, highly contextual networks of human relationships (Winn 1994: 196-7).

The reluctance of the business community to have recourse to formal insolvency law in Taiwan is explained by a range of factors. In Taiwan, 'the cultural tradition is that companies are family controlled, even those

listed on the stock exchange. This tradition may prevent cases going to court' said a partner in a law firm in Taipei. There is often reliance on *guangxi*, or mutually beneficial personal relationships, to settle the payment of debts. And a partner in an international accounting firm suggested that '[i]t is Chinese culture. It affects everything...There is a tendency for compromise and out of court settlements. People in Taiwan do not like to go to the courts'. A partner in an international accounting firm in Taipei also observed that in Taiwan, 'being an Asian country, people take bankruptcy very seriously and it is the last thing that anyone would want to go into'. According to one lawyer, '[b]ankruptcy is a foreign concept. We adopted this concept from the civil systems of Europe and it is not a native concept in our history'. According to a lawyer in an international legal firm, '[o]ne cultural attitude is not wanting to be the bad guy who forces the collapse. So, there is a tendency not to resort to bankruptcy if possible. So, there are few corporate bankruptcies'. An interviewee from an international accounting firm suggested therefore that political interference in the insolvency process contributes to insolvency law's marginalisation.

Informal means of settling debt are common in Taiwan. A local partner in an international accounting firm said that '[g]iven the fact that people try to avoid the courts, there will always be negotiation. The use of other non-legal means depends on the level of the economy you are at. At the lower levels there are loan sharks and more criminal activity. I have heard that some companies may hire a company to collect debts — "I'll break your knees if you don't pay shortly — like yesterday" '. Underground methods are often used in Taiwan to settle debt problems. According to one lawyer and a member of the Judicial Review Committee:

> Some creditors go underground to recover assets. If a creditor knows you have assets elsewhere, they use underground persons to assist, for example, there are many kidnapping cases involved in this area ... Lawyers decline to become involved as administrators because often the underground is involved. If these sort of people lose their money they become crazy and mad. People who get involved risk their lives.

Hong Kong

In contrast, in Hong Kong, insolvency law is used mainly by foreign creditors and corporations, and rarely by Chinese businesses. Hong Kong's insolvency law 'is there to ensure that creditors get their money back', as one expatriate lawyer in an international law firm put it. Its administration is legalistic in order 'to assist creditors in the recovering of their debt in accordance with their legal rights', observed an accountant with an international firm. Few Chinese businesses, however, use the legislation as it is perceived to be based on foreign laws, rather than on Chinese social tradition. 'It is a tradition that people will pay their creditors when they can — there is a moral obligation to pay creditors' said one expatriate accountant. According to one major international accounting firm, in Hong Kong, 'there has been little purely Chinese insolvency. We are involved with foreign investors who come unstuck. Chinese families stick together generally except where they want to make an example of someone or recognise the situation is beyond their collective means'. An expatriate accountant said, of the insolvency law, that '[w]e have an English system imposed in Hong Kong, which does not necessarily reflect how Hong Kong

works. The Chinese system is one of self reliance, where people aim to solve their problems themselves — you keep it within the family'.

In Hong Kong the extent of the use of non-legal means of dealing with insolvencies is described by an expatriate accountant as follows:

> Before an administration starts, a lot of pressure can be applied on debtors (for example, triads and collection agencies). This tends to sort out any problems — even if it is a public company because there are always families behind them. Non-legal means are not an issue after insolvency begins.

But, as an expatriate lawyer suggested, 'triads still operate. There are also quite a lot of private debt collection agencies. It is a growing industry in Hong Kong'. As a senior official of the Official Receiver's office in Hong Kong acknowledged, the use of debt collectors 'is quite frequent. It is cheaper'.

Indonesia

Similar tendencies leading to the marginalisation of insolvency law are evident in Indonesia, where very little use made of the formal procedures of insolvency administration. Insolvencies in Indonesia are more often resolved by relying on traditionally consensual methods, or by using extra-legal means, than by having recourse to formal law. One expatriate officer with a foreign bank observed of Indonesian insolvency law that '[t]he recovery of debt should be the main purpose but it does not show through. In Indonesia it is seldom that you will even see a formal insolvency as most are conducted informally through arrangements and negotiations by powerful business interests'. According to a foreign lawyer with an Indonesian legal firm, '[t]he main purpose is to call the ultimate bluff when all other avenues have evaporated'. Further, '[i]f banks enforce securities, it is usually because of political connections, for example, an official causes the action to be brought', said a foreign accountant from an international firm in Jakarta.

One foreign accountant with an international accounting firm said to us that , '[i]nsolvency law doesn't work according to law but according to face saving'. An Indonesian law professor and senior partner in a local law firm also said that 'avoidance of insolvency is a cultural factor. I have been involved in this area for 3 years and I have noted that with corporations that are not yet declared bankrupt [for example, Bank Summa], creditors and the public seek to solve the problem in the honourable or peaceful way rather than go to court. They think it is best to settle in the family way'. In Indonesia, insolvencies are 'being settled by other means' according to a foreign accountant. A foreign lawyer noted that '[t]o the extent that there are bankruptcy problems, non-legal means are the primary means of solving the problems — by calling in favours, helping people out, promises of future favours'. Those with 'financial muscle and political connections' and 'positions of power' can rely on extra-legal means of resolving bankruptcy difficulties. In Indonesia, 'most large corporations have influence and can get favours'. One interviewee also suggested that, '[i]f the company is large and of strategic significance or has influence, the government will help directly or ask another SOE to help'.

Malaysia

In Malaysia, however, there is less evidence that insolvency law is marginalised, at least by large business. Insolvency law which, according to an officer in a foreign bank, 'follows from the English law and is concerned with the ordinary recovery of debt', is seen as serving important purposes for Malaysian businesses. They are 'to help with the orderly administration of insolvencies and to provide certainty and predictability to commercial transactions and in the protection of creditors', according to a local accountant with an international firm of accountants. A foreign lawyer suggested that there is a more business-oriented approach to insolvency in Malaysia as it 'has such a multi-cultural society [and] that there is no one cultural regime affecting insolvency. It is a so-called Asian culture with a transplanted legal regime. Bank officers do not have any cultural inhibitions with taking action'. Some residual cultural influences, however, remain, especially amongst the Chinese. According to one interviewee, 'the strictest culture is Confucianism because of the long history of commerce in China where "my word is my bond". In such a culture, if you failed to deliver then you were outlawed and being bankrupted was even worse'. But even in the Chinese community in Malaysia, as one interviewee said, 'Chinese community traditions are on the decline, as foreign educated children (who are not as obedient to those values) take over from the family patriarchs'. And, as another interviewee put it simply, ' [g]reed is now the ruling force'.

In Malaysia, the use of unlawful means of collecting debt is not common and is limited to particular types of loans. As one interviewee said: '[n]egotiations are commonly the usual starting point. Strong arm tactics may be used at the lower levels prior to legal proceedings. However, they are not common because you can report it to the police. Occasionally, you will get debt collectors who merely pressure and harass in front of customers'. And, as a local lawyer said: '[i]n Malaysia, I have known files to "go missing" in the court office — court clerks may be bribed. In addition, 11th hour tactics are common, like lodging spurious counter-claims'.

Singapore

In Singapore, as in Malaysia, insolvency law is widely used by business. The law is administered highly legalistically. According to a lawyer with a Singapore legal firm, 'corporate insolvency law is the means of compelling parties to settle outstanding debts in Singapore. Winding up proceedings are taken out often in Singapore. Even if the company is insolvent and you will get nothing out of it, the proceedings are still taken out as a form of punishment'. The influence of traditional Asian values on insolvency law administration has declined to relative insignificance. 'Insolvency is very straight forward and practical', said one interviewee. 'These cultural factors don't affect insolvency in Singapore. The laws are based on British and Australian laws. Unless you are talking about a very Chinese company where there may be a loss of face. But not otherwise', said a partner in a local legal firm. Most interviewees agreed that any residual influence of cultural factors on insolvency law is declining further with recent reforms of insolvency law which promote greater business competitiveness.

Consequently, in Singapore, the use of non-legal means of settling debt is not common. A partner in a local legal firm said to us that '[n]on-legal

means are not used among larger corporations. It is not very common, but I am sure it exists'. Another Singapore lawyer agreed, and he said that the use of non-legal means is '[v]ery negligible. Less subtle pressures are quite rare. It is very common in Malaysia but the criminal law in Singapore is just not worth tangling with. There are no longer cases where the family will be called upon to rescue, for example, their sons. Now, modern business will dictate what occurs. The father will turn his back on the son'. According to a partner in an international accounting firm, '[n]on-legal means are used to a much lesser extent in Singapore. After all negotiation fails, then insolvency is used...The use of force is very uncommon in Singapore".

5. CONCLUSIONS

Political and legal elites in Asian states frequently proclaim adherence to rule of law values. However, such statements should not be taken at face value, or at least, they should be interpreted by reference to local conditions, cultural values and practices. However, Asia is not dramatically different in that regard from many Western legal systems in which the rule of law rhetoric usually serves only symbolic purposes and is often used merely as a legitimation device. For this reason, debates about the rule of law have become relatively infrequent in the West and have only recently resurfaced largely due to the serious difficulties which many legal systems have faced in meeting the promise of the rule of law rhetoric in the face of a rising tide of expectation of due process and the resolution of social and economic questions through often overburdened legal institutions.

In the six legal systems discussed in this paper, there is clearly a strongly stated view that insolvency matters are susceptible to processing through the application of the rule of law. But, in reality, it is rare for this to occur. One reason for this, of course, has been that rising economic prosperity has brought about a relatively low level of insolvency, at least compared to the West. As we have seen above, the explanation for the widespread failure to mobilise insolvency laws in dealing with corporate debt are somewhat more complex. In many jurisdictions, these can be related to either the poor development of judicial and related legal structures for dealing with insolvency, or to the political or administrative constraints which are placed on these structures. Cultural factors also suggest little faith in the promise of the rule of law and have often led to a preference for the use of informal or even illegal methods of dealing with business debt. Whilst none of the legal systems discussed here are static, it is nevertheless clear that there are significant restraints upon the degree to which unqualified rule of law values can be implemented. Indeed, informal mechanisms of dealing with insolvency may well become more prevalent. But, this, in itself, is not an undesirable development.