Speech by the Hon Wong Yan Lung, SC, JP
Secretary for Justice
at the speaker luncheon organized by
the Hong Kong Democratic Foundation
on 26 June 2006

"Rule of Law – The Recent Experience"

Ladies and Gentlemen,

Thank you for inviting me to speak today.

2. The Hong Kong Democratic Foundation is a well established political think tank in Hong Kong. Your members as well as the guests invited today are all familiar with the affairs of Hong Kong. I would not do you justice if I were to speak on elementary matters regarding the rule of law.

3. Instead, I think you might find it more useful and interesting for me to comment on some more recent events in Hong Kong, which, hopefully, will demonstrate to you how the rule of law is faring 9 years since the Re-unification.

4. Also, how these issues have emerged and been tackled may also help us reflect on some of the changes on the social, economic and political landscape of Hong Kong.

5. The topics or cases I have selected touch on some of the fundamental human rights, such as freedom of expression and assembly, the right to privacy, and property right, as well as the cardinal independence of the judiciary.

THE PUBLIC ORDER ORDINANCE

6. Let me start with the controversial Public Order Ordinance. It was enacted in 1967, at a time when there had been serious rioting in Hong Kong and there was a perceived need for the prevention and control of disorder. As a result, many of its original provisions were (according to today's standards) draconian. For example, public processions consisting of more than 20 people had to be authorized by a *licence* issued by the Commissioner of Police.

7. I won't bore you with the legislative history regarding the proposed amendments and the passage through the handover. Suffice it to say that the new scheme enacted in 1997 was not a licensing scheme, but a notification scheme.

8. Those proposing to organize public meetings of more than 50 persons, or public processions of more than 30 persons, are required to notify the Commissioner of Police. The Commissioner may only restrict or prohibit a gathering where he reasonably considers that this is necessary in the interests of national security or public safety, public order ***(ordre public)*** or the protection of the rights and freedoms of others.

9. Those grounds are the same as those set out in the International Covenant on Civil and Political Rights as being permissible grounds for restricting freedom of assembly.

10. In practice, regular public gatherings have continued to take place since Reunification. From July 1997 until January this year, 18,628 public meetings or processions were held – an average of 6 per day. During

that period, only 10 public meetings and 11 processions were prohibited or objected to because of concerns for public safety and public order. Of these, 9 subsequently took place after the organizers revised their routing, venue or scale of gathering.

11. Although this experience may point to the legislation having been on the liberal side, opposition to the Public Order Ordinance has nevertheless been expressed at regular intervals.

12. In December 2000, a motion debate was held on this subject in the Legislative Council. Before it took place, the Council organized public hearings and received about 240 submissions. More than 75% of the submissions favoured retaining the Ordinance in its existing form. After a nine-hour debate, the Legislative Council passed a motion to the effect that the legal provisions relating to the regulation of public meetings and processions should be preserved.

13. But that was not the end of the matter. There were still those who claimed that the notification system was inconsistent with human rights guarantees in the Basic Law. Some organizers of public gatherings refused to notify the police, saying that this requirement was unlawful.

14. Eventually, one such organizer, Mr Leung Kwok-hung, our famous Mr. Long Hair, was prosecuted for failing to comply with the notification requirement. In his defence, he claimed that the provision was unconstitutional.

15. The case eventually reached the Court of Final Appeal. The court began its judgment by emphasizing the importance of freedom of speech and freedom of peaceful assembly. I quote –

> "….These freedoms enable such dialogue and debate to take place and ensure their vigour. A democratic society is one where the market place of ideas must thrive. These freedoms enable citizens to voice criticisms, air grievances and seek redress….. Minority views may be disagreeable, unpopular, distasteful or even offensive to others. But tolerance is a hallmark of a pluralistic society. Through the exercise of these freedoms minority views can be properly ventilated."

16. The court then analysed the constitutional requirements that must be satisfied before a restriction on these rights is permissible. They are –

(1) the restriction must be *prescribed by law*, and

(2) the restriction must be *necessary* in a democratic society in the interests of one of the grounds specified in the International Covenant on Civil and Political Rights, and must be *proportionate* to the purpose of protecting those interests.

17. The court concluded that the notification system itself satisfied these tests. As to the grounds on which the police can object to a public gathering, the court ruled that any law which confers discretionary powers on public officials, allowing them to interfere with fundamental rights, must give

an adequate indication of the scope of the discretion. Applying that test to the ground of "public order (***ordre public***)", the court held that the French expression, which has a broader meaning than public order, did ***not*** give an adequate indication of the scope of the discretion.

18. The remedy, the court said, was to strike out those French words from the legislation, but to leave the rest of the scheme in place. As a result, Mr Leung's conviction was upheld.

19. This account of the Public Order Ordinance is, I believe, noteworthy for several reasons. First, it reflects some of the political tensions that existed at the time of Reunification, but also shows how those tensions were resolved in a constructive way. Secondly, it demonstrates the importance that the Hong Kong community and the SAR government place on the protection of freedom of assembly. Thirdly, it shows how legal disputes can be resolved through litigation before an independent judiciary that jealously guards human rights.

MC6

20. Not long after the CFA delivered the landmark judgment, the principles were put to test when Hong Kong played host to the 6th Ministerial Conference of the World Trade Organization ("MC6").

21. There were over 10,000 participants at MC6, including foreign ministers and internationally protected persons from 22 countries. There were also thousands of protestors, many of whom from overseas.

22. As you all know, some previous WTO conferences held elsewhere had been the occasion of serious public disorder and disrupted official meetings. As the host government, the Hong Kong SARG had an obligation to ensure that it would be safely and smoothly held. At the same time, it was committed to acting strictly in accordance with the law, and to respecting the constitutional rights of protesters to free speech and peaceful assembly.

23. I don't think I will ever forget that eventful Saturday evening when I was monitoring the situation outside the Convention Centre, when the anti-riot police were being attacked on various fronts by a number of WTO protestors. The spraying of the pepper mist did not seem to be working. Should the police escalate their force? Is it time? What if the confrontation turns bloody?

24. I am pleased to say, as most people agree, the Hong Kong police force did a very good job, striking the right balance. After the event, the Police estimated that about 4,000 overseas and 2,500 local protesters took part in the various demonstrations and processions. Over 105 public order events occurred. Of these only eight involved an element of public disorder or violence.

25. I should add that in the run-up to MC6, the Department of Justice was closely involved in the preparation, helping the police to anticipate events, and advising them in advance how they should react.

26. I have recounted these events because I believe they are a vivid illustration of the fact that law and order, and the protection of human rights, are <u>not</u> conflicting concepts, but one needs great wisdom and sensitivity in

striking the right balance, after considering the key issues of necessity and proportionality.

27. I think we got it more or less right, and thus managed to diffuse the tensions and frustrations which could otherwise escalate into ugly violence. MC6 is a kind of baptism by fire and we have benefited greatly from that experience. Hong Kong has matured a lot on these matters and we are now ready for any major international events.

INTERCEPTION OF COMMUNICATION AND COVERT SURVEILLANCE

28. Let me turn now to another hot topic, which is very much current, namely, interception of communication and covert surveillance.

29. Before the implementation of the Basic Law, telephone tapping in Hong Kong was carried out pursuant to an old enactment Section 33 of the Telecommunications Ordinance, which is a very simple and short section providing that the Governor or an authorized officer could order the interception of telecommunications "whenever he considers that the public interest so requires". This was, as the Court recently ruled, not sufficient in terms of providing the necessary safeguards against infringement of the right to privacy of communication, which is guaranteed under Article 30 of the Basic Law.

30. The government accepted that legislation was needed to deal with both telephone tapping and covert surveillance, but knew that this would

take some time to prepare. In the meantime, some temporary measure was needed to ensure that the law enforcement agencies could continue to rely on covert surveillance.

31. The solution found was for the Chief Executive to issue an Executive Order under Article 48(4) of the Basic Law. The government accepts that an Executive Order is not a source of law, and cannot change the law. It was considered that an Executive Order could provide the "legal procedures" under Article 30 of the Basic Law in accordance with which covert surveillance would be lawful.

32. This view did not go uncontested. Mr Leung Kwok-hung brought proceedings challenging the lawfulness of, inter alia, the telephone intercepts under the Telecommunications Ordinance and the CE's Executive Order.

33. In February this year, the Court of First Instance gave its judgment. With regard to telephone intercepts, it declared that, insofar as section 33 of the Telecommunications Ordinance authorises or allows access to, or disclosure of, the contents of any message, it is unconstitutional. It was held to violate the relevant provisions in the Basic Law, the International Covenant on Civil and Political Rights and the Hong Kong Bill of Rights Ordinance.

34. The court held that the Executive Order was lawfully made but that it was not capable of laying down a body of "legal procedures" that satisfied Article 30 of the Basic Law.

35. Had matters rested there, the law enforcement agencies would have been unable to conduct telephone intercepts or covert surveillance until the new legislation was enacted. That would have had devastating consequence for law and order. The government therefore asked the court to grant temporary validity to section 33 of the Telecommunications Ordinance and to the Executive Order.

36. There was no precedent for such an order in Hong Kong, and the Basic Law does not expressly confer a power to make such an order. However, there were precedents from other jurisdictions, particularly from Canada, to the effect that temporary validity could be ordered in exceptional situations. The Hong Kong court followed those precedents. Being satisfied that any legal vacuum brought about by its rulings would constitute a real threat to the rule of law in Hong Kong, it ordered that the effect of the declarations be suspended for a period of six months.

37. Since that decision was announced, a Bill has been introduced into the Legislative Council and is being carefully scrutinized by a Bills Committee. We are trying hard to get it enacted before the period of temporary validity expires. The Bills Committee has just finished the clause-by-clause vetting. I understand the Committee is dealing with the Committee Stage Amendments.

38. I would add that, in May this year, the Court of Appeal affirmed the decision of the Court of First Instance. An appeal is, however, pending to the Court of Final Appeal and so the matter is still not finally determined.

39. This development has many interesting angles. Firstly, as further demonstrated by the recent events in the US, the question of telephone

intercepts and covert surveillance raise difficult questions concerning the proper balance between the interests of security and law and order on the one hand, and the right to privacy on the other.

40. Secondly, it also raised the important question of the role of the Judiciary. The doctrine of temporary validity is an example of judicial realism and activism. The court is not turning a blind eye to the detrimental consequence of a ruling which is the only correct conclusion as a matter of strict law. How far can the court go? The CFA will be grappling with this difficult question soon.

LINK REIT

41. The next matter I want to briefly mention is perhaps better known internationally. It concerns the listing of the Link Real Estate Investment Trust, or Link REIT for short.

42. Most of you will be familiar with this matter. You remember the uncertainty created by this litigation which started by an elderly lady causing the Housing Authority to call off the global offer of unit trusts. This caused great embarrassment all around. Had the offering been completed, the Authority would have received from Link REIT about $30 billion. Expenses of over $100 million had been spent on the global offering exercise.

43. In July 2005, the Court of Final Appeal determined that the Housing Authority was acting lawfully in divesting itself of these assets. The offering was re-launched in November 2005.

44. What is one to make of all this? In hindsight, some may say the litigation was a serious setback to the Authority and the thousands of potential investors around the world. Some queried whether the court challenge was an abuse of the process of the court. But the court granted leave to the applicants to bring the proceedings – which it would not do if the application was wholly without merit.

45. The main lesson of those events was, I believe, that the rule of law is paramount in Hong Kong. This David and Goliath battle may have resulted in a defeat for David, but the fact remains that it is possible to challenge the acts of public authorities in Hong Kong on the basis that they are unlawful. Eventually, the victory belongs to the rule of law in the long run. That should be reassuring to Hong Kong residents and to international businessmen alike.

BACKYARD POULTRY

46. The last matter I want to mention which highlights the give and take nature of our law concerns precautions against bird flu. The banning of backyard poultry triggered another challenge that the Government acted in breach of Article 105 of the Basic Law, which protects property right.

47. As you know, measures are being taken all around the world to minimize the risk of avian flu. In February this year, the SAR Government decided that action was needed in respect of backyard poultry. Evidence indicated that poultry kept otherwise than in licensed farms posed a public

health threat, since they were not subject to bio-security arrangements or systematic vaccination.

48. The government therefore planned to ban the keeping of backyard poultry in Hong Kong. In order to achieve this, legislation was needed. But there was a further complication. Article 105 of the Basic Law provides, inter alia, that the HKSAR shall protect the right to compensation for lawful deprivation of their property.

49. The question was whether the banning of backyard poultry would breach Article 105. Case authorities show that a restriction on the use of property can be justified if it is in accordance with law, is for a legitimate purpose and is a proportionate measure. However, would this ban amount to a "deprivation of property" leading to a right to compensation? There is almost no Hong Kong jurisprudence on this issue, and so my department had to conduct extensive research into jurisdictions which have similar property rights protection – particularly the European Union and the USA.

50. For reasons I need not elaborate, we advised that there was no deprivation of property as the owner of the less than 20 chicken could have put them into meaningful alternative use. Thus, compensation did not have to be paid. It will not surprise you to learn that court proceedings have been instituted, challenging that decision.

51. Given those are still pending proceedings, I will not comment further on the legal issue. However, what these events again illustrate is the extent to which government policies are now subject to the scrutiny and

challenge on constitutional grounds, and how delicate it is to strike a balance between competing interests of society.

CONCLUSION

52. Ladies and gentlemen, I hope the above also gives you an idea of what exciting and also exhausting life I am leading in my present position.

53. I will end with a word of wisdom given to me by someone who, like many of you, is a veteran about Hong Kong matters. This is one in the series of advice to the new and young Secretary for Justice that I am collecting: “do your best not just to make the law something to be feared and obeyed, make the rule of law something that people, including those who have just come into contact with it, will find it necessary to nurture and to have.”

54. To that end I will devote my energy. I will cherish more advices from you all. Thank you.