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CACV 73/2006 AND CACV 87/2006

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IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 73 OF 2006

(ON APPEAL FROM HCAL NO. 107 OF 2005)

BETWEEN

LEUNG KWOK HUNG	1st Applicant
KOO SZE YIU	2nd Applicant
and	
CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION	Respondent

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LEUNG KWOK HUNG	1st Applicant
KOO SZE YIU	2nd Applicant
and	
CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION	Respondent

Before: Hon Stuart-Moore VP, Yeung and Tang JJA in Court
Date of Hearing: 26 April 2006
Date of Judgment: 10 May 2006

J U D G M E N T

Hon Tang JA (giving the judgment of the Court):

Introduction

1. The freedom and privacy of communication are fundamental rights. They are protected by the Basic Law as well as the Hong Kong Bill of Rights Ordinance, Cap. 383 ("the Hong Kong Bill of Rights").

2. These fundamental rights and the limited basis upon which they may be infringed can be found in the following provisions:

> Basic Law
>
> "Article 30
>
> The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences. ("Article 30")

> Article 39
>
> The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
>
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article. ("Article 39")"
>
> Hong Kong Bill of Rights
>
> "Article 14 (identical to the Article 17 of the International Covenant on Civil and Political Rights ("ICCPR"))
>
> Protection of privacy, family, home, correspondence, honour and reputation
>
> (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> (2) Everyone has the right to the protection of the law against such interference or attacks."

3. Thus, under Article 30, inspection of communication by the relevant authorities "in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences" is permitted. Under Article 39(2), the rights and freedoms under Article 14 of the Hong Kong Bill of Rights "shall not be restricted unless as prescribed by law". And that such contraventions shall not contravene the provisions of Article 14 of the Hong Kong Bill of Rights, which require that any such law must protect against "arbitrary or unlawful interference".

4. This appeal concerns covert surveillance by government and whether they fall within the limited power of the government to infringe

upon the freedom and privacy of communication which are fundamental rights.

5. We have as guidance for our approach, the following observation in the judgment of the Court of Final Appeal in *Leung Kwok Hung and Others v HKSAR* [2005] 8 HKCFAR 229 at 248C:

> "16. It is well established in our jurisprudence that the courts must give such a fundamental right a generous interpretation so as to give individuals its full measure. *Ng Ka Ling v. Director of Immigration* (1999) 2 HKCFAR 4 at 28-9. On the other hand, restrictions on such a fundamental right must be narrowly interpreted. *Gurung Kesh Bahadur v. Director of Immigration* (2002) 5 HKCFAR 480 at para.24. Plainly, the burden is on the Government to justify any restriction. This approach to constitutional review involving fundamental rights, which has been adopted by the Court, is consistent with that followed in many jurisdictions. Needless to say, 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 on them."

Background

6. There is no operative Hong Kong legislation that provides for all forms of covert surveillance. There are, however, a number of operative statutes which provide for secret interception of limited types of private communications. Such statutory provisions included section 33 of the Telecommunications Ordinance ("section 33"), Cap. 106, which gives the Chief Executive power, whenever he considers that the public interest so requires, *inter alia*, to order the interception or disclosure to the government of telecommunications.

7. On 27 June 1997, the Interception of Communications Ordinance, Cap. 532 ("IOC Ordinance") was passed to:

> "provide laws on and in connection with the interception of communications transmitted by post or by means of a telecommunication system and to repeal section 33 of the Telecommunication Ordinance." The preamble

8. Section 1 of IOC Ordinance provides:

> "(2) This Ordinance shall come into operation on a day to be appointed by the Governor by notice in the Gazette."

9. No date has been appointed by the Chief Executive.

10. On 5 August 2005, the Law Enforcement (Covert Surveillance Procedure) Order ("the Executive Order") was published to address concerns about non-compliance with the requirements of Article 30. The background to the Executive Order has been dealt with fully by the judge and it is not necessary for us to repeat them. It is the respondent's case that while the Executive Order is an administrative order only and is not law, it constitutes "legal procedures" for the purposes of Article 30.

11. On 9 February 2006, Hartmann J made the following declarations:

> "1. The Law Enforcement (Covert Surveillance Procedure) Order ("the Executive Order") issued by the Chief Executive of the Hong Kong Special Administrative Region on or about 4th August 2005 comprises administrative directions only and does not constitute a set of "legal procedures" for the purpose of Article 30 of the Basic Law of the Hong Kong Special Administrative Region; and

> 2. Insofar as s.33 of the Telecommunications Ordinance, Cap. 106, authorises or allows access to or disclosure of the contents of any message or any class of messages, it is unconstitutional, void and of no legal effect in that it violates Articles 30 and 39 of the Basic Law and Article 17 of the International Covenant on Civil and Political Rights, 1966 / Article 14 of the Hong Kong Bill of Rights Ordinance, Cap. 383;"

12. He also ordered:

> "3. Notwithstanding the judgment of the court and the declarations herein, section 33 of the Telecommunications Ordinance and the Executive Order, are valid and of legal effect for a period of six months from the date hereof, the parties having liberty to apply;" (the Order)

13. Both the 1st and 2nd applicants have appealed against the Order.

14. Before the judge, the applicants also sought the following relief in relation to the IOC Ordinance:

> "'(i) A Declaration that the Chief Executive by failing or refusing to bring into force the Interception of Communications Ordinance, Cap. 532 had acted unlawfully in breach of his duty under s.1(2) of the Ordinance and arts.48(2) of the Basic Law of the Hong Kong Special Administrative Region; and
>
> (ii) A Declaration that the Chief Executive has a legal obligation forthwith to appoint a day by notice in the Gazette for the Ordinance to come into operation in its present form.'
>
> Further that, should declaratory relief not be effective, the applicants sought leave to apply for mandatory relief to the following effect :
>
> 'An order of Mandamus directing the Chief Executive of the Hong Kong Special Administrative Region to appoint a date for the commencement of the Interception of Communications Ordinance, Cap. 532.'"

15. The 1st applicant has appealed against the judge's refusal to declare that the Chief Executive, in failing to appoint a date for the implementation of IOC Ordinance, has acted unlawfully.

16. There is no appeal against the second declaration. In any event, we agree with the judge's conclusion and the reasons stated by him, namely, that:

> "126. For the reasons given, I have concluded that art.30 of the Basic Law and art.14 of the Bill of Rights (both as read with art.39(2) of the Basic Law), in protecting the same fundamental right in essentially the same manner, incorporate into their constitutional requirements the need for the existence of laws which make for legal certainty and require that any limitations on the right, as a characteristic of that legal certainty, be proportionate. On that basis, I fail to see how it can be said that s.33 meets the requirements of those constitutional articles upon which the applicants have relied."

17. The respondent has appealed against the 1st declaration.

The appeal

IOC Ordinance

18. In para. 97 of the judgment, the judge concluded as follows:

> "97. In summary, it has not been demonstrated to me that the Chief Executive, in failing to appoint a date for the implementation of the IOC Ordinance, has exceeded his powers and thereby acted unlawfully. I am satisfied he has at all times acted within his powers. There will be no declaration that he has acted unlawfully nor will there be a declaration that he must forthwith appoint a day for implementing the IOC Ordinance."

19. The 1st applicant (but not the 2nd applicant), has appealed against the judge's decision in this regard.

20. The 1st applicant relies principally on the submissions made by Mr Dykes SC to the judge, which were dealt with in paras. 47 to 98 of the judgment. On the basis of the leading authority on the subject, namely, the decision of the House of Lords in *R v Secretary of State for the Home Department, ex parte Fire Brigades Union & Ors* [1995] 2 AC 513, the judge concluded that section 1(2) of IOC Ordinance did not:

> "… impose a legally enforceable duty on the Secretary of State to bring the enacted provisions into force at any particular time…" (Para. 53 of the judgment)

21. The relevant wording of the provision under consideration in *Fire Brigades Union* was:

> "… that provisions of the 1988 Act 'shall come into force on such day as the Secretary of State may … appoint.'" (See para. 54 of the judgment)

22. We agree with the judge that although the wording of section 1(2) of IOC Ordinance is different, the meaning and intent is the same. We also agree that, section 1(2) did not impose a duty on the Chief Executive to bring the IOC Ordinance into force at any particular time, although it did impose a continuing obligation on the Chief Executive to consider whether to bring it into force.

23. We also agree with the judge that:

> "72. In respect of the present case, therefore, the Chief Executive, while not bound by any finite timetable, has at all times remained

> under a statutory duty, to be discharged in good faith, to actively keep under consideration whether or not an appropriate time has come to bring the IOC Ordinance into operation. That duty cannot be abrogated.
>
> ……
>
> 96. In the final analysis, it seems to me that, if the Chief Executive was to advocate his position as to the discharge of his statutory duty under s.1(2) of the IOC Ordinance, he would be able to do so accurately (in fact and law) as follows : 'After an in-depth review, taking into account such matters as the changing technology of communications and the rise of global terrorism, I have come to the conclusion that the scheme contained in the Ordinance, which the Administration has always opposed as being unworkable, has, against the moving landscape of recent history, shown itself very definitely to be so. That being the case, I have now returned to the Legislative Council seeking to be relieved of the statutory duty imposed upon me in terms of s.1(2) of the Ordinance by asking for a repeal of the Ordinance and its replacement by a new statutory regime. But these matters will, of course, be for the Legislative Council to determine.'"

24. The 1st applicant submitted that Article 48(3) of the Basic Law ("Article 48(3)") requires the Chief Executive to sign the IOC Ordinance into law. Article 48(3) provides:

> "Article 48
>
> The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions:
>
> ……
>
> (3) To sign bills passed by the Legislative Council and to promulgate laws;"

25. Article 48(3) does not assist in the interpretation of section 1(2) of the IOC Ordinance, which gives the Chief Executive the discretion to determine when a law should become operative. The Legislative Council could have provided for the time within which the legislation must become

operative, in which event, the Chief Executive would have to sign the legislation, unless he invokes Article 49 of the Basic Law ("Article 49").

26. Article 49 provides that the Chief Executive may return a bill passed by the Legislative Council to the Legislative Council within three months for reconsideration, if he considers that the bill is not compatible with the overall interests of the Region. But if the original bill was passed by not less than a two-thirds majority, the Chief Executive must sign and promulgate it within one month or act in accordance with the provisions of Article 50 under which he may dissolve the Legislative Council.

27. The judge concluded that Articles 49 and 50 of the Basic Law were not engaged. Rather, the issue is one of construction of section 1(2) of IOC Ordinance. We agree.

28. The 1st applicant's appeal in relation to the IOC Ordinance is dismissed.

The First Declaration

29. The Executive Order was issued by the Chief Executive under Article 48(4) of the Basic Law. These are directions of an administrative kind which are made by the Chief Executive for the purpose of implementing laws and carrying out government policies. The Executive Order was gazetted in August 2005. It is directed to and binds officers of the public service responsible for law enforcement. It directs that no exercise in covert surveillance may be carried out without authorization. It

also provides for regular reviews by monitoring authorities of the exercise or performance by the authorising officers of the powers and duties conferred or imposed on them by the Executive Order. However, the monitoring authorities are themselves government officers.

30. Mr Zervos SC, appearing for the respondent, submitted the Executive Order came within the meaning of "legal procedures" in Article 30, and that such legal procedures need not be prescribed by law. That insofar as Article 39 requires that any restriction on Article 14 of the Hong Kong Bill of Rights be prescribed by law, it has been qualified by Article 30. Mr Zervos accepted that but for Article 30, any infringement of Article 14 of the Hong Kong Bill of Rights must be prescribed by law.

31. The judge rejected Mr Zervos' submission in the following terms:

> "145. For the Chief Executive, Mr Zervos has submitted that, on a proper construction of art.30 of the Basic Law, the phrase 'in accordance with legal procedures', being broad in its language, includes procedures that are legally established under a statutory or other legal power, duty or function and is not to be equated with the phrases 'in accordance with law' or 'prescribed by law'. I disagree. In this regard, I can do no better than repeat what I have said in para.122 of this judgment; namely that, when the framework of art.30 is considered as a whole, the requirement that the right to freely and privately communicate with others 'shall be protected by law' must be read as being complemented by the provision that any limitation of the right must be 'in accordance with legal procedures'. Those legal procedures, therefore, are not distinct from but are part and parcel of the protection of the right which must be provided by law.
>
> 146. In support of his submissions, Mr Zervos relied on the observations of Keith J (as he then was) in *The Association of Expatriate Civil Servants of Hong Kong v. The Chief Executive* [1988] 1 HKLRD 615, at 622. In looking to this judgment, I

> accept of course, just as Keith J accepted, that the phrase 'in accordance with legal procedures' is a broad and general phrase and, depending on the context, is capable of different meanings. The phrase appears several times in the Basic Law in different contexts. In his judgment, Keith J observed that the phrase appears in arts.30, 48(6), 48(7), 73(1) and 74. He was, however, unable to find a common meaning and intent :
>
> > ' On the whole, I have not been assisted by these provisions. The meaning of a particular provision, whether in an ordinance or in a constitutional instrument such as the Basic Law, depends very much on its context, and I have not discerned a clear pattern as to the rationale behind the use of one phrase and not another in the Basic Law.'"

32. We agree.

33. The provisions of the International Covenant on Civil and Political Rights ("ICCPR") have been implemented through the Hong Kong Bill of Rights. Article 14 of the Hong Kong Bill of Rights is identical to Article 17 of the ICCPR. Article 39 provides that such rights and freedoms "shall not be restricted unless as prescribed by law". Furthermore, such restrictions shall not contravene the provisions of the ICCPR.

34. We do not agree with Mr Zervos that Article 30 qualifies the rights and freedoms implemented through the Hong Kong Bill of Rights. We read Article 30 as limiting the restrictions that can be placed on such freedoms. In other words, any restriction prescribed by law must be "to meet the needs of public security or of investigation into criminal offences". Furthermore, the restrictions to be prescribed by law under Article 39(2) must be rationally connected with one or more of the legitimate purposes, namely, "the needs of public security or of

investigation into criminal offences". Needless to say, any such law must satisfy the principle of legal certainty and be proportionate.

35. The Basic Law gives effect to the basic policies of the People's Republic of China regarding Hong Kong which was formally expressed in the Joint Declaration. In para. 3(5) of the Joint Declaration, the Central Government declared as a basic policy regarding Hong Kong that:

> "…Rights and freedoms, including those of the person, … of correspondence, … will be ensured by law in the Hong Kong Special Administrative Region …"

36. In Annex I to the Joint Declaration which elaborated the Central Government's basic policies, Part XIII Basic Rights and Freedoms, provides, *inter alia*, as follows:

> "The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, …
>
> ……
>
> The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force."

37. We regard the submission that Article 30 should be read as cutting down on the protection provided by Article 39 as misconceived.

38. It follows that, in our view, any restrictions on the fundamental rights must be prescribed by law. The Executive Order is not law. The first declaration was rightly made.

39. The cross-appeal by the respondent is dismissed.

The Order

40. The judge described the Order as an exceptional remedy but one which the court has the jurisdiction to make. He said:

> "160. … It is admittedly an exceptional remedy, one that has never been used in the relatively short time that Hong Kong has enjoyed a written constitution. I am satisfied, however, for reasons to which I shall refer, if the need arises to avoid a vacuum of law, that this court has the jurisdiction to employ the remedy.
>
> 161. The remedy may be stated as follows. If this court is required to declare that a legislative provision is inconsistent with the Basic Law and thereby invalid, it may assume the power to postpone the operation of the declaration of invalidity to allow the Administration and the Legislative Council time to enact corrective legislation."

41. The judge pointed out that as a result of his declarations, there will be no operative body of law in place which, in compliance with the Basic Law, regulates covert surveillance by law enforcement agencies. He said:

> "154. The consequence of this is as profound as it is stark. It means that for an extended period of time, probably about six months, it will be unlawful for Hong Kong's law enforcement agencies to conduct many forms of covert surveillance, certainly the secret interception of telecommunication messages. This handicap, said Mr Zervos, could have disastrous results."

42. He went on to say in paras. 158 and 159 of his judgment:

> "158. At this juncture, let me state plainly that I agree with the concerns that Mr Zervos has expressed on behalf of the

> Administration. If the ability of the police and other agencies to carry out covert surveillance is to be made unlawful, even if only for a period of weeks, the well-being of our civil society will be placed in peril.
>
> 159. This court has no knowledge of the number and nature of threats facing Hong Kong. That they exist, however, can be assured. Hong Kong is prosperous, free, open and in equal measure, if its guard is down, it is vunerable. Rendering covert surveillance unlawful creates an amnesty for conspirators. No lurid examples are necessary to illustrate the dangers that presents."

43. We agree the court can make the Order in truly exceptional circumstances. Here, as the judge said:

> "… No lurid examples are necessary to illustrate the dangers that presents." Para. 159.

44. Mr Dykes SC, for the 2nd applicant, submitted that there is an alternative. The Chief Executive could nominate a date for the operation of the IOC Ordinance. But, the IOC Ordinance is restricted to "the interception of communications transmitted by post or by means of a telecommunication system" and does not cover other aspects of covert surveillance. So, it is not a complete answer. Secondly, we agree with the judge that:

> "157. In any event, I have determined in this judgment that the decision of the Chief Executive not to bring the IOC Ordinance into effect is a lawful decision. I have determined that he is not at this time, nor has he ever been, in breach of his duties under s.1(2) of the IOC Ordinance. I have further found that his decision to return to the Legislative Council seeking the repeal of the IOC Ordinance and its replacement by a more effective legislative regime is a lawful process. It seems to me that if I am now to direct the Chief Executive to bring the Ordinance into effect – despite the fact that there has been a finding that he has no obligation in law to do so – this court will be encroaching on the executive and political powers of the Chief Executive,

> powers that are specifically reserved to him under the Basic Law. In short, it seems to me that this court, if it was to make such a direction, would itself be in danger of acting unconstitutionally."

45. The 1st applicant described as paradoxical the judge's refusal to order the Chief Executive to bring the IOC Ordinance into operation on the ground that it would otherwise be in danger of acting unconstitutionally, but would grant a temporary stay of the declarations. There is no paradox. The power to grant a temporary stay depends on the jurisdiction of the court. If there is jurisdiction to do so, the court would be performing its proper constitutional role when it decides whether or not to exercise its jurisdiction.

46. Mr Dykes has further submitted that the Order is inconsistent with Article 160 "which prescribed the only consequences of discovered invalidity as being amendment of the relevant law or that law ceasing to have force." However, in *HKSAR v Hung Chan Wa and Another*, CACC 411/2003, unreported 26 January 2006, in a different context but having equal application to the present situation, Stock JA, giving the judgment of the court, explained that Article 160 has no application to judicial 'discovery' of contravention with the Basic Law.

47. Article 160 provided, that:

> "If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law."

48. What was envisaged by Article 160 were situations such as those in Article 17 of the Basic Law which expressly provides for the

invalidation of certain laws passed by the legislature of the HKSAR, but that:

> "This invalidation shall not have retroactive effect, unless otherwise provided for in the laws of the Region."

49. Mr Dykes also submitted that the Order is inconsistent with the relevant declaration:

> "… To the extent that the order of temporary validity implies the Executive Order has legal effect, i.e. is a source of lawful authority for the regulation of surveillance, it is inconsistent with the relevant declaration." (Second ground of appeal.)

50. But that is in the nature of an order of this kind and does not provide an answer whether the jurisdiction to make such orders exists and if so, under what circumstances should the jurisdiction be exercised.

51. There is strong support for the existence of such jurisdiction in the decision of the Supreme Court of Canada in *Manitoba Language Rights* [1985] 1 SCR 721.

52. The *Manitoba Language* case was concerned with the constitutionality of the Official Language Act 1890, which provided, *inter alia*, that:

> "The Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language."

53. The Supreme Court of Canada held that the Official Language Act 1890 to be unconstitutional as being contrary to the Manitoba Act,

1870 (which required legislation to be in French and English) and as a result, all laws, passed after 1890, were invalid.

54. The Supreme Court of Canada, however, held that in order to avoid a legal vacuum and ensuring the continuity of the rule of law,

> "… the invalid current Acts of the Legislature will be deemed temporarily valid for the minimum period of time necessary for their translation, re-enactment, printing and publication."

55. The Supreme Court of Canada felt able to do so because:

> "… In the present case, declaring the Acts of the Legislature of Manitoba invalid and of no force or effect would, without more, undermine the principle of the rule of law …
>
> ……
>
> Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life." At page 22.

56. It also held that the constitutional status of the rule of law is beyond question and that:

> "The rule of law has always been understood as the very basis of the English Constitution characterising the political institutions of England from the time of the Norman Conquest (A.V. Dicey, The Law of the Constitution (10th ed. 1959), at p. 183). It becomes a postulate of our own constitutional order by way of the preamble to the Constitution Act, 1982, and its implicit inclusion in the preamble to the Constitution Act, 1867 by virtue of the words 'with a Constitution similar in principle to that of the United Kingdom'.
>
> Additional to the inclusion of the rule of law in the preambles of the Constitution Acts of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution." Page 23-24.

57. The rule of law also lies at the foundation of Hong Kong.

58. Mr Dykes accepted that dire consequences such as chaos, might justify the upholding of unconstitutional laws. He said the jurisdiction can be found under the doctrine of state necessity.

59. This is how Mr Dykes has put it in para. 8 of his skeleton submissions:

> "Article 8 of the Basic Law contains the common law. The doctrine of necessity is a common law concept: See *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645. It is not a concept which is incompatible with the Basic Law. That doctrine may be involved in cases of constitutional crisis (see below)."

60. The Supreme Court of Canada found "analogous support … under the doctrine of state necessity" (page 29), a doctrine evolved by the common law to deal with:

> "… otherwise illegal conduct of a government during a public emergency. In order to ensure rule of law, the Courts will recognize as valid the constitutionally invalid Acts of the Legislature. According to Professor Stavsky, 'The Doctrine of State Necessity in Pakistan' (1983), 16 Cornell Int. L.J. 341, at p. 344: 'If narrowly and carefully applied, *the doctrine constitutes an affirmation of the rule of law*'." Page 30.

61. The *Manitoba Language* case discussed the circumstances in which the doctrine of state necessity have been invoked by the courts. A number of such cases involved challenges to the laws of an illegal and insurrectionary government. Some of these cases arose out of the American Civil War. A more recent example, is the decision of the Privy Council in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (PC), which was concerned with Southern Rhodesia. In Hong Kong, the Court of Final Appeal upheld the recognition of a Taiwanese Bankruptcy Order on

similar principles in *Chen Li Hung and Another v Ting Lei Miao and Others* [2000] 3 HKCFAR 9, relying on:

> "… the passage in Lord Wilberforce's speech in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (Authority to Insitute Proceedings: Issue Estoppel* [1967] 1 AC 853 at p.954 C-E where he famously said:
>
> > 'In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit, and that where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question. These ideas began to take shape on the termination of the Civil War (see *United States v. Insurance Companies* (1875) 89 US 99), and have been developed and reformulated, admittedly as no more than dicta, but dicta by judges of high authority, in later cases.'" per Bokhary PJ at page 17J.

62. One common feature of the "state necessity doctrine" is that:

> "… the laws saved by the application of the doctrine not impair the rights of the citizens guaranteed by the constitution." page 31.

63. We recognise, as was recognised in the *Manitoba Language* case, that this feature of the doctrine of state necessity is not satisfied in the present case. We agree with the statement in the *Manitoba Language* case at 31 that:

> "… Nonetheless, the necessity cases on insurrectionary governments illustrate the more general proposition that temporary effect can be given to invalid laws where this is necessary to preserve the rule of law."

64. The doctrine of state necessity is part of the common law and is not to be taken as a final or exhaustive statement of the court's jurisdiction to deal with analogous situations.

65. Indeed, as the Supreme Court of Canada's discussion on Special Reference No. 1 of 1955, PLR [1956] WP 598, a decision of the Federal Court of Pakistan, shows:

> "… a situation of state necessity can arise as a consequence of judicial invalidation of unconstitutional laws, leaving a legal void." Page 34.

which is:

> "… illustrative of the broader principles which justify this Court's action in the present case: namely, that otherwise invalid acts may be recognized as temporarily valid in order to preserve normative order and the rule of law. The Federal Court of Pakistan allowed an unconstitutional exercise of executive power since the effects of not allowing such an exercise of power would have been anarchy and chaos and thereby a violation of the rule of law." Page 35.

66. The approach adopted in the *Manitoba Language* case, has been applied to different situations in Canada.

67. *R v Swain* [1991] 1 SCR 933, the provisions of the Criminal Code that required the detention of a person acquitted on the ground of insanity were held contrary to the Charter of Rights. However, the Supreme Court of Canada held that there should be a six-month "period of temporary validity" so that judges would not be compelled to release into the community all insane acquittees.

68. In the judgment of Lamer CJ and La Forest, Sopinka and McLachlin JJ at 1021 it was said:

> "Transitional Period
>
> If, based on the reasons given above, s. 542(2) is simply declared to be of no force or effect pursuant to s. 52(1) of the Constitution Act, 1982, it will mean that as of the date this judgment is released, judges will be compelled to release into the community all insanity acquittees, including those who may well be a danger to the public. Because of the serious consequences of finding s. 542(2) to be of no force and effect, there will be a period of temporary validity which will extend for a period of six months."

69. Wilson J agreed at page 1037.

70. In *Schachter v Canada* [1992] 2 SCR 679, where the Supreme Court of Canada concluded that certain legislation conferring statutory benefits was unconstitutional because it was "under-inclusive", Lamer CJ for the majority of the court said at page 716:

> "The logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits."

71. At page 715:

> "A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (*R. v. Swain, supra*) or otherwise threatens the rule of law (*Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721). It may also be appropriate in cases of underinclusiveness as opposed to overbreadth. For example, in this case some of the interveners argued that in cases where a denial of equal benefit of the law is alleged, the legislation in question is not usually problematic in and of itself. It is its underinclusiveness that is

> problematic so striking down the law immediately would deprive deserving persons of benefits without providing them to the applicant. At the same time, if there is no obligation on the government to provide the benefits in the first place, it may be inappropriate to go ahead and extend them."

72. Mr Dykes accepted that on the facts of the *Manitoba Language* case, that decision was justified and could be accommodated by the common law. Indeed, he agreed that if it could be shown that a law essential to the maintenance of the rule of law was unconstitutional, the court could give temporary effect to it where this is necessary to preserve the rule of law.

73. This is what the judge said:

> "165. Canadian jurisprudence indicates that the radical remedy of temporary validity is only to be used in situations where danger, disorder or deprivation would be caused by an immediate declaration of invalidity. I am satisfied that any immediate declaration of invalidity in the present case would give rise to the probability of danger to Hong Kong residents, disorder by way of a threat to the rule of law and deprivation to Hong Kong residents generally."

We see no reason to disagree with the judge's conclusion.

74. We are of the view that the extraordinary dangers, which Hong Kong might face in the absence of a stay, and which would threaten the rule of law and the fabric of our society, give rise to the jurisdiction to stay.

75. Mr Dykes was more ready to accept that the Order might be made in relation to section 33, but not in relation to the Executive Order.

76. In para. 65 above, we drew attention to the Special Reference No. 1 of 1955, where it was the executive branch of government which proclaimed that laws were retrospectively valid and enforceable, and the role of the judiciary was simply to condone the actions of the executive. See page 34 of *Manitoba Language* case. Here, the Executive Order was a failed attempt to comply with Article 30, and section 33 was a failed attempt to comply with Article 39. We see no difference in principle between a failed attempt by the executive or the legislature to comply with the Basic Law. Both are unconstitutional. The Order has the same effect on section 33 as it has on the Executive Order. It gives colour to the legality of actions taken under section 33 and the Executive Order. Insofar as a refusal to make the Order has the same direful consequences, we are of the view that there is jurisdiction to make the Order in respect of the Executive Order.

77. The judge also found support in decisions by the Strasbourg Court. He referred to *Walden v Liechtenstein* (Application No. 33916/96, 16 March 2000, unreported), where the court recognised that the temporary preservation of a law by the domestic courts of Liechtenstein, even though it violated the rights of the applicant, served the legitimate aim of maintaining legal certainty.

78. Mr Dykes accepted that legal certainty is an aspect of the maintenance of law and order, and hence the rule of law.

79. The judge concluded at para. 167 that:

> "167. International jurisprudence therefore recognises that, in constitutional matters, laws declared to be in violation of a constitution may nevertheless be declared temporarily valid. In my judgment, this court, for the reasons expounded by the Supreme Court of Canada, possesses the same jurisdiction, one founded on its inherent powers. An examination of the Basic Law reveals that the rule of law lies at its heart. Equally, therefore, the rule of law in Hong Kong has constitutional status."

80. The question of a temporary stay is unlikely to arise in the United Kingdom because section 4 of the Human Rights Act 1998, enables the courts (High Court and above) to make a declaration of incompatibility with a convention right but such a declaration:

> "(6)(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
>
> (b) is not binding on the parties to the proceedings in which it is made."

81. In South Africa, the constitution provides that the courts, in deciding a constitutional matter, may suspend any declaration of invalidity of a legislative provision for any period and on any conditions it sees fit to allow the compliant authorities to enact corrective legislation.

82. We do not believe the fact that in the United Kingdom and in South Africa there are these express provisions necessarily show the absence of any inherent power at common law to deal with situations which might otherwise have arisen.

83. As the judge said:

> "171. Each and every constitution, however, arises out of its own unique historical circumstances. Those circumstances are often reflected in the constitution itself. Those responsible for drafting the South African constitution had to bear in mind that the courts would be faced with a large body of laws which had been enacted during the *apartheid* era and which would, directly and indirectly, reflect formalised racial prejudice. If all such provisions were to be struck down, allowing no time for corrective legislation, chaos would have been the result. Hong Kong's constitution, however, was drafted in very different circumstances. It is a constitution which emphasises continuity rather than the abandonment of an old legislative regime."

84. Furthermore, in England, in *Re Spectrum Plus Ltd* (in liquidation) [2005] 2 AC 680, the House of Lords considered whether the court has the power to make a prospective overruling. It is relevant to note that in *Re Spectrum Plus Ltd* was not concerned with any fundamental human right. It was concerned with whether the charge over book debts, present and future, granted by Spectrum Plus Ltd ("Spectrum"), to the National Westminster Bank plc ("the bank") under a debenture was a fixed charge, which it was expressed to be, or merely a floating charge. If it was a floating charge, preferential debts have priority under section 175(2)(b) of the Insolvency Act 1986. In deciding that the charge was a floating charge, the House of Lords overruled *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep 142, a first instance decision. It was in such context that it was argued that the House of Lords should overrule *Siebe Gorman* only for the future because that decision had been acted on as correct since its decision. It is not surprising that the argument was rejected. Even so, Lord Nicholls said:

> " Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer

> justice fairly and in accordance with the law. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions.
>
> If, altogether exceptionally, the House as the country's supreme court were to follow this course I would not regard it as trespassing outside the functions properly to be discharged by the judiciary under this country's constitution. Rigidity in the operation of a legal system is a sign of weakness, not strength. It deprives a legal system of necessary elasticity. Far from achieving a constitutionally exemplary result, it can produce a legal system unable to function effectively in changing times. 'Never say never' is a wise judicial precept, in the interest of all citizens of the country. [699F]"

85. Lord Hope of Craighead at para. 74 and Lord Walker of Gestingthorpe at para. 161 expressed agreement with Lord Nicholls' views. Lord Hope of Craighead said at para. 69:

> "… But it is for the House, as the ultimate court, to define the limits of its own jurisdiction. It can take as its starting point the inherent power which it has under the common law to do whatever is necessary to serve the interests of justice."

86. The majority view on the court's jurisdiction in *Spectrum* is consistent with the views expressed in the *Manitoba Language* case that:

> "In other words, in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada. In the case of the *Patriation Reference, Supra*, this unwritten postulate was the principle of federalism. In the present case it is the principle of rule of law." Page 25.

That is to say the court must have the inherent power to do whatever is necessary to preserve the rule of law. In highly exceptional circumstances,

the power included the power to uphold temporarily otherwise unlawful laws or acts.

87. In *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] 2 AC 467 which was concerned with the capacity of a transsexual to undergo a marriage under the Matrimonial Cases Act 1973 in the reassigned gender, Lord Nicholls observed that:

> "53. It may also be that there are circumstances where maintaining an offending law in operation for a reasonable period pending enactment of corrective legislation is justifiable. An individual may not then be able, during the transitional period, to complain that his rights have been violated. The admissibility decision of the court in *Walden v Liechtenstein* (Application No. 33916/96) (unreported) 16 March 2000 is an example of this pragmatic approach to the practicalities of government."

88. In *R(Hooper) v Secretary of State for Works and Pensions* [2003] 1 WLR 2623, Lord Phillips of Worth Matravers MR in the judgment of the court said at para. 77:

> "77. … The manner in which we have given effect to the Convention preserves the supremacy of Parliament. The Court can do no more than declare legislation incompatible with the Convention, leaving it to Parliament to address the offending legislation. The Walden principle can have no direct application in this jurisdiction."

89. However, the House of Lords in *R (Hooper) v Secretary of State for Works and Pensions* [2005] 2 FCR 183 at 201, Lord Hoffmann described *Walden* as a puzzling decision.

90. Although the English decisions are not directly applicable, they provide some support for the jurisdiction to make the Order.

91. In *Ha v State of New South Wales* [1997] 189 CLR 465, the High Court of Australia was unanimous that the court had no power to overrule cases prospectively. It said at 504:

> "… If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law."

92. *Ha* was concerned with a state law imposing tobacco wholesalers' and retailers' licence fees and the issue was whether the licence fees were duties of excise within section 90 of the constitution and fell within the exclusive power of the Commonwealth Parliament. It held by a majority that they were. *Ha* was not concerned with the question whether there was jurisdiction to recognise as temporarily valid otherwise invalid laws or acts in order to preserve the rule of law. So we do not regard it as an authority against making the Order. Lord Hope of Craighead in *Spectrum* at para. 68 said he did not think *Ha* could be taken as the last word on this issue.

93. It was also tentatively suggested that since a stay of the effect of the declaration was possible pending appeal, it was unnecessary for the judge to make the Order. He could have stayed the declarations pending appeal.

94. When important constitutional points are involved, and where it is legitimate for the parties to want a determination by the Court of Final Appeal, it may be that the court can stay the effect of the declarations pending appeal. If the judge had stayed the 1st declaration pending appeal, it seems that Mr Dykes would not complain. However, there was no

application for a stay on this basis. In any event, there was no appeal so far as the second declaration was concerned so no stay pending appeal could have been made in relation to section 33.

95. We are of the view that the judge has jurisdiction to make the Order. The making of the Order was an exercise of discretion. We see no reason to interfere. In any event, on the basis that the maintenance of the rule of law requires it, we would have exercised our discretion in the same way.

96. The appeal by the 1st and 2nd applicants is dismissed.

97. At the conclusion of the hearing of the appeal, the parties asked us to grant leave to appeal to the Court of Final Appeal and to certify the following as question of great general public importance:

> "1. Does the Law Enforcement (Covert Surveillance) Order published on 5 August 2005 comprise or contain 'legal procedures' within the meaning of those words as they appear in Article 30 of the Basic Law of the Hong Kong Special Administrative Region?
>
> 2. Where a court declares or otherwise makes a finding that a law is not consistent with one or more articles of the Basic Law of the Hong Kong Special Administrative Region, can the court suspend the effect of its declaration or order it makes consequent upon such finding?"

98. We were also asked to dispense with a Notice of Motion under section 24(1) of the Hong Kong Court of Final Appeal Ordinance, Cap. 484 ("HKCFAO") and to impose no conditions under section 25 of HKCFAO other than that the Appellant in the Court of Final Appeal

should file a Notice of Appeal to the Court of Final Appeal within 7 days of the judgment.

99. It was said that dispensing with the Notice of Motion would save time and costs.

100. The court should not have been asked to make such a highly unusual order without the benefit of any submission on our power to make such an order. We make no such order.

101. The appeal and cross appeal are dismissed. We make an order *nisi* that there be no order as to costs save that the 2nd applicant's costs be taxed in accordance with Legal Aid Regulations.

(M. Stuart-Moore)	(Wally Yeung)	(Robert Tang)
Vice-President	Justice of Appeal	Justice of Appeal

1st Applicant (Appellant in CACV 87/2006), in person, present.

Mr Philip Dykes, SC and Mr Hectar Pun, instructed by Messrs K M Cheung & Co, for the 2nd Applicant (Appellant in CACV 73/2006)

Mr Kevin P Zervos, SC, SADPP and Mr Alexander Stock, instructed by Department of Justice, for the Respondent.