

**立法會**  
**Legislative Council**

LC Paper No. LS101/05-06

**Paper for the Bills Committee on  
Interception of Communications and Surveillance Bill**

At the meeting of the Bills Committee on 19 July 2006, the Legal Service Division referred to paragraph 50 of the judgment of the Court of Final Appeal (“CFA”) in Koo Sze Yiu and Leung Kwok Hung v Chief Executive of the Hong Kong Special Administrative Region (circulated vide LegCo Paper No. CB(2)2731/05-06). A member queried if the sentence “[t]he Government can, during that period of suspension, function pursuant to what has been declared unconstitutional .....” should be understood as “permitting” the Government to continue acting on something which has been declared unconstitutional. The Bills Committee instructed the Legal Service Division to provide a written advice on the meaning of the sentence.

2. The conclusion of the CFA in the said judgment is reproduced below:-

*“Conclusion*

49. I would allow the appeal to set aside the temporary validity order. In its place I would, to afford an opportunity for the enactment of corrective legislation, substitute suspension of the declarations of unconstitutionality so as to postpone their coming into operation, such postponement to be for six months from the date of Hartmann J’s judgment of 9 February 2006.

50. The Government can, during that period of suspension, function pursuant to what has been declared unconstitutional, doing so without acting contrary to any declaration in operation. But, despite such suspension, the Government is not shielded from legal liability for functioning pursuant to what has been declared unconstitutional.”

3. The events leading to the final appeal could be summarized as follows. On 9 February 2006 the Court of First Instance gave judgment against the Appellants on the Interception of Communications Ordinance, finding there nothing unlawful for the Chief Executive in not bringing the Ordinance into operation. On the other hand, the Court of First Instance gave judgment in the Appellants’ favour on the Law Enforcement (Covert Surveillance Procedures) Order and section 33 of the Telecommunications Ordinance (Cap. 106) issues, declaring that the Order is a set of administrative directions only and does not constitute a set of “legal procedures” for the purposes of Article 30 of the Basic Law, and that section 33 of the Telecommunications Ordinance is unconstitutional in so far as it authorizes access to or the disclosure of the contents of any message or class of messages. The Court of First Instance made a temporary validity order in the following terms :-

“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.” (*Emphasis added*).

The case eventually reached the CFA on one issue only: the temporary validity order.

### **Difference between temporary validity and suspension**

4. The CFA explained the difference between temporary validity and suspension in paragraphs 33 to 35 of the judgment:-

“..... Where temporary validity is accorded, the result would appear to be twofold. First, the executive is permitted, during such temporary validity period, to function pursuant to what has been declared unconstitutional. Secondly, the executive is shielded from legal liability for so functioning. .... This leaves the question of suspension, which would not involve the shield .....

” *(Emphasis added)*

5. The wording of the temporary validity order has the effect of making section 33 of the Telecommunications Ordinance and the Executive Order “valid and of legal effect” for a period of six months. This is apparently the reason behind the CFA’s explanation that the Government was “shielded from legal liability”. The effect of setting aside the temporary validity order is that the relevant provisions are no longer “valid and of legal effect”. If the CFA merely sets aside the temporary validity order without substituting suspension, the effect would be that the relevant provisions immediately become unconstitutional by virtue of the declarations made by the Court of First Instance.

6. Members may note that the CFA used the words “permitted ..... to function” when explaining the effect of the temporary validity order, and “can ..... function” when explaining the effect of the suspension. To put paragraph 50 into its proper context, it would seem that in the final appeal, the CFA was merely deciding between whether temporary validity or suspension was appropriate. Having set aside the temporary validity order and substituted it with an order of suspension so as to postpone the coming into operation of the declarations of unconstitutionality, the CFA went on to explain the effect of the suspension in law as “[t]he Government can, during that period of suspension, function pursuant to what has been declared unconstitutional, doing so without acting contrary to any declaration in operation”. It is clear in the present context that the wording used by CFA would not have the effect of “permitting” the Government to continue acting on something which has been declared unconstitutional.

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1 August 2006