立法會
Legislative Council

LC Paper No. CB(1)2116/02-03(01)

Ref: CB1/BC/13/02

Bills Committee on Public Officers Pay Adjustments (2004/2005) Bill

Background Brief

Purpose

This paper:

(a) sets out the background of the Public Officers Pay Adjustments (2004/05) Bill (the current Bill);

(b) summarizes the deliberations of the Bills Committee on Public Officers Pay Adjustment Bill (the POPA Bill); and

(c) summarizes the views expressed by Members at the meetings of the Panel on Public Service (PS Panel) on 16 December 2002 and 25 February 2003, and at the House Committee meeting on 13 June 2003.

Background

2. Given the economic downturn in recent years and pay reduction in the private sector, the upward adjustment in civil service pay announced in mid 2001 aroused public concern about the possible erosion of broad comparability of civil service pay with the private sector. The views expressed by various sectors of the community sparked a public debate on whether civil service pay levels were reasonable. In response to calls for a review of civil service pay levels and pay adjustment mechanism, the Administration decided on 18 December 2001 to conduct a comprehensive review of the civil service pay policy and system.

2002 civil service pay adjustment

3. Having regard to the state of the economy and the stringent fiscal position, the Financial Secretary (FS), in the 2002-03 Budget Speech delivered on 6 March 2002, stated that he aimed to restore fiscal balance step by step through reducing the growth of Government expenditure and modestly raising revenue. As personnel-related expenses accounted for a significant part of

Government operating expenditure, FS stated that for financial planning purposes, he had assumed in the Medium Range Forecast that civil service pay would be cut by 4.75% and the salary-related portions of subventions to the various organizations would also be reduced by the same rate with effect from 1 October 2002. FS also stated that any decision on a civil service pay cut needed to go through the legislative process before it could be implemented. The assumption on civil service pay reduction made by FS before the findings of the 2001-02 Pay Trend Survey (PTS) were available caused concern that the Administration had a predetermined stance on the pay adjustment exercise. It also invited queries on the need to implement civil service pay reduction by legislation.

4. In late April 2002, the Administration announced the findings of the 2001-02 PTS. The net Pay Trend Indicators (PTIs) for the three non-directorate salary bands were: -4.42% for the upper salary band ($47,591 - $97,325 a month), -1.64% for the middle salary band ($15,520 - $47,590 a month), and -1.58% for the lower salary band (below $15,520 a month). On 22 May 2002, the Chief Executive (CE) in Council decided that an offer of a pay reduction of 4.42% for the directorate and the upper salary band, 1.64% for the middle salary band, and 1.58% for the lower salary band, with effect from 1 October 2002, should be put to the staff sides of the four central consultative councils.

5. Having considered all relevant factors including the staff sides' views, the Administration considered that the proposed pay adjustment, which was in line with the net PTIs of the 2001-02 PTS, was reasonable and had struck a balance between the concerns of civil servants and the wider interests of the community. The CE in Council decided on 28 May 2002 that civil service pay should be adjusted as originally proposed, and that the POPA Bill should be introduced into the Legislative Council (LegCo).

POPA Bill

6. The POPA Bill aimed to implement the Government's decision to reduce civil service pay with effect from 1 October 2002. It provided that the pay and allowances of public officers at different salary bands should be adjusted downward with effect from 1 October 2002 and specified the relevant rates of adjustment. It further provided that the POPA Bill did not prohibit adjustments made after that date and that the employment contracts of public officers were to be read as expressly authorizing the adjustments to their pay and allowances under the Bill. The estimated savings arising from the proposed pay reduction in terms of civil service pay and allowances and subventions for the subvented sector from 1 October 2002 to 31 March 2003 was $1,551 million.

Deliberations of the Bills Committee on POPA Bill

7. Following the first reading of the POPA Bill on 5 June 2002, the Bills Committee formed by LegCo to study the Bill held a total of seven meetings in June 2002. In view of the wide implications of the Bill on the civil service and subvented sector, the Bills Committee met with the four central consultative councils (staff sides), major civil service unions and deputation from the subvented sector. While the Bills Committee had no objection to the Administration's decision to reduce civil service pay in accordance with the existing pay adjustment mechanism, members expressed concern on the following issues:

(a) whether the existing pay adjustment mechanism allowed for pay reduction;

(b) the need and appropriateness to implement civil service pay reduction by legislation;

(c) alternatives to the legislative approach, e.g. the staff sides' request for the setting up of a Committee of Inquiry;

(d) whether the POPA Bill would contravene Articles 100 and 103, 6 and 105, 39, and 160 of the Basic Law; and

(e) implications of the POPA Bill on the subvented sector.

8. Having considered the views of the Administration, Legal Adviser of the LegCo Secretariat and the staff sides, some members of the Bills Committee were not convinced of the legislative approach to implement civil service pay reduction. In their view, the fact that the Administration pursued the legislative approach demonstrated that there was no sufficient legal basis for the Administration to reduce civil service pay. To rectify the situation once and for all, members requested the Administration to consider introducing a general enabling legislation on civil service pay adjustment mechanism, providing the legal framework for implementing upward and downward pay adjustments. Members considered this general enabling legislation more appropriate than the proposed one-off legislation to deal with the civil service pay reduction for 2002. While the Administration was prepared to give further thought to the suggestion, it considered that the proposed general enabling legislation and the POPA Bill were not mutually exclusive and that the most pressing issue at that time was the implementation of the pay reduction for 2002. Some members of the Bills Committee still maintained their view that the problem should be tackled by a comprehensive, rather than a piecemeal, approach.

9. Please refer to the report of the Bills Committee presented to LegCo on 10 July 2002 for details of its deliberations (LC Paper No. CB(1)2165/01-02).

10. The POPA Bill (with minor amendments) was passed by LegCo on 10 July 2002.

2003 civil service pay adjustment

11. Despite the civil service pay reduction with effect from 1 October 2002, the perceived pay disparity between the civil service and the private sector continued to be the focus of public attention. The 2003 civil service pay adjustment, same as the pay adjustment exercises in the previous two years, remained a contentious issue.

Deliberations of the Panel on Public Service

12. Given the pressing need to tackle the budget deficit problem, the Administration set the objective of cutting public expenditure by $20 billion to $200 billion by 2006-07. To achieve this objective, the Administration sought to reduce the size of the civil service and its expenditure on civil service pay and allowances. While the PS Panel considered that civil servants should share the burden with the community to tackle the budget deficit problem, it was concerned about the extent of the reduction and the impact of the reduction on the civil service and the quality of public service.

13. The PS Panel was pleased to note that the Secretary for the Civil Service had reached consensus with the staff side representatives in February 2003 on the pay adjustment issue. Under the consensus, the dollar value of all civil service pay points would be restored to the levels as at 30 June 1997 in cash terms. For all pay points at D3 and above or equivalent, the pay reduction would be effective from 1 January 2004. For all pay points below D3 or equivalent, the pay reduction would be implemented by two adjustments of broadly equal amount from 1 January 2004 and 1 January 2005 respectively. On 25 February 2003, the CE in Council made a decision on civil service pay adjustment which was in line with this consensus. It also decided that the Administration should aim to introduce legislation into LegCo as soon as possible to implement the pay reduction.

14. The PS Panel was concerned about the Administration's decision to introduce legislation to implement the pay reduction. The Panel pointed out that members of the Bills Committee on the POPA Bill in 2002 had clearly expressed their views that it was inappropriate for the Administration to legislate on a one-off basis, and had urged the Administration to introduce general enabling legislation on the civil service pay adjustment mechanism, providing the legal framework for implementing upward and downward pay adjustments. Some members queried why the Administration still proposed to introduce a

piece of one-off legislation to implement the civil service pay reduction in 2004 and 2005. The PS Panel was advised that the Administration would further consider the need for such general enabling legislation in developing an improved civil service pay adjustment mechanism, which would comprise among others an effective means for implementing both upward and downward pay adjustments. The Administration aimed to complete the exercise on the development of an improved mechanism, including the conduct of a Pay Level Survey, within 2004. The PS Panel called for early action of the Administration.

15. At the PS Panel meetings on 16 December 2002 and 25 February 2003, Members also expressed concerns on the following issues:

(a) Basic Law implications on the magnitude of civil service pay adjustment;

(b) Implications of the proposed pay reduction on judges and judicial officers; and

(c) Implications of the outcome of the judicial review cases before the court on the lawfulness of the Public Officers Pay Adjustment Ordinance enacted in July 2002.

16. On item (c) above, the Administration's legal advice was that the Administration was not precluded from introducing a bill into LegCo, pending the judgment of the Court of First Instance (CFI), but that it would be prudent to defer the resumption of the second reading debate until after the delivery of the CFI judgment. The Administration indicated that it would take full account of the court judgment in taking forward the legislative exercise.

17. Please refer to the minutes of the two Panel meetings for details (LC Paper Nos. CB(1)680/02-03 and CB(1)1472/02-03).

The current Bill

18. Following staff consultation conducted by the Administration, the CE in Council decided on 13 May 2003 that the current Bill should be introduced into LegCo.

19. The Administration introduced the current Bill into LegCo on 21 May 2003. The current Bill seeks to reduce the pay of and the amounts of allowances payable to public officers to their levels at 30 June 1997 in dollar terms, as mentioned in paragraph 13 above. The estimated annual savings from 2005-2006 is $7.3 billion.

Outcome of judicial review cases

20. On 10 June 2003, the CFI ruled in favour of the Administration by dismissing the two applications for judicial review launched against it in respect of the POPA Ordinance. A copy of the judgement is attached in the **Appendix**.

Deliberations of the House Committee on 13 June 2003

21. At the House Committee meeting on 13 June 2003, Members expressed concern that even after the CFI had delivered its judgment, there was still the question of the lodging of appeals. The Legal Adviser explained that:

(a) the court judgment handed down by the CFI on 10 June 2003 was related to two applications for a series of declarations that the POPA Ordinance, in so far as it sought to impose a reduction in civil service pay scales, contravened individual articles of the Basic Law. Both applications were dismissed. According to the Administration, there were three other applications made in relation to the Ordinance pending disposal by CFI. The Administration had not indicated how these three applications would be taken forward;

(b) under section 13(2) of the High Court Ordinance (Cap. 4), an appeal from the CFI judgment could lie to the Court of Appeal, within the time limit of 28 days, running from the date on which the judgment was sealed. The judgment handed down on 10 June 2003 had just been sent for sealing. If the appellant applied for legal aid, the 28-day time limit for appeal would stay, pending the determination of the application for legal aid. If the application of legal aid was refused, it would be subject to appeal to the Registrar and eventually to a committee formed under the Court of Final Appeal for determination; and

(c) the right of the legislature to legislate on a matter would not be affected by pending, on-going or likely court proceedings.

22. Members also asked whether there would be any implications on the current Bill, if there were appeals against the judgment of the CFI and if the Court of Appeal ruled in favour of the appellants. The Legal Adviser explained that the court proceedings were related to the POPA Ordinance which had been enacted. The court judgment in respect of these appeals would not have legal effect on the current Bill. However, since the legal and constitutional issues considered in those proceedings would, to a large extent, be similar to those that might be raised in relation to the current Bill should there be judicial proceedings initiated to challenge the constitutionality of it, the result of appeals, if any, might have a bearing for Members in their consideration of the Bill.

23. Please refer to the minutes of the House Committee meeting on 13 June 2003 for details (LC Paper No. CB(2)2499/02-03).

Council Business Division 1
Legislative Council Secretariat
30 June 2003

附錄
Appendix

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NOS. 177 OF 2002 & 180 OF 2002

HCAL 177/2002

BETWEEN

LAU KWOK FAI BERNARD Applicant

and

SECRETARY FOR JUSTICE (for and on behalf of the Government of HKSAR) Respondent

---

AND BETWEEN

HCAL 180/2002

GOVERNMENT PARK AND PLAYGROUND KEEPERS UNION 1st Applicant

SHUM MAN LAI 2nd Applicant

LEUNG TAT WAH 3rd Applicant

and

SECRETARY FOR JUSTICE (for and on behalf of the Government of HKSAR) Respondent

---

Before : Hon Hartmann J in Court

Dates of Hearing : 6, 7, 9 and 10 May 2003

Date of Handing Down Judgment : 10 June 2003

J U D G M E N T

Introduction

1. In the latter months of 1997 a financial crisis swept through the economies of South East Asia. That crisis, profound in its ramifications for Hong Kong, has been followed by other economic difficulties, local and global, which, to a greater or lesser degree, have left scars on the *corpus* of Hong Kong's previously bourgeoning

prosperity. In the result, in economic circumstances marked by rising unemployment and by deflation rather than inflation, the Government of the Hong Kong Special Administrative Region has had to look to measures to address what it has recognised has become a 'structural problem' facing the Territory's public finances, one which has resulted in persistent fiscal deficits.

2. On 6 March 2002, in his budget speech to the Legislative Council, the Financial Secretary spoke of the economic difficulties facing Hong Kong and commented : "I am fully aware that, due to the externally-oriented nature of the Hong Kong economy and our linked-exchange-rate system, keeping public finances sustainable is of paramount importance." Budgetary prudence is a constitutional obligation. In this regard, art.107 of the Basic Law states :

> " The Hong Kong Special Administrative Region shall follow the principle of keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product."

3. In his budget speech, noting that 'personnel-related' expenses accounted for 70% of government operating expenditure, the Financial Secretary proposed a cut in the pay of public officers. Such officers are described in s.3 of the Interpretation and General Clauses Ordinance, Cap.1, as those 'holding an office of emolument under the Government, whether such office be permanent or temporary'. While for planning purposes he assumed a cut of 4.75%, he said that 'the existing mechanism' for determining levels of civil service pay would be employed. In this regard, he said : "Under the existing mechanism, the Government will consider, among other things, the results of the private sector pay trend survey and its own budgetary position before deciding on an annual civil service pay adjustment. We will continue to adopt this mechanism and make a final decision after the outcome of this year's survey is known in May." The Financial Secretary informed the Legislative Council that any decision on a pay cut for public officers would need to 'go through the legislative process' before it could be implemented; in short, that a governing statute would need to be enacted.

4. When the employment of almost all public officers; that is, civil servants, is determined by contracts entered into in private law, it may be asked why it was considered necessary to seek legislation in order to affect a variation of those contracts? Material aspects of the reasoning are stated by the Secretary for the Civil Service in a speech made to the Legislative Council on 5 June 2002 when he moved the Second Reading of the bill containing the intended legislation. He said :

> "Our main reason for seeking to implement the pay reduction by legislation is that the contractual employment arrangements between the Government and the vast majority of serving civil servants do not contain an express provision authorizing the Government to reduce pay."

The Secretary expanded on this by saying :

> "Specifically speaking, the employment arrangements for a civil servant are, at present, governed by the provisions set out in a letter of appointment and the Memorandum on Conditions of Service (MOCS) attached to the letter. While the standard MOCS applicable to civil servants provide that the Government reserves the right to alter any of the officer's terms of appointment and conditions of service should the Government consider this to be necessary, the employment contracts of most serving civil servants, except for a very small number of officers recruited since June 2000, do not contain any express provision authorizing pay reduction by the Government. *The legal advice we obtained is that on the basis of decided cases, the courts are unlikely to accept that this general power of variation could apply to such a fundamental term as the salary. It is possible that the Government would face legal challenges if it relies solely on this provision to implement the decision on a civil service pay reduction.*" [my emphasis]

He continued :

"Any civil servant can challenge the Government's decision in court. As matter of fact, some staff unions have already stated that they are considering to sue the Government for breach of contract by reducing civil service pay. Should the court decide in a single case that there is inadequate legal basis for the Government to reduce civil service pay, we would not be able to implement the decision on a pay reduction this year. In such an eventuality, the good governance of the Government and the stability of the civil service would be seriously affected. Thus legislation is the only way to implement with certainty the decision on a civil service pay reduction."

5. On 28 May 2002, the Government — the Executive, as I shall call it, art.59 of the Basic Law stating that the Government of the Hong Kong Special Administrative Region shall be its executive authorities — came to the view that it had exhaustively employed the existing mechanism for determining civil service pay. Pursuant to this, the Chief Executive in Council resolved that civil service pay should be reduced by the following percentages : 4.42% for the directorate and upper salary band, 1.64% for the middle salary band and 1.58% for the lower salary band. He further resolved that the reductions should, if possible, be implemented by legislation.

6. Three days later, on 31 May 2002, the Public Officers Pay Adjustment Bill was gazetted, being introduced into the Legislative Council for its first and second readings on 5 June 2002. After due consideration, including scrutiny by a bills committee, the legislation was enacted on 11 July 2002. After signature by the Chief Executive, it was promulgated in the Gazette on 19 July and came into operation that same day under the short title of the Public Officers Pay Adjustment Ordinance ('the Ordinance'). The effect of the Ordinance is to adjust the pay and pay-related benefits ('pay') of civil servants and other public officers whose pay is determined in accordance with civil service pay scales by reducing that pay in accordance with the percentages detailed in paragraph 5 above.

7. The Ordinance provides for certain limited exceptions to the generality of its application. To this end, s.3 of the Ordinance states :

"This Ordinance does not apply to—

(a) the pay of a public officer who is remunerated on a salary, being a starting salary, that is not linked to the annual civil service pay adjustment;

(b) the pay or allowances of a judicial officer—

(i) holding a judicial office—

(A) specified in Schedule 1 to the Judicial Officers Recommendation Commission Ordinance (Cap. 92); or

(B) known as Senior Deputy Registrar, High Court; or

(ii) appointed by the Chief Justice."

8. That the reductions in pay constitute a variation of the contracts of public officers is acknowledged in the Ordinance, s.10 of which reads :

" The contracts of employment of public officers are varied so as to expressly authorize the adjustments to pay and the amounts of the allowances made by the Ordinance."

9. The reductions are not retrospective. In respect of the coming into operation of the Ordinance the reductions take effect at a future date; that is, 1 October 2002. Nor does the Ordinance seek to affect any further future

adjustments. As Mr Fok SC, leading counsel for the respondent expressed it, the Ordinance, constitutes a 'one-off' exercise; it does not, other than in respect of this single reduction of pay, alter contractual arrangements between the Executive and its employees. In this regard, s.9 of the Ordinance reads :

> " The adjustments made by this Ordinance to the pay, and the amounts of any allowances, payable to public officers do not prohibit or affect any adjustment to the pay or the amounts of any allowances payable to public officers made after 1 October 2002."

10. What is challenged in these proceedings is the legality of the Ordinance in so far as it purports to reduce the pay of public officers. Specifically what is challenged is the compatability of the Ordinance with the Basic Law. For the legislature of Hong Kong is itself subject to the restrictions of our primary document of constitution. In this regard, art.11, para.2 of the Basic Law states :

> " No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law."

The basis of the challenges

11. In the two applications now before me what are sought are a series of declarations that the Ordinance, in so far as it seeks to impose a reduction in civil service pay scales, contravenes individual articles of the Basic Law and indeed, so it is argued, violates the principles of the Rule of Law and thereby the integrity of the Basic Law as a whole. The applicant in the first application, who at all times has acted in person, has sought a declaration that the Ordinance is 'unconstitutional and unlawful'. Mr Dykes SC, leading counsel for the applicants in the second application, has accepted in the course of submissions that 'the sole issue' to be determined is whether the Ordinance does or does not contravene the Basic Law.

12. Accordingly, this Court is not concerned, for example, with the accuracy of the methodology employed to calculate the percentage reductions nor with matters of procedural propriety within the Legislative Council. The issue is solely a constitutional one going to *the substance* of the law enacted by the legislature, the matter for determination being whether that law, in so far as it varies the contractual rights of public officers by reducing their pay, contravenes the Basic Law.

13. At the heart of the applicants' several challenges has been the uncontested assertion that the Executive has the power to enter into binding contracts in private law, such contracts including contracts of service. This power is a necessary incidental to the power to govern. But while the Executive cannot by contract fetter its general powers, a principle to which I shall refer later, as Devlin J observed in *Commissioners of Crown Lands v. Page* [1960] 2 QB 274, at 293 : "That does not mean that the Crown [the Executive] can escape from any contract which it finds disadvantageous by saying that it never promised to act otherwise than for the public good."

14. The applicants have contended that if the Executive wishes to derogate from its terms of contract with public officers, as with any contracting party in private law, it may do so. But it must be answerable in the courts; answerable, that is, as a party to actions brought by public officers suing in private law to enforce their contractual rights. What is not permitted by the Basic Law, said the applicants, is the enactment of legislation which shuts out access to the courts and which has as its sole purpose the variation of certain specified contracts, that variation financially benefitting the one party; namely, the Executive, by reducing the pay of the other party; namely, individual public officers. As Mr Dykes put it : legislatures do not re-write individual contracts to secure the pecuniary interests of one party to those contracts.

15. Mr Dykes expressed the applicants' fundamental contention in the form of a question. Is the Executive permitted by the Basic Law to 'derogate from free and fairly bargained contracts for personal service negotiated with public officers' and then by means of enacting legislation to 'deny those public officers access to the courts to seek compensation'? For the following reasons, which I set out in broad summary, Mr Dykes contended that the Basic Law bestows no such mandate :

(a) Articles 100 and 103 of the Basic Law, while not 'fossilising' the public service; that is, shutting out change, nevertheless have preserved the 'contractual nature' of the employment of public officers. By changing the basis on which pay is calculated, the Ordinance has changed the 'previous system ... of employment' including the system for determining 'pay and conditions' and is thus inconsistent with art.103. The result is the 'less favourable treatment' of public officers which constitutes a subversion of both art.100 and art.103.

(b) Art.102 of the Basic Law protects the pension rights of public officers ensuring that pensions shall be on terms 'no less favourable' than before the transfer of sovereignty. The Ordinance changes the mechanism for earning pension rights, rendering the terms on which they are earned less favourable.

(c) Article 35 of the Basic Law guarantees access to the courts. In respect of public officers whose pay has been reduced, the Ordinance has removed that right of access 'without good reason', there being no reasonable relationship of proportionality between the means employed; that is, the enacting of the Ordinance, and the aim sought to be achieved; that is, to save money to help meet a deficit.

(d) Article 160 of the Basic Law not only guarantees that 'contracts' together with 'rights and obligations' valid under the laws in force prior to the change of sovereignty shall continue to be valid but goes further to guarantee that they shall be 'protected'. The Ordinance is inconsistent with art.160 because it has not been demonstrated that the failure to protect the contracts of public officers employed prior to the change of sovereignty and still in service was the consequence of a 'compelling public purpose' rather than a desire to save money to meet a deficit by the expedient of cutting the payroll of public officers.

(e) Alternatively to (c) above, art.105 of the Basic Law, which protects the right of individuals to property and to receive compensation for the lawful deprivation of their property, is subverted by the Ordinance which removes the right of public officers to claim their property; namely, the pay to which they would have been entitled but for the enactment of the Ordinance. The Ordinance is further inconsistent with art.105 in that it removes any right to compensation for the deprivation of the property of public officers.

(f) Article 39 of the Basic Law preserves and enshrines the international labour conventions applied to Hong Kong. The Ordinance has had the effect of terminating the pay dispute between the Executive and its public officers which was required to be resolved pursuant to art.8 of the Labour Relations (Public Service) Convention, 1978. The enactment of the Ordinance therefore amounts to a breach of that convention and thereby a breach of art.39 of the Basic Law.

(g) The Ordinance is repugnant to the Rule of Law and thereby subverts the Basic Law which enshrines the Rule of Law. It is repugnant to the Rule of Law in the following ways :

> (i) It is applicable only to a limited group of persons and thereby lacks 'generality and equality'.
>
> (ii) It serves only the interests of one party to a limited group of contracts and thereby fails to 'serve the good of the people'.
>
> (iii) It legalises breaches of those contracts and thereby, 'instead of commanding right and prohibiting wrong, commands wrong and prohibits right'.
>
> (iv) It denies access to the courts and thereby usurps judicial power.

16. I would add that the applicant in the first application, Mr Lau Kwok Fai, in his submissions sought to adopt all of the arguments advanced by Mr Dykes and junior counsel with him, Mr S.H. Kwok and Mr P.Y. Lo. In substance, his various challenges (set out in his application and his written submissions) were encompassed by the submissions made those counsel.

A consideration of certain underlying matters

(a) The separation of powers under the Basic Law

17. It has at all times been fundamental to the challenge of the applicants that the Basic Law incorporates the principle of the separation of powers; namely, that it gives to Hong Kong a system of government based on the Rule of Law and in so doing gives crucial recognition to the principle that the primary functions of law-making, law-executing and law-adjudicating are to be distinguished from each other.

18. This is not in any way a contentious assertion by the applicants. In *Yau Kwong Man and Another v. Secretary for Security* (unreported, HCAL 1595/2001) I made the observation that 'the Basic Law is founded on what is commonly called the Westminster model. As such, the powers of the legislature, the Executive and the judiciary are separate'. In his article, *Executive Orders and the Basic Law* (Law Lectures for Practitioners 1998, 187) Professor Wesley-Smith said :

> " ... the separation of powers is implicit in the design of our constitution [the Basic Law]. As in the United States, 'The principle of the separation of powers was not simply an abstract generalisation in the minds of the Framers: it was woven into the document ...' And from this it follows that the doctrine of the separation of powers is not merely, as in Britain, a moral or political ideal, but, as in the USA, Australia, Mauritius, Sri Lanka, Jamaica, Ireland, and several other states with codified constitutions, it is a legal and constitutional principle."

19. I accept that the principle is woven into the fabric of the Basic Law. But what does the principle mean? It has been expressed in *R v. Kirby, ex parte Boilermaker's Society of Australia* (1956) 94 CLR 254 at 279 in the following terms :

> "... a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions unless such powers are properly incidental to the performance by it of its own appropriate functions."

20. The difficulty, of course, lies in defining the limits. Professor Wade in his work *Administrative Law* (Oxford, 7th Ed. 1994, p.860) commented that there 'is an infinite series of graduations, with a large area of overlap, between what is plainly legislation and what is plainly administration'. The same must apply, in my view, when looking to the relationship between what is plainly the function of the judiciary contrasted with the functions of the legislature and the administration.

21. In the present case, it is inherent in the challenge of the applicants that the Executive and the legislature have usurped the power of Hong Kong's judicature by passing legislation which determines existing private law contractual rights in respect of a particular group of individuals, denying those individuals the right to have those rights determined by the courts. An illustrative case, although related to criminal law matters, is that of *Liyanage v. R* [1967] 1 AC 259 (PC). The Parliament of Ceylon (as it then was) passed a series of statutes which had retrospective effect to cover persons involved in an abortive *coup d'etat*. The statutes ensured that the manner of their arrest and detention could not be challenged in the courts, widened the scope of relevant offences and prescribed new minimum penalties. The Privy Council held that the Acts were *ultra vires* the Constitution, the headnote reading :

> " That the Acts, directed as they were to the trial of particular prisoners charged with particular offences on a particular occasion, involved a usurpation and infringement by the legislature of judicial powers inconsistent with the written Constitution of Ceylon, which, while not in terms vesting judicial functions in the judiciary, manifested an intention to secure in the judiciary a freedom from political, legislative and executive control ..."

The Privy Council observed (at 289) :

" It goes without saying that the legislature may legislate, for the generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence. But the Acts of 1962 had no such general intention. They were clearly aimed at particular known individuals who had been named in a White Paper and were in prison awaiting their fate. The fact that the learned judges declined to convict some of the prisoners is not to the point. That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the general law is shown by the fact that the effect of those alterations was to be limited to the participants in the January coup and that, after these had been dealt with by the judges, the law should revert to its normal state."

But lack of 'generality' *per se* was not held to usurp judicial power. Indeed, the Privy Council accepted that it was not possible to lay down a general rule. It continued (at 289) :

" ... a lack of generality in criminal legislation need not, of itself, involve the judicial function, and their Lordships are not prepared to hold that every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power. *Nor do they find it necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference.* Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings. It is therefore necessary to consider more closely the nature of the legislation challenged in this appeal." [my emphasis]

22. In *R v. Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532 (at 548), Lord Steyn made the observation that 'in law context is everything'. That, in my judgment, is a natural corollary to the observations of the Privy Council in *Liyanage (supra)*.

23. While therefore I accept that the Basic Law incorporates the principle of the separation of powers (subject of course to the meaning and purpose of specific articles which may act to modify that principle), it is apparent that whether the Ordinance, in respect of any individual article or in respect of the Basic Law generally, offends that Law is a matter which may only be determined by looking at the Ordinance 'in context'. As the Privy Council said in *Liyanage* : each case must be decided in the light of its own facts and circumstances, including the *true purpose of the legislation* and *the situation to which it is directed*.

(b) General executive powers ('reserve powers') may not be fettered by private contract

24. In terms of art.48 of the Basic Law, the Chief Executive (who is the head of the Executive) exercises the following powers and functions :

"(1) To lead the government of the Region;

(2) To be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the Hong Kong Special Administrative Region;

(3) To sign bills passed by the Legislative Council and to promulgate laws;

To sign budgets passed by the Legislative Council and report the budgets and final accounts to the Central People's Government for the record;

(4) To decide on government policies and to issue executive orders ..."

25. These powers must be exercised for the good governance of Hong Kong and, in my judgment, the exercise of these general executive powers by the Chief Executive pursuant to art.48(4) (described by Mr Dykes with reference to the Basic Law as 'reserve powers') cannot therefore be fettered in advance by contract. This accords with the

long-established principle of English common law arising out of the exercise of prerogative power. In *Commissioners of Crown Lands v. Page (supra)* Devlin J stated the principle in the following terms :

> " When the Crown, or any other person, is entrusted, whether by virtue of the prerogative or by statute, with discretionary powers to be exercised for the public good, it does not, when making a private contract in general terms, undertake (and it may be that it could not even with the use of specific language validly undertake) to fetter itself in the use of those powers, and in the exercise of its discretion."

Devlin J illustrated the principle by analogy :

> " When the Crown, in dealing with one of its subjects, is dealing as if it too were a private person, and is granting leases or buying and selling as ordinary persons do, it is absurd to suppose that it is making any promise about the way in which it will conduct the affairs of the nation. No one can imagine, for example, that when the Crown makes a contract which could not be fulfilled in time of war, it is pledging itself not to declare war for so long as the contract lasts."

26. That the Chief Executive and the Executive itself cannot, by private contract, fetter in advance their constitutional duty to exercise their powers for the purposes of good governance does not mean — as I have earlier said (see paragraph 13) — that they can thereby escape from a contract entered into in private law by use of a 'colourable device' such as legislation simply because the contract is found to be commercially disadvantageous. In *The Amphitrite* [1921] 3 KB 500, at 503, Rowlatt J, while acknowledging that it was not competent for the Government to fetter its future executive action, which must be determined by the needs of the community when the question arises, went on to hold that :

> " No doubt the Government can bind itself through its officers by a commercial contract, and if it does so it must perform it like anybody else or pay damages for the breach."

27. There is therefore a distinction to be drawn between acts which the Chief Executive and the Executive perform for a general executive purpose for the good governance of Hong Kong and acts which they perform in order to extracate Government from liability under a specific commercial contract or contracts. But where is the distinction to be drawn? It must in each case be a matter of fact to be determined by an objective analysis. However, if it is to be demonstrated that Government has acted only to extracate itself from a disadvantageous commercial contract, high authority is to the effect that clear evidence is required : see, for example, *Czarnikow Ltd. V. Rolimpex* [1979] AC 351 (HL) per Lord Wilberforce (at 364).

(c) Civil servants as a 'class' of persons

28. In introducing his submissions, Mr Dykes commented that it was unusual for the rights and obligations of civil servants to be set out in a constitution. The fact that 'transitional' provisions appear in the Basic Law is, it was agreed, a consequence of history; first, the need for there to have been a workable transition from a Crown colony to an 'inalienable part' of the People's Republic of China; second, the need to ensure civil servants that they would continue to be employed on a basis that, aside from matters relevant to sovereignty, left them unaffected.

29. But the Basic Law is not restricted to making 'transitional' provisions only in respect of civil servants. Art.99 reads :

> " Public servants serving in all government departments of the Hong Kong Special Administrative Region must be permanent residents of the Region, except where otherwise provided for in Article 101 of this Law regarding public servants of foreign nationalities and except for those below a certain rank as prescribed by law.

> Public servants must be dedicated to their duties and be responsible to the Government of the Hong Kong Special Administrative Region."

30. As I understand it, it has been an important pillar supporting the edifice of the applicants' challenge to the constitutional validity of the Ordinance that the Ordinance has been directed not to the generality of Hong Kong residents but instead to specific individuals; namely, public officers, and it is not therefore legislation that is permissible under the Basic Law, it is instead executive action which usurps the form of legislation. It has been argued that legislation directed against selected individuals is not law at all but an exercise of judicial power or an interference with judicial power, both of which are invalid.

31. In my judgment, however, the Ordinance, considered in context, is not directed at a specific group of individuals but instead at a class of persons. 'Public servants', as they are termed in the Basic Law, are dealt with in that Law not simply as individuals who happen to share the same employer but, as I have said, as a class of persons, a class owing a duty of dedication to public office (art.99), a class subject to an obligation of allegiance (art.104) and a class afforded certain protections (arts.100, 102 and 103). Civil servants, numbering some 170,000 persons, as a class owing constitutional obligations and afforded constitutional protection, receive their remuneration from public funds.

32. In my judgment, legislation may lawfully be directed at a specific class of persons. Examples abound : at property owners, at employers, at particular professions or industries.

33. During the course of submissions by the applicants, it has been asserted that the Ordinance has acted somehow to isolate public officers as individuals, as opposed to the collectivity of Hong Kong residents, in order to meet out to them, for the benefit only of the Executive, a form of disadvantage; namely, the stripping of their contractual rights in private law. This, it has been said, offends the very fundamentals of the Rule of Law. In support of the submissions, John Locke (*Second Treatise of Government*, 1690 11 xi section, 142) has been cited :

> "These are the bounds which the trust, that is put in them by the society, and the law of God and nature, have set to the legislative power of every common-wealth, in all forms of government. First, they are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court, and the country man at plough. Secondly, these laws also ought to be designed for no other end ultimately, but the good of the people."

William Blackstone (*Commentaries on the Laws of England*, 1765, Vol 1 vi) has also been cited in the form of the introduction by Stanley Katz :

> "The function of the legislature is to establish and ascertain 'the boundaries of right and wrong ... And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights and to restrain or redress these wrongs.' Correspondingly, the task of the legal system is to 'command' what is right and 'prohibit' what is wrong."

34. These principles are of ancient authority and may not be undermined. They lead to the conclusion that the rule of law does 'not permit a special rule for a particular person or a particular case' : see *Hutardo v. California* 110 US 516 (1884) at 535. But that conclusion, in my view, does not apply in the present case. As I have said, a class of persons has been identified and, for reasons which I state later in this judgment, the purpose of the Ordinance has been not to single out and impose a disadvantage on that class but rather to ensure that that class has its terms and conditions of employment determined in accordance with long-settled, long-agreed mechanisms founded on a desire to ensure broad comparability in respect of pay levels between the public sector and the private sector. There has therefore been no intent to undermine Locke's hallowed principle of 'one rule for rich and poor, for the favourite at court, and the country man at plough'.

(d) The contractual character of the employment of public officers

35. Prior to the transfer of sovereignty, the Crown, under the Letter's Patent and the Colonial Regulations, in the

exercise of prerogative powers, entered into contracts of service with those it employed as public officers. However, the ancient law that service for the Crown was not marked by a contractual relationship, at least one enforceable at law, had over time been modified. In the result, if the Crown in matters of contract agreed to be bound by obligations it would (in the main, one anomaly being the right to dismiss at pleasure) be held to them. Contracts of service with Crown servants were therefore mutually enforceable.

36. Being mutually enforceable, a public officer was entitled to sue for a breach of contract, for example, for remuneration agreed to be paid to him by the terms of his appointment and remaining unpaid : see *Kodeeswaran v. Attorney-General of Ceylon* [1970] AC 1111. The contractual relationship was governed by private law and not public law : see *R v. Lord Chancellor's Department, ex parte Nangle* [1992] 1 All ER 817, the headnote of which reads (in part) :

> " All the incidents of a contract of employment were present in the applicant's relationship with the Crown because it was agreed that there had been the necessary offer and acceptance and consideration, and on the facts the parties had intended to create legal relations since the documents relating to the applicant's appointment, including the Civil Service pay and conditions code, laid down with great clarity rights, obligations and entitlements in regard to those matters normally covered by a contract of employment and the relationship of employer and employee existing between the applicant and the Crown by its very nature involved an intention to create legal relations. Furthermore, despite the statement in para 14 of the code that the relationship between civil servants and the Crown was regulated by the prerogative and that civil servants could be dismissed at pleasure, it could not have been intended that the conditions relating to civil servants' appointments were to be merely voluntary. *It followed that the parties must have intended their relationship to be governed by private law and not public law and that if the applicant could show a failure to comply with the disciplinary procedures which had caused him loss his remedy was to sue for breach of contract.*" [my emphasis]

37. It is not disputed that contracts of service with public officers prior to the transfer of sovereignty have remained of full force after that date. Art.100 of the Basic Law is explicit in that regard. Nor, in my view, can it be said that the law applicable to those contracts has changed. Art.8 is explicit in that regard.

38. The employment of public officers in Hong Kong has at all times been governed by provisions contained in a letter of appointment and an accompanying memorandum of conditions of service. The memoranda, although by and large similar in their standard provisions, have nevertheless differed in order to meet different terms of appointment. As at June 2002, the evidence indicates that over 200 differing sets of memoranda introduced over the years remained in force. These memoranda will only cease to be valid upon the departure of the last public officer employed under them.

39. Ms Jessie Yip Yin Mei, a Deputy Secretary for the Civil Service, in an affirmation dated 10 February 2003, has said that 'for decades' two standard clauses have appeared in the memoranda. Before the transfer of sovereignty, the first was to the effect that the public officer was subject to 'Colonial Regulations, Government Regulations and Circulars, Departmental Instructions and to any Ordinances or Regulations' relevant to his employment. Since the transfer of sovereignty, this first clause has been to the effect that the officer is subject to 'Executive Orders issued from time to time by the Chief Executive for the administration of the public service and to regulations and directions made under those orders'. The second standard clause — both before and after the transfer of sovereignty — has been to the following effect :

> "Notwithstanding anything contained in this Memorandum or in the covering letter of offer of appointment, the Government reserves the right to alter any of the officer's terms of appointment and/or conditions of service set out in this Memorandum or the said covering letter should Government at any time consider this to be necessary."

40. Prior to June 2000, Ms Yip has affirmed that none of the memoranda contained a clause expressly stipulating that adjustments of pay may include a 'pay increase, pay freeze or pay reduction'. Only from June 2000 were the memoranda amended to include that express provision. Ms Yip estimated that about 2,700 public officers are today employed subject to the amended memoranda. The balance of officers however (estimated at 30 September 2002 to

be in excess of 167,000 persons) are not subject to that express provision.

41. At all times relevant to these proceedings, the Executive has accepted that in respect of public officers employed prior to June 2000 the general power to alter terms and conditions contained in the memoranda may not extend to the power to unilaterally alter a fundamental condition such as terms of remuneration. That uncertainty has arisen not only out of standard canons of construction but to a limited degree from authority. In *Nobrega v. Attorney General of Guyana* [1967] 10 WIR 187 CA (Guyana), the Court of Appeal of Guyana ruled that :

> " ... in order to justify a reduction in pay—well intended compromise though it may be on the part of the Crown—there must be an enabling term in the contract or provision in a relevant statute; failing either of these, any variation of the contract must be mutual."

Within this jurisdiction there is the first instance decision of Cons J (as he then was) in *Choi Sum and Others v. Attorney-General* [1976] HKLR 609. The facts of that case reveal that a number of Crown servants employed in the New Territories embarked on a regime of 'work to rule'. In response, the Government unilaterally reduced their pay. The headnote to the judgment reads :

> "That there was no implied or express term in the contracts of employment with the plaintiffs enabling the Crown to reduce salaries and that such reduction constituted a breach of contract."

(e) The 'existing mechanism' for determining pay

42. It is accepted that since the mid-1960s the Executive has aimed to peg civil service pay at rates broadly comparable to those in the private sector. The 1968 Salaries Commission confirmed the principle that the Executive "subscribes to the principle of fair comparison with the current remuneration of outside staffs employed on broadly comparable work taking account of differences in other conditions of service".

43. In her affirmation of 10 February 2003, Ms Yip has said that, to ensure the fulfillment of this principle of 'fair comparison', since 1974 an annual private sector pay trend survey report has been commissioned.

44. In 1979, a Standing Commission on Civil Service Salaries and Conditions of Service ('the Commission') was appointed. In its first report, the Commission recommended that 'broad comparability with the private sector should continue to be an important factor in setting civil service pay'. The Commission believed it to be essential that 'civil service salaries do not get out of line with that sector of the economy producing the income from which they are paid'.

45. But that being said, the 'fair comparison' principle has never been the sole principle relied upon by the Executive. Ms Yip has observed that :

> " Under the prevailing annual civil service pay adjustment mechanism, the Government decides on the size of any annual civil service pay adjustment having regard to the following factors: (i) the net pay trend indicators derived from a private sector Pay Trend Survey, (ii) the state of the economy, (iii) budgetary considerations, (iv) changes in the cost of living, (v) the pay claims of the staff sides of the central consultative councils and (vi) civil service morale."

46. Ms Yip has stated that :

> "It is inherent in the prevailing pay adjustment mechanism that civil service pay may be increased or decreased as some of the factors taken into consideration such as the net pay trend indicators and the cost of living are capable of upward and downward movements. The fact that there has been no reduction until 2002 is a reflection of the generally favourable fiscal and economic environment over the years and is not an indication of any Government policy that pay should not be reduced."

47. The annual private sector pay trend survey report is prepared by a research unit which reports to the Commission. Its conclusions are expressed in the form of 'gross pay trend indicators'. The results of each year's survey are 'analysed and validated' by a committee — the Pay Trend Survey Committee — which is chaired by a member of the Standing Commission and *inter alia* has on it representatives of four civil service consultative councils ('the staff unions') representing the civil service as a whole. Once that committee has validated the survey results, those results are then, according to an established formula, mathematically modified by members of the Government administration into what are called 'net pay trend indicators', there being an indicator for each salary band. 'Net pay trend indicators' reflect matters of pay particular to the civil service.

48. Once the 'net pay trend indicators' are determined, the staff unions are invited to submit their pay claims. In light of these claims and the matters to which reference has been made in paragraph 17 above, the Chief Executive in Council makes a final decision on pay adjustments for the year.

49. It must be emphasised that civil service pay adjustments have not always been determined in direct correlation with the results of the relevant private sector pay trend survey. For example, in 1982, in order not to exacerbate inflation, the civil service pay adjustment was set at a lower level than that indicated by the private sector survey. In 1990 and 1991, the pay adjustments were again lower, the Executive resolving that there was a need to control inflation and curb public expenditure.

(f) The 2002 pay adjustment

50. On 6 May 2002, the research unit reported to the Commission that all its 'gross pay trend indicators' for 2001/2002 were in the negative. Three of the four staff unions represented on the Pay Trend Survey Committee sought extra time to consider the results of the report but the chairman of the Committee found no reason to delay and the Committee met on 13 May 2002. At that meeting, the results of the research unit were validated.

51. The figures, when passed to Government, were modified in order to determine the necessary 'net pay indicators'. When calculated, they were : -4.42% for the upper salary band, -1.64% for the middle band and -1.58% for the lower band : the same percentages by which the Ordinance subsequently reduced the scales of civil service pay.

52. On 15 May 2002, three of the staff unions submitted their pay claims. All sought a freeze of civil service pay. The following day the fourth staff union said that it would not submit a claim.

53. On 22 May 2002, the Chief Executive in Council resolved that a formal offer be put to the staff unions reflecting the exact percentage decreases thrown up by the net pay trend indicators, the reductions to be given force of law by legislation.

54. In her affirmation, Ms Yip has explained the reasoning of the Chief Executive in Council, saying it was *inter alia* influenced by the following matters :

(a) The net pay trend indicators for all three salary bands showed a downward trend.

(a) For the year ending 31 March 2002, the Composite Consumer Price Index had declined by 1.8% over the same period in 2001. Other consumer price indices had registered similar decreases.

(c) The Hong Kong economy had undergone a downturn. The labour market had slackened with the unemployment rate reaching a high of 7% in the first quarter of 2002.

(d) The Government was facing a structural fiscal deficit problem, with an estimated consolidated deficit of $65.6 billion and $45.2 billion for 2001-02 and 2002-03 respectively.

55. In response to the formal offer of the Chief Executive in Council, two staff unions sought a pay freeze rather than a reduction; one staff union declined to make submissions; one objected to the intention to make the pay reductions the subject of legislation.

56. On 28 May 2002, the Executive resolved that the pay reductions should be made and should, if possible, be secured by legislation.

57. In my opinion, what must be noted — as Mr Fok, for the respondent, has emphasised — is that the Executive has sought legislation to reduce civil service pay not in order to meet a 'target figure' which had been unilaterally calculated as being fiscally prudent and which, in relation to the existing mechanism for adjusting pay, was entirely arbitrary but instead to reduce that pay entirely in accordance with the existing mechanism and with principles long accepted by both the Executive and the representatives of the civil service, one of those principles, indeed a founding principle, being the need for a 'broad comparability' between private and public sector pay.

58. In a letter dated 11 June 2002 to various civil service staff associations, which had requested that a committee of inquiry be set up to report on the dispute as to the proposed pay reduction and its imposition by means of legislation, the Chief Secretary for Administration wrote :

> " The Chief Executive is of the opinion that it is a matter of settled public policy that in determining the size of each year's civil service pay adjustment, the Government takes into account the following factors: the net pay trend indicators derived from an independent private sector pay trend survey, the state of the economy, budgetary considerations, changes in the cost of living, the staff sides' pay claims and civil service morale. Some of the considerations under the existing mechanism such as the net pay trend indicators and the cost of living are capable of upward and downward movements. It is thus inherent in the existing mechanism that civil service pay may be increased or decreased. The 2002 civil service pay adjustment exercise has been conducted in strict accordance with the established mechanism and the final decision on a civil service pay reduction has taken account of all the relevant factors mentioned above."

In respect of the contemplated legislation, the Chief Secretary commented :

> " On the Chief Executive in Council's decision to give effect to the 2002 civil service pay adjustment by legislation, this is a matter of *implementation of a settled policy*. The reason for this approach is that the employment contracts between the Government and the vast majority of serving civil servants do not contain an express provision authorizing the Government to reduce pay. Legislation is therefore the only way to implement the Chief Executive in Council's pay adjustment decision fairly and with certainty." [my emphasis]

59. In that letter, the Chief Secretary asserted that no implication could be said to arise from what I have called the existing mechanism that civil service pay may remain unchanged or be increased but can never be reduced. That, in my judgment, must be correct. The possibility of a reduction must be inherent in both the mechanism and the principles relevant to that mechanism. In this regard, although it is not directly on point, some guidance may be obtained from *King v. Attorney General of Barbados* [1994] 1 LRC 164 (PC) per Lord Templeman, at 202 :

> "Even if s 112 [a provision protecting the salaries of certain high officers] had not been included in the Constitution, their Lordships can discern no possible justification for any implication that the emoluments attached to the office of the appellant in the public service shall never be reduced."

The approach to interpreting the Basic Law

60. However complex the factual background to this matter, the sole issue to be determined is whether the Ordinance does or does not contravene the Basic Law. The seminal statement on the interpretation of the Basic Law is to be found in the CFA judgment of *Ng Ka Ling and Others v. Director of Immigration* [1999] 1 HKC 291. In that judgment (at 325), the Chief Justice commented :

> "We must begin by recognizing and appreciating the character of the document. The Basic Law is an

entrenched constitutional instrument to implement the unique principle of 'one country, two systems'. *As is usual for constitutional instruments, it uses ample and general language. It is a living instrument intended to meet changing needs and circumstances.*" [my emphasis]

Mr Dykes, of course, recognised that the Basic Law is 'a living instrument' and, in respect of the terms and conditions of employment of public officers, does not act to shut out all change.

61. In interpreting the Basic Law, the Chief Justice spoke of the need for adopting a purposive approach :

"It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.

As to purpose, the purpose of the Basic Law is to establish the Hong Kong Special Administrative Region being an inalienable part of the People's Republic of China under the principle of 'one country, two systems' with a high degree of autonomy in accordance with China's basic policies regarding Hong Kong as set out and elaborated in the Joint Declaration. The purpose of a particular provision may be ascertainable from its nature or other provisions of the Basic Law or relevant extrinsic materials including the Joint Declaration."

62. It follows from these observations that the Basic Law is not to be given a narrow interpretation :

"As to the language of its text, *the courts must avoid a literal, technical, narrow or rigid approach*. They must consider the context. The context of a particular provision is to be found in the Basic Law itself as well as relevant extrinsic materials including the Joint Declaration. Assistance can also be gained from any traditions and usages that may have given meaning to the language used." [my emphasis]

63. In *Director of Immigration v. Chong Fung Yuen* [2001] 2 HKLRD 533, at 546, the CFA held unanimously that the exercise of interpretation of the Basic Law requires—

" ... the courts to identify the meaning borne by the language when considered in the light of its context and purpose. This is an objective exercise. Whilst the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear. As was observed in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 at p.329E, a case on constitutional interpretation: 'Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language."

The challenge in respect of art.100 and art.103

64. Chapter IV of the Basic Law bears the heading 'Political Structure'. Section 6 of that chapter is concerned with 'public servants'. Art.100, contained within that section, reads :

" Public servants serving in all Hong Kong government departments, including the police department, *before* the establishment of the Hong Kong Special Administrative Region, may all *remain* in

employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before." [my emphasis]

65. Art.100 is transitional in nature. It applies only to public servants employed by the Crown prior to the transfer of sovereignty who remain in service after that date. I agree with the observations of Barnett J in *AECS v. Secretary for the Civil Service* (unreported) HCAL No.9/1998, that art.100 is intended :

"... to ensure continuity of employment so that no public servant suffers as a consequence of the transition itself."

66. I further agree with Barnett J's observations in his judgment to the effect that it would be wrong to interpret art.100 as stultifying change :

"Whatever else may have been the intention, I am confident that Article 100 is not intended to inhibit the introduction of new measures for the good governance of Hong Kong."

67. In my view, art.103 of the Basic Law — that is, its second sentence — is also essentially transitional in nature. The article reads :

" The appointment and promotion of public servants shall be on the basis of their qualifications, experience and ability. Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service, including special bodies for their appointment, pay and conditions of service, shall be maintained, except for any provisions for privileged treatment of foreign nationals."

While art.100 ensures the continuity of employment of public servants with their seniority, pay, allowances, benefits and conditions of service being no less favourable than prior to the transfer of sovereignty, art.103 ensures the continuation of the public service itself in an unchanged form.

68. But, of course, prior to the transfer of sovereignty, the public service was in a constant state of adaption. That is a characteristic of all large organizations charged with maintaining operative capability. That ability (and requirement) to adapt was an integral part of Hong Kong's 'previous system' of public service and, in terms of art.103, has been maintained. Art.103 does not attempt as at 30 June 1997 to lock the public service into a reliquary. Art.103 cannot therefore be interpreted in such a narrow way as to inhibit all introduction of new measures for the good governance of the public service and thereby for the good governance of Hong Kong, the public service being the constitutionally recognised servant of Hong Kong.

69. In light of these observations, I turn now to the applicants submissions in respect of the two articles which may be expressed as follows :

(a) It was submitted that, prior to the change of sovereignty, public officers were employed by the Crown pursuant to contracts of service. Those contracts, which differed in their terms and conditions, were each mutually enforceable in private law. The making of contracts of service was an exercise by the Crown of its prerogative powers. Art.XIV and XVI of the Letters Patent expressly reserved the powers of appointment and dismissal of public officers to the Crown's representative, the Governor. The introduction of legislation to govern those contracts, said Mr Dykes, would have constituted a surrender by the Crown of its prerogative powers and would have been fundamentally at odds with the nature of colonial rule, encroaching as it would have done on the power of the Crown to employ (and remove) its servants as it deemed fit.

(b) That being the case, the regulation of contracts of service by the making of statute law was never a

feature of the system of employing civil servants prior to the change of sovereignty. The system was instead defined by its contractual nature and the powers given to the Governor under the Letters Patent, powers now, in substance, resting with the Chief Executive by way of executive orders under art.48 of the Basic Law.

(c) What is protected by art.103 is 'Hong Kong's previous system of ... employment' of public officers, a system that art.103 directs 'shall be maintained'. That being the case, what must be maintained is a system of employment which, in respect of fundamental issues such as pay, is not governed by legislation but rather by contract, those contracts of course not allowing for a unilateral reduction in pay.

(d) As Mr Dykes expressed it, the Ordinance has the effect of subverting art.103 in that, in respect of pay, it materially changes the basis on which such pay is calculated.

(e) The changes, he said, have also resulted in less favourable treatment of public officers appointed before the change of sovereignty and have therefore offended art.100 which, in respect of those officers, guarantees that they shall retain their 'seniority with pay, allowances, benefits and conditions of service *no less favourable than before*'. Those officers, it was submitted, have lost a fundamental contractual benefit; that is, the right not to have pay changed to their detriment by unilateral action without retaining the right to seek compensation in the courts.

(f) In summary, Mr Dykes contended that the Ordinance offends both art.100 and 103 because it provides for the legislative variation of the terms and conditions of the contracts of service of public officers when such variation is, 'as a matter of constitutional implication' prohibited by those articles.

(g) Mr Dykes accepted that the contracts of public officers may be subject to legislative amendment in certain matters of general application. As I have said, he conceded that the Basic Law was not intended to freeze progress or inhibit change. But the Ordinance, he said, went to an issue of fundamental importance in respect of public service contracts; that is, pay, and, in attempting to change the basis on which pay was calculated, it materially altered the previous system of the employment of public officers, the integrity of that system being expressly protected by art.103.

(h) If the basis for calculating pay could be amended by legislation, said Mr Dykes, other fundamental terms could also be changed by statute; for example, legislation providing for instant dismissal of a blameless public officer without payment in lieu.

70. For the purposes of determining this matter, I believe that the critical word in art.103 is the word 'system'—

" Hong Kong's previous *system* of recruitment, employment, assessment, discipline, training and management for the public service, including special bodies for their appointment, pay and conditions of service, shall be maintained ..." [my emphasis]

A system is defined by the fact that it consists of parts, those separate parts co-ordinating to make the whole. Some of those separate parts may change, they may be modified or replaced, but the system, seen as such, may continue as before. Whether it does continue or is materially changed so that it becomes another system is, of course, determined by the degree of internal change.

71. Looking to the ample and general language of art.103, I am satisfied that, in respect of pay, the word 'system' incorporates not only its contractual characteristic but also in respect of annual pay adjustments the mechanism employed over an extended period of time to determine the rate of those adjustments.

72. While historically, using the existing mechanism, there may not have been any pay reduction, that, as I have indicated, was due to the kind winds that directed the ship of Hong Kong's prosperity and could not give rise to the implication that in more stormy times an adjustment by way of a reduction would not be possible.

73. In the present case, the pay reductions imposed by the Ordinance have not been calculated by some method

entirely removed from the existing mechanism. To the contrary, the reductions have been calculated by employing the existing mechanism in an entirely orthodox manner. The *exact* percentages thrown up by this orthodox use of the existing mechanism have been placed in the Ordinance. To that extent, therefore, the Ordinance directly maintains a material part of the previous system.

74. As to the characteristic of contract, in my judgment the Ordinance does not so modify that characteristic as to subvert and thereby change the essential nature of the system itself. Contracts of service remain an integral part of the system of the employment of public officers. The Ordinance does not permanently alter the terms and conditions of those contracts. To repeat what Mr Fok emphasised, the Ordinance is a 'one-off exercise'. All that it achieves is an adjustment of civil service pay for one specific year in direct accordance with a long-established mechanism for calculating that adjustment and does so in order to ensure that the adjustment is of general application.

75. I turn now to the matter of legislation. The applicants' contention, as I understand it, is that the introduction of legislation to effect the pay reduction has nullified the contractual rights of public servants and has thereby materially changed the previous system of employment. The legislation of course has been only of limited effect in varying contractual rights. It has made a variation in respect of one pay adjustment only. It has no deeper effect. I doubt whether legislation *per se*, which gives effect by way of general application to what in the past has been achieved by concensus, is so profound as to constitute a change to the previous system. But, if I am wrong in that regard, it appears to me that in any event the use of legislation has, prior to the transfer of sovereignty, been ruled to be a lawful means by which civil service contracts of employment may be unilaterally varied. The authority in point is *Lam Yuk Ming and Others v. Attorney General* [1980] HKLR 815, a decision of the Court of Appeal.

76. The facts of the case may be summarised as follows. In 1979, a number of public officers embarked on a 'work to rule'. They were suspended from duty without pay. The action against them was taken pursuant to certain Civil Service Regulations. A declaration was sought by the officers that the Regulations did not form part of their contracts of employment and that the administration was in breach of those contracts by suspending their pay.

77. The Court of Appeal acknowledged that the Crown had power to legislate for public officers. As to the nature of that power, it was said—

> " Hong Kong is, in constitutional terms, a 'ceded territory' within which the Crown, by virtue of its prerogative, enjoys full legislative authority, subject to any act of Parliament which may extend to the territory. See *Campbell v. Hall* (1774) 20 St. Tr.239.
>
> The Crown's legislative power may be exercised by Order in Council, Letters Patent or Proclamation. All such instruments form part of the law of the territory to which they are directed."

78. The Court of Appeal held that, as asserted by the officers, there were contracts between the Crown and its servants and that their terms 'should be, and are, mutually enforceable'. It held further that the contracts contained by incorporation the Civil Service Regulations. But the public officers who had been suspended had all been employed by the Crown prior to the coming into force of the Regulations which were used to bring about their suspension without pay. As Roberts CJ stated the issue :

> " The Crown, therefore, has to show that it was entitled to vary the contract of service of serving public officers unilaterally, by introducing a form of summary suspension from office without pay which had not existed before."

79. The Chief Justice determined the question in the following manner :

> " The trial judge observed that he found it difficult to view as part of a true contract provisions which can be changed at will by one party alone. Thus stated, we agree with him. In this instance, however, the contract itself contains, *as one of its express terms*, a right in one of the parties to vary any of its conditions. So the public officer, when accepting the offer made to him, does so in the knowledge that any of its terms can be varied by the Crown, without his agreement, whether to his benefit or to his

detriment.

It is not unusual for contracts to contain some terms which can be altered at the option of one party only, for example, many leases allow for an increase of rent at the option of the landlord alone. There is thus no objection in principle to a provision in a contract whereby one party can alter some of its conditions without agreement, so long as this overriding provision was within the terms of the main contract which he entered. With hesitation, we conclude that that principle is applicable also when any term is capable of unilateral variation, and that such a clause does not destroy the contractual relationship between the Crown and public officers, however vulnerable the latter may be as a result."

80. In giving the rationale for this determination the Chief Justice said :

" We must recognize also the practical difficulties of reaching any other conclusion. If, as we have found, there is a contract between the Crown and its servants, and the overriding provision for unilateral variation were held to be inoperative, the Crown would be obliged to secure the agreement of each public officer to every change to Government Regulations, however minute."

81. In summary, in cases where contracts of service contain an express term empowering unilateral variation, the Court of Appeal in *Lam Yuk Ming* held that it was lawful for the Crown to amend those contracts by means of the legislative powers possessed by it.

82. Accordingly, on the authority of *Lam Yuk Ming* it is apparent that the ability of the Crown to employ its powers of legislation to unilaterally vary the contracts of service of its public officers when the contracts provide for unilateral variation was lawfully part of the 'system' of the employment of those officers prior to the change of sovereignty. Art.103 maintains that 'system' and therefore, in my judgment, acknowledges the power on the part of the Executive, when necessary, to seek legislation (albeit now, by reason of the Basic Law, of a different complexion) for the same and allied purposes.

83. Mr Dykes has complained that, while legislation may be permissible to vary some contractual terms, it was never part of the system prior to the transfer of sovereignty to do so in respect of such a fundamental matter as a reduction in pay and could not lawfully have been part of that system. I cannot agree. *Lam Yuk Ming*, as I have noted, focused directly on the fundamental matter of pay and not merely in a passing or peripheral way.

84. Prior to the transfer of sovereignty, there may not in fact have been legislative steps taken to bring about a reduction in pay for all civil servants as a class but that is not to say that the power did not exist. I am satisfied that it did exist, most certainly where, after it was calculated in accordance with well-settled mechanisms, it was imposed across the civil service; that is, by way of general application, to avoid the need, as Roberts CJ said, 'to secure the agreement of each public officer' in a service some 170,000 strong. In the course of his submissions, Mr Fok said that the fact that legislation is used to effect a contractual variation in respect of a class of persons is not *per se* unlawful. As a general statement of principle I believe that must be correct. For example, legislation passed to ensure the health of employees in the retail sector by mandating maximum hours of duty per day would no doubt have the effect of varying a great many contracts between employers and employees. But by that alone I fail to see how such legislation could be ruled to be of no force and effect.

85. In conclusion, therefore, I am satisfied that, while the Ordinance has (by way of general application) modified the conditions of service of civil servants in respect of pay, that modification has not so altered the previous 'system' of pay and conditions of service protected by art.103 as to constitute a change to that 'system'. In short, the Ordinance does not offend art.103.

86. As to art.100, if the Ordinance has not offended art.103 by changing the previous 'system' of pay and conditions, I do not see how it can be argued that nevertheless those public officers who may seek the protection of art.100 are, by reason of the Ordinance, prejudiced as to pay and conditions of service on the basis that they are 'less favourable than before'. In my judgment, those officers remain subject to conditions of service which, in respect of pay, for the reasons I have given, remain unchanged. Those conditions are therefore no less favourable.

87. While, in considering whether art.100 has been offended, it may perhaps be necessary to look to specific

figures relating to matters of pay, allowances and benefits, I do not see that art.100, as an article of constitution, is itself worded in such rigid terms as to direct that pay, allowances and benefits may not for any reason, in terms of specific figures, fall below those bestowed on 30 June 1997. If such an inflexible interpretation was to be applied then, purely by way of illustration, it may be said that the Executive, even with the consent of public officers, would be prohibited from raising pay as a *quid pro quo* for doing away with some moribund allowance or benefit.

88. But in any event, it has been shown by the respondent that the specific reductions contained in the Ordinance have not reduced the pay of public officers to below that which they were receiving at the transfer of sovereignty.

89. Mr Dykes, of course, has not argued the matter in direct mathematical terms. He has argued instead that public officers have lost a fundamental contractual benefit. It is not an argument that I accept. For the reasons I have given in considering art.103, I am satisfied that public officers have at all time, both before and after the transfer of sovereignty, been under the legitimate risk of having their contracts of service amended by way of legislation. The enactment of the Ordinance has not therefore placed them in a position less favourable than before the transfer of sovereignty.

The challenge in respect of art.102

90. Art.102 of the Basic Law protects the pensions of public officers. It reads :

> "The Government of the Hong Kong Special Administrative Region shall pay to public servants who retire or who leave the service in compliance with regulations, including those who have retired or who have left the service in compliance with regulations before the establishment of the Hong Kong Special Administrative Region, or to their dependants, all pensions, gratuities, allowances and benefits due to them on terms no less favourable than before, irrespective of their nationality or place of residence."

91. As I understand it, in order to calculate the pensions to which public officers are entitled, three elements are employed. The length of service is one element, the highest pensionable emolument (that is, the highest salary level) is another and a 'pension factor', which varies according to the particular pension scheme in question, is the third. There is no need to examine the manner in which these elements are placed into a mathematical computation to appreciate that the highest pensionable emolument earned by an officer in the course of his career will materially effect the level of his pension. By way of illustration, an officer who has attained a salary level of $50,000 month will earn a higher pension than an officer of equal service under the same pension scheme who has attained a salary level of $40,000 per month.

92. As stated, pensions are calculated on the basis of the *highest* pensionable emolument earned by an officer in his career. Accordingly, an officer earning $100,000 per month whose pay is reduced by the Ordinance by 4.42% to $95,580 will still, upon retirement, have his pension calculated on the basis of $100,000 per month.

93. The Ordinance itself makes no direct reference to pensions. It therefore leaves entirely untouched the terms upon which pensions are calculated. It has not been suggested, however, that the Ordinance offends art.102 by making any direct change. To employ the phrase used by Mr Dykes, the Ordinance has a 'knock on' effect in respect of pensions. As I understand it, this 'knock on' effect is brought about by the fact that certain officers — by no means all — are prevented from moving up the salary scale and thereby achieving a higher pensionable emolument which will, of course, translate into a higher pension.

94. There appear to be two ways to move up the salary scale. First, by way of promotion; second, by way of what is called a salary increment. Promotion, of course, can never be guaranteed. An officer may not be deemed suitable, there may be no vacancies. The applicants seek rather to mount their challenge by reference to the long-established mechanism within the public service of awarding pay increments.

95. Many (but not all) appointments in the civil service are subject to pay increments. Increments are awarded at set intervals to public officers holding a particular post in order to reflect the increased experience of that officer within the post and to reward good conduct, diligence and efficiency within the post. Increments, however, are not open-ended. By that I mean that a post may be subject to three or four increments at determined intervals but then a ceiling is reached and no further increments are granted. It follows that many officers who retire have reached the highest increment level in their post.

96. There is no absolute entitlement to an increment. In this regard, Civil Service Regulation 451(1) states :

> " An officer may be granted an increment only if his/her performance at work (including conduct, diligence and efficiency) have been satisfactory during the appraisal period."

But, as Mr Dykes said, if an officer does conduct himself satisfactorily, he is then entitled to his increment. An increment cannot therefore be equated with a promotion.

97. In respect of increments, the 'knock on' effect of the Ordinance on pension entitlements is, as I understand the applicants' submissions, to the following effect. An officer due to receive an increment may, because of the pay reductions brought about by the enactment of the Ordinance, discover that the increment which he receives puts him on a salary that is less than he was receiving before the reduction. He has not therefore been able to attain a higher pensionable emolument despite the fact that he has been awarded an increment. An example put forward by Mr Dykes illustrates the point. An officer on point 37 of the Master Pay Scale was earning $57,745 before the pay reduction. The reduction, however, has reduced his salary to $55,195. That officer, on receiving his increment *after* the pay reduction, will move up to point 38 on the Master Pay Scale which now pays $57,730. The increment has given the officer more money in his pocket : he has moved from $55,195 to $57,730, an increase of $2,535. However, the increment has not increased his pension emolument and thereby the level of his future pension entitlement That is because, before the pay reduction he was earning $57,745, a sum $15 greater than he is now receiving.

98. But, accepting that the result propounded by Mr Dykes (a result supported on affirmation by certain identified officers) is correct, does this *of itself* result in the enactment of the Ordinance offending art.102? I think not. My reasons may be stated in the following way :

> (a) The Ordinance does not vary the stated terms and conditions of public service pension schemes. It does not therefore vary the established mechanism (contained in the terms and conditions) for calculating the level at which public officers are paid their pensions.
>
> (b) Public officers, therefore, remain entitled to receive their pensions calculated according to the *highest* salary earned by them during the course of their pensionable service. In that regard, their pensions are assessed on terms no less favourable than before the transfer of sovereignty.
>
> (c) the terms and conditions, while they encompass *the fact* of the highest salary earned by public officers so that pension levels may be computed, are not concerned with how salary levels were achieved. That is not a matter relevant to those terms and conditions. It is instead a matter relevant to the lawfulness of the pay awarded to the officers during their service.
>
> (d) If officers have lawfully had their pay reduced during the course of their service then any 'knock on' effect on their future pension entitlements will itself be lawful.

99. In my judgment, therefore, the Ordinance, which does not in any way vary the terms and conditions of public service pensions, does not *of itself* offend art.102. It is only if the Ordinance, which reduces the pay of serving officers, is found to be inconsistent with other articles of the Basic Law, or of the Law itself, and is quashed that there will in consequence be a benefit for some officers in respect of the level of their future pension entitlements. But that is a matter of practical consequence only, it does not speak to the Ordinance offending art.102.

The challenge in respect of art.35

100. The Executive is not obliged to perform commercial contracts (such as contracts of service) if it determines that to do so would not be in the public interest. It may repudiate or vary those contracts. But what the Executive is not permitted to do in terms of the Basic Law, the applicants have submitted, is to pass legislation which purports to deny to those persons whose rights have been affected by such repudiation or variation the right to seek redress for their loss through the courts. The enactment of the Ordinance, it has been said, has denied public officers that very right; namely, the right to seek redress through the courts for a unilateral breach of their contracts of service, and to

that extent the Ordinance offends art.35 of the Basic Law. Art.35 reads :

> " Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and no judicial remedies.
>
> Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel."

101. Mr Fok, for the respondent, has replied to the effect that there has been no denial of access to the courts. Proof of that lies in the fact that the applicants have brought the present proceedings. Mr Fok has submitted that, if the applicants are successful, the Ordinance will be declared effectively to be of no force and effect and the applicants' pay, assessed at the pre-reduction level, will fall due. These proceedings for judicial review will therefore — if the applicants are successful — give to them the ultimate remedy they seek.

102. I do not accept the argument. These judicial review proceedings will not determine, according to the law of contract, the merits of whether the Executive is entitled unilaterally to reduce the pay of its employees. These proceedings go to the lawfulness of the legislation that was passed in order to avoid a dispute as to those very merits. More than that, even if the applicants are successful, it cannot be guaranteed that the Executive will concede that it is unable in private law to unilaterally reduce salaries. I have never understood the Executive to make such a concession. At the highest, it has accepted only that its position in private law is uncertain. The judgment of Cons J in *Choi Sum and Others v. Attorney General* (*supra*, paragraph 28) may have said that, in respect of a limited number of civil servants, their contracts of employment did not allow for a unilateral reduction in salary. But that judgment did not address the fundamental constitutional principle that general executive powers affecting the civil service *as a whole* may not be fettered by private contract. In summary, the resolution of these proceedings in favour of the applicants will not necessarily finalise the issue as to pay; litigation in private law may still result.

103. In the circumstances, it must be accepted that the enactment of the Ordinance has had the effect of denying public officers the ability to seek redress through the courts for what they would contend is a breach of their contracts of service. The issue in question is whether the enactment of the Ordinance thereby offends art.35.

104. In an article entitled *Is the Pearson Airport legislation unconstitutional? The Rule of Law as a limit on contract repudiation by Government* (1995) 33 Osgoode Hall Law Journal 411, Professor Patrick Monahan commented that—

> " ... if the rule of law means anything, it must prevent the Crown from entering into binding contracts and then, *for no good reason*, rewriting the terms of the contract terms in its favour without paying compensation. To permit the Crown [the Executive] to act in this manner is to authorize decisions that are, by definition, arbitrary and high-handed."

105. Mr Dykes has advanced this argument by contending that equally the Executive cannot by the use of a 'legislative device' *for no good reason* rewrite the terms of the contracts of service of public officers in its favour without paying compensation or allowing redress to the courts to seek such compensation. Only in 'exceptional circumstances', said Mr Dykes, would there exist a good reason for such legislation. But, he said, the Ordinance itself, by way of preamble or otherwise, lays no good ground for such circumstances and the purpose of the Ordinance advocated by the Executive; that is, budgetary expediency — as opposed to measures required to meet some 'dire economic and social crisis' — can never amount to a good reason for setting aside a basic constitutional right.

106. The use of the phrase *for no good reason* employed in the course of submissions seems to me to be too general a description, one which obliquely tempts the courts into the forbidden territory of judging legislation not by its lawfulness but by its perceived wisdom. The root question is simply phrased : is the legislation compatible with art.35? To determine that question, when a constitutionally protected right is in issue, this court must be satisfied that the legislation pursues a legitimate aim and that a reasonable relationship of proportionality exists between the means employed and that aim.

107. I also recognise that any restriction on a fundamental right, even one that is not absolute, should be narrowly interpreted : see *Ming Pao Newspapers Ltd v. Attorney-General* [1996] AC 907 (PC) at 917.

108. In *R v. Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326 at 380, Lord Steyn spoke of applicable principles to determine the question I have posed. He spoke, of course, within the context of a different domestic legislative regime and in reference to the European Convention for the Protection of Human Rights of which Hong Kong is not a member. Nevertheless, in the present case I believe that his observations afford appropriate guidance. The European Convention, he said—

> " ... should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality. In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention. This point is well made at p 74, para 3.21 of *Human Rights Law and Practice* (1999), of which Lord Lester of Herne Hill and Mr Pannick are the general editors, where the area in which these choices may arise is conveniently and appropriately described as the 'discretionary area of judgment'. It will be easier for such an area of judgment to be recognised where the right is stated in terms which are unqualified. *It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are specially well placed to assess the need for protection.*" [my emphasis]

109. In light of these observations, it must first be recognised that the right of access to the courts is not absolute. It may be subject to limitations and the legislature, in making laws, may set such limits. This is internationally recognised. See, for example, the judgment of the European Court of Human Rights in *Osman v. United Kingdom* (1998) 29 EHRR 245, para.147 :

> " However, [the right of access to a court under article 6(I) of the Convention] is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the state."

110. In my judgment, although it was not argued before me, it must further be recognised that, unusually perhaps because of the retention of Hong Kong's capaitalist system, the Basic Law includes within its framework matters relevant to public finance and monetary affairs. Chapter V is headed : 'Economy'. That being the case, what Mr Dykes has described as budgetary expediency is not merely a matter of accounting prudence, I believe it is a broad constitutional obligation. I have referred to this earlier (see paragraph 2) but art.107 bears citing again :

> " The Hong Kong Special Administrative Region shall follow the principle of keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product."

The language used is, of course, ample. It allows for the necessary use of financial discretion. But that said, art.107 directs Hong Kong to a particular course. It employs forceful language : the Government shall 'strive' to achieve a fiscal balance. That being the case, it speaks for itself that the Ordinance, as one instrument in a set of co-ordinated measures aimed at keeping public finances sustainable, must have a legitimate aim. The question therefore is whether, in denying access to the courts, the Ordinance attains the required balance between the ends sought and the means used.

111. In the course of his submissions, the applicant in the first application, Mr Lau Kwok Fai, argued that Hong Kong had sufficient funds 'in reserve' and those funds should be employed. He provided no evidence, however, as to the exact amount of those funds or what call there may or may not be on them. It is not for this Court, of course, to

assume the place of the Financial Secretary and decide matters of financial policy where there is a dearth of evidence before it.

112. It is true that in material part the decision to seek the enactment to the Ordinance was made to further economic policy. But more than that, it was to further a policy mandated by Hong Kong's Supreme Law. As such, in my opinion, in considering the balance between ends and means, this is an area where the judiciary should give due weight to the considered opinion of the Executive which proposed the legislation and the Legislative Council which passed it into law, this being, as Lord Steyn said, an area of economic policy.

113. This itself cannot decide the issue. But, in my judgment, the following matters, considered in light of the due weight which I have said should in this case be given to the view of the Executive and the Legislative Council, demonstrate that the enactment of the Ordinance was proportionate to the aims sought to be achieved and did not go beyond what was proportionate.

(a) The Ordinance was enacted to reduce (not expunge) the pay not of a small group of identified individuals as such but of a class of persons, a class recognised by the Basic Law.

(b) The Ordinance was enacted to reduce the pay of that class of persons in accordance with a mechanism for assessing levels of pay that had in the past over an extended period of time been accepted by that class. In addition, the reduction reflected a reduction in the pay levels of employees in Hong Kong's private sector generally. To that extent it was entirely rational and in the interests of the collectivity as a whole.

(c) The right that was removed by the Ordinance is in any event a qualified right not an absolute one.

(d) Finally, it must be recognised that if the Ordinance made provision for access to the courts by public officers to seek redress in private law for breach of their contracts, that measure would effectively vitiate the purpose Ordinance itself.

114. However, the challenge of the applicants to the compatibility of the Ordinance with art.35 does not end there. It has also embraced the contention that enacting the Ordinance was a specific device to extracate the Executive from threatened litigation in the courts and was in substance therefore the dealing of a trump card to avoid that litigation. In support of these submissions, Mr. Dykes made reference to a number of decisions of the European Court of Human Rights. As I have read them, the decisions in essence affirm the same central principle, that principle being stated in *Zielinski & Ors v. France* (unreported, App Nos 24846/94, 24165-34173/96, 1999) ECtHR and *Papageorgiou v. Greece* (unreported, 97/1996/716/913, 1997) ECtHR as follows :

"*Zielinski* :

The Court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature - other than on compelling grounds of the general interest - with the administration of justice designed to influence the judicial determination of a dispute.

Papageorgiou :

The Court agrees with the Government that in principle the legislature is not precluded from regulating by new provisions rights arising under laws previously in force.

However ... the principle of the rule of law and the notion of fair trial enshrined in Article 6 precluded the interference by the ... legislature with the administration of justice designed to influence the judicial determination of the dispute. It concluded that the State had infringed the applicants' rights under Article 6 by intervening in a manner which was decisive to ensure that the imminent outcome of proceedings in which it was a party was favourable to it."

115. The *factual* bases of the cases to which Mr Dykes has referred were also in their fundamental elements the same; more particularly as to the fact that the legislation passed was retrospective and was found in reality to determine litigation which had already been commenced by the applicants, the state being (or about to be) a party to that litigation. A case which is illustrative is that of *Agoudimos and Cefallonian Sky Shipping Co v. Greece* (2001) 11 BHRC 489. The applicants complained that the Greek Government had enacted into law, with retrospective effect, an interpretative provision which in reality determined in the Government's favour on-going litigation proceedings between the applicants and the Government. This, it was said, violated the applicants' rights to a fair trial under art.6(1) of the convention which (in relevant part) reads :

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by [a] ... tribunal established by law ..."

The headnote to the judgment of the European Court reads :

> " While in principle the legislature was not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in art 6 precluded any interference by the legislature-other than on compelling grounds of the general interest—with the administration of justice designed to influence the judicial determination of a dispute. In the instant case, the effect of the impugned legislative provision, taken together with the method and timing of its enactment, could not be overlooked. To begin with, while the provision expressly excluded from its scope court decisions that had become final, it settled once and for all the terms of the dispute before the ordinary courts and did so retrospectively. Therefore, the adoption of the provision while the proceedings were pending in reality determined the substance of the [applicants'] dispute ... Accordingly, the state infringed the applicants' right to a fair trial by intervening in a manner which was decisive to ensure that the outcome of proceedings in which it was a party was favourable to it."

116. In *Agoudimos*, and the other cases to which I have been referred, there are, in my view, two central features which materially distinguish them from the matter now before me.

(a) Intervention in 'on-going' litigation

117. In the European cases, the relevant law was passed when the litigation (which was found to be the essential subject of *that* law) was already in progress. As the European Court observed in *Smokovitis v. Greece* (unreported, App No 46356/99) ECtHR, the state infringed the rights of the applicants under art.6(1) by 'intervening' in a manner which was decisive to ensure that the outcome of legal proceedings (that were already in process and in which it was a party) was favourable to it.

118. In the matter now before me, at the time when the Ordinance was enacted, there was no on-going litigation in respect of civil service salaries. During the process of defining policy and enacting the Ordinance there were indications only that, if salaries were reduced (by whatever means), the matter *may* be taken to the courts.

119. Nor can there be any certainty that, even if salaries were unilaterally reduced by executive order without recourse to legislation, that there would inevitably have been litigation. All that can be said, in my view, is that one of the material factors taken into account by the Executive in seeking the enactment of the Ordinance was the avoidance of possible legal action by sections of the civil service, legal action that may, if instituted, take a long time to be resolved and may not enable the Executive to impose a timely pay reduction on the civil service as a whole for the good governance of Hong Kong.

120. Mr Dykes has submitted that there can be no difference in principle in intervening in existing litigation to ensure a favourable result and taking steps before that litigation commences to ensure it cannot be launched. I do not agree. There is a material difference. In the first case, the judiciary, having already been seized of a matter, has the exercise of its jurisdiction undermined; indeed, effectively removed, thus preventing the court from making a determination of a matter before it according to the law applicable at the time the cause arose. That, in my view,

directly offends the principle of the separation of powers contained, as I have said, in the Basic Law. In the second case, before any cause of action has arisen, the legislature has passed a law of general application, one of the consequences of that law being that the qualified right of access to the courts — if it was to be sought — is now limited or removed.

121. In enacting laws, the legislature may often vary or do away with rights of individuals under private law and may, to avoid the potential for litigation (which will undermine the purpose of the legislation or vitiate its general effect) restrict or remove the rights of those individuals to seek redress in private law. Access to the courts, as I emphasise again, is not an absolute right; it may be regulated by the state. The judgments of the European Court cited by Mr Dykes all acknowledge the principle that the legislature is not precluded from regulating by new provisions rights and obligations arising under laws previously in force.

(b) Retrospective legislation

122. In the European cases, the legislation was retrospective. In each case it reached back to alter (to the state's advantage) an existing law or principles relevant to that law. In the face of retrospective legislation, the logic of the European Court in adopting a test of compelling circumstances cannot be criticised. But the Ordinance is in no way retrospective. It does not back-date the pay reduction, removing rights in property already lawfully acquired. The Ordinance does not, therefore, for example, prevent an aggrieved public officer from suing for pay witheld or underpaid that fell due to him before the effective date of the Ordinance; that is, 1 October 2002.

123. Was the enactment of the Ordinance a colourable device specifically created to ensure that litigation would be determined in the favour of the Government? In my judgment, it was not. While it had the result of preventing the possibility of litigation (a very different thing from intervening in existing court proceedings) I am satisfied that its purpose was not simply to frustrate litigation. Its purpose was, in accordance with a pay adjustment mechanism long in place and long agreed, to vary the terms of contract of a full class of persons so that the unchallenged results of that mechanism were put in place in respect of that class of persons. Legislation not only avoided the possibility of long and expensive court proceedings, it avoided the immense practical difficulties of attempting to negotiate with all the individual members of the public service and clearly, in the view of the legislature, was for the greater good of the community.

124. Accordingly, I am satisfied that the Ordinance does not offend art.35.

The challenge in respect of art.160

125. Art.160 is the final article in the Basic Law. It is the only article in Chapter IX, the chapter bearing the heading 'Supplementary Provisions'. In the course of his submissions, Mr Fok has said that, read in context, art.160 is of the nature of a 'sweep-up' or 'catch-all' provision to ensure the continuity of Hong Kong's separate system of law, commerce and finance. As a general description, I think that must be correct. Art.160 reads :

> " Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. 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.
>
> Documents, certificates, *contracts*, and rights and obligations *valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong Special Administrative Region*, provided that they do not contravene this Law." [my emphasis]

126. Mr Dykes has stressed, however, that art.160(2) does more than merely preserve the validity of contracts, it imposes an obligation on the Executive, the Legislative Council and the judiciary to 'protect' those contracts so long as that protection does not contravene the Basic Law.

127. Protection, of course, goes further than mere recognition of validity. It imposes an obligation to defend; to actively guard against arbitrary and/or unlawful injury or destruction. It imposes an obligation to preserve.

128. Addressing the Legislative Council on the second reading of the Public Officers Pay Adjustment Bill, the Secretary for the Civil Service made the following observations in respect of art.160 of the Basic Law :

> " A view has been expressed that the rights protected by Article 160 of the Basic Law include a right not to have any legislative interference with a subsisting contract. We do not share this view. We consider that Article 160 is primarily *a savings provision* to ensure that contractual rights do not fall away as a result of reunification. Given that amendments consistent with the Basic Law can be made to laws previously in force, it would be difficult to argue that contractual rights cannot be modified by legislation." [my emphasis]

129. Mr Dykes submitted that it was wrong in law to relegate art.160(2) to a mere 'savings provision' which ensures only that contractual rights do not fall away as a result of the transfer of sovereignty but that legislative means can thereafter be used to undermine those contractual rights. But I do not take the Secretary for the Civil Service to have suggested that since the transfer of sovereignty the Executive now had the kind of free hand which Mr Dykes has suggested.

130. In my view, art.160, in so far as it relates to contractual rights and obligations, provides that in all respects as they were before the transfer of sovereignty so those contractual rights and obligations remain afterwards : as they were protected before so they remain protected afterwards. The purpose is to effect a seamless transfer, as if there was no transfer at all. That being so, if contractual rights and obligations were lawfully variable before the transfer of sovereignty so, in my view, they must remain lawfully variable afterwards provided only that there is no contravention of the Basic Law.

131. For reasons given earlier in the judgment, I am satisfied that prior to the transfer of sovereignty the Executive had the power to vary the contracts of civil servants as a class by means of legislation, that power including the power to vary such fundamental contractual conditions as those related to pay. If that power, lawfully exercised, existed before the transfer of sovereignty so, lawfully exercised, it must remain after its transfer.

132. But even if I am wrong in that regard, I am further satisfied that before the transfer of sovereignty, the Executive was unable to fetter its general executive powers by way of private contract. Unless the Basic Law prohibits the transfer of that principle, it too must seamlessly make the transition. In my judgment, the Basic law does not prohibit the transfer of that principle, one so essential to the good governance of any state or territory. Indeed, Mr Dykes accepted that the power of the Chief Executive to issue 'executive orders' pursuant to art.48(4) of the Basic Law for all practical purposes reserves what was before the general executive power and what Mr Dykes has described now as the reserve power. In my judgment, that acknowledgement has been correctly made.

133. But it is with respect to the exercise of the reserve power in the present case that Mr Dykes takes issue. As I understand it, it has been his contention that the Ordinance is inconsistent with art.160 because it has not been demonstrated that the failure to 'protect' the contracts of public officers (employed prior to the transfer of sovereignty) was the consequence of a compelling public purpose rather than a desire on the part of the Executive to cut pay as a budgetary expedient.

134. In respect of that argument, I do not accept that the appropriate test is one of compelling public need, not in order to test the constitutionality of legislation which, while it has an impact on rights protected by the Basic Law, does not impact on protected fundamental human rights. Contractual rights are protected by art.160 but not as fundamental human rights. In my view, it is sufficient to ask whether the exercise of the reserve power (a) is in fact the exercise of that power and (b) is necessary to meet the greater public need. Again, in looking to what is necessary, issues of proportionality arise.

135. Mr Fok has said that the respondent in no way relies on the exercise of the reserve power. It is not part of the Government's case. The enactment of the Ordinance, he has said, is to be judged on the basis of its constitutional propriety alone. On a proper reading of art.160 it cannot be said that it has offended that article. The contracts of public officers are still protected; equally however what is protected is the power, lawfully exercised, to effect amendments to those contracts by legislation when such legislation is of general effect. I agree with those submissions. But, in so far as it is necessary to determine the question of the exercise of the Chief Executive's reserve power, I am satisfied that, if relied upon *in this case*, it would have been demonstrated that it was necessary. The reasons given earlier in this judgment, in considering art.35, apply equally here.

The challenge in respect of art.105

136. Art.105 protects the right to acquire, use, dispose of and inherit property. While it accepts the need for the lawful deprivation of property, it affirms the right to be compensated for any such deprivation. Art.105, in so far as it is relevant, reads :

> " The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.
>
> Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay."

137. Mr Fok has argued that a public officer's contract of service does not constitute 'property' within the meaning of art.105. However, I find no need to resolve that issue.

138. It is sufficient, I believe, to observe again that the Ordinance has no retrospective effect. It does not seek to claw back a portion of salaries already earned. It looks only to a reduction of future pay; by definition, to pay not yet earned and therefore not yet acquired as property.

139. For the reasons given in this judgment, I am satisfied that public officers have no constitutional right to continue to be paid the salary that they were being paid before the Ordinance came into effect; that is, before 1 October 2002. If they have no right to the continuance of that earlier salary as a minimum salary it follows that they have no property (in the form and amount of their pay reduction) protected by art.105.

The challenge in respect of art.39

140. Art.39 of the Basic Law reads as follows :

> " 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." [my emphasis]

141. In respect of art.39(2), the CFA, in *Gurung Kesh Bahadur v. Director of Immigration* [2002] 2 HKLRD 775, at 784, has stated that the article is protective of the rights and freedoms of Hong Kong residents. Its provisions make it clear, first, that such rights and freedoms may only be restricted as prescribed by law and, second, even if restrictive measures are prescribed by law, those measures may not contravene provisions of the various international conventions applied to Hong Kong and referred to in art.39(1).

142. One of the international labour conventions referred to in art.39(1) which has been applied to Hong Kong is the Labour Relations (Public Service) Convention, 1978 ('the 1978 Convention').

143. The 1978 Convention applies to 'all persons employed by public authorities'. In its preamble, the Convention recognises the great diversity of political, social and economic systems among member states and the differences among them in respect of such matters as the nature of employment relationships. The language of the Convention is broad and purposive. Flexibility, to reflect the diversity of which I have spoken, is integral to the Convention.

144. Art.7 of the 1978 Convention looks to procedures for determining the terms and conditions of public officers. It reads :

"Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters."

145. In respect of art.7, paragraph 923 of the Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the International Labour Organization (4 edition, revised) ('the Digest') states :

" The Committee acknowledges that Article 7 of Convention No. 151 allows a degree of flexibility in the choice of procedures to be used in the determination of the terms and conditions of employment."

146. Art.8 of the 1978 Convention looks to procedures for the settlement of disputes 'arising in connection with the determination of terms and conditions of employment'. It reads :

"The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved."

147. Art.8 contemplates either the use of negotiation or the use of other procedures such as mediation or arbitration. It is not a requirement that the one must follow the other. As I read it, if, in compliance with the article, negotiation is chosen and is not successful it is not then mandatory to refer the dispute to an independent body. In this regard, paragraph 917 of the Digest reads :

" Referring to Article 8 ... concerning the settlement of disputes, the Committee has recalled that, in my view of the preparatory work which preceded the adoption of the Convention, *this Article has been interpreted as giving a choice between negotiation or other procedures* (such as mediation, conciliation and arbitration) in settling disputes. The Committee has stressed the importance of the principle contained in Article 8 of Convention No. 151."

148. Art.8, like art.7, allows for a flexible use of procedures. In this regard, paragraph 918 of the Digest reads :

" The Committee has pointed out that Article 8 *allows a certain flexibility in the choice of procedures* for the settlement of disputes concerning public servants on condition that the confidence of the parties involved is ensured ..."

149. How then has the Hong Kong Government sought, for its part, to comply with the procedural provisions of art.7 and art.8?

150. In 1968 an agreement was entered into between the Government and the staff unions. This agreement ('the 1968 agreement') was revised in 1998. The agreement contains an undertaking by Government not to make any material change to conditions of service which affect a substantial percentage of public officers without 'prior consultation' with the staff unions.

151. In 1995, the Committee of Experts on the Application of Conventions and Recommendations ('CEACR') of the International Labour Organization, when considering a complaint by the Hong Kong Confederation of Trade Unions ('the HKCTU'), observed in respect of art.7 that—

" ... appropriate consultative machinery is in place at the central level which allows staff representatives to participate in the determination of civil service employment matters."

152. In the course of his submissions, the applicant in the first application asserted that, he being a police officer, the staff union representing the police had never, to his knowledge, participated in negotiations to set terms and conditions of employment. I do not know whether that is or is not the case. But the Convention, of course, does not seek participation by each and every sector of a state's public service. The principle of a limited number of representatives acting for the service as a whole has never been criticised.

153. In terms of the 1968 agreement, if deadlock is reached in connection with any proposed material change to conditions of service then, as I understand it, a two-stage process may be followed : first, administrative channels are used to see if, by this process of negotiation, an agreement can be reached and, if this fails then, second, an independent committee of inquiry may be appointed to report as to its views. In this regard, s.7 of the 1968 agreement provides that :

" ... existing administrative channels shall first be used in an effort to enable agreement to be reached, failing which an independent Committee of Inquiry will be appointed by the Chief Executive, provided the Chief Executive so decides or the Associations so request, and provided the matter in dispute is not one which, in the opinion of the Chief Executive :

(a) is trivial; or

(b) *is a matter of settled public policy*; or

(c) affects the security of the Hong Kong Special Administrative Regions ..."

[my emphasis]

154. The Chief Executive may therefore decline to appoint a committee of inquiry if the issue in dispute is considered to be trivial; that is, of no real effect or consequence, if it affects what may be termed national security or if it is considered to relate to an issue which has already been determined and acted upon in the past and has therefore become a 'matter of settled public policy'.

155. As I have indicated, the findings of a committee of inquiry are not binding. In this regard, s.12(2) of the 1968 agreement reads :

" The recommendations of a Committee of Inquiry (including recommendations concerning dates of implementation) will be subject to any decision thereon by the Chief Executive-in-Council and/or the Legislative Council or the Finance Committee thereof whenever the Chief Executive considers that reference to any of those bodies is necessary. In matters not requiring such reference, the recommendations of the Committee of Inquiry will be binding on the Government of the Hong Kong Special Administrative Region and the Associations provided they are acceptable to both parties."

156. As I see it, therefore, in broad terms, the procedural system that has been set in place is to the following effect :

(a) The Executive, having proposed a change, consults with the staff unions; that is, enters into negotiations with them.

(b) If agreement is not reached by that method of consultation, then an attempt is made through existing administrative channels to reach an agreement, again by way of consultation.

(c) If that fails, and a request is made, the Chief Executive may, but is not obliged, appoint a committee

of inquiry to advise on the dispute.

(d) The Chief Executive may decline to appoint a committee if, by way of example, the matter in dispute concerning terms and conditions has already in his view become a matter of settled public policy and is not therefore open to further debate.

157. Against this background, it is necessary briefly to look to the history of this matter to understand the factual context within which the applicants' challenge is made.

158. On 31 May 2002, three days after a decision had been made by the Chief Executive in Council that civil service pay should be reduced and that the reduction should be affected by means of legislation, the staff unions wrote to the Chief Executive requesting that a committee of inquiry be appointed in terms of s.7 of the 1968 agreement. In support of this request, *inter alia* the following was said :

"(i) though important, the net Pay Trend Indicators should not be the sole determining factor in this year's pay adjustment exercise. Any pay reduction would not only hurt Civil Service morale but would also have an immediate and severe impact on consumer spending, and hence retard the economic recovery;

(ii) ...

(iii) a pay reduction by legislation is unprecedented and as it involves the question of legality, it has already sparked off serious quarrels and aroused widespread concern over the possibility of introducing further legislation for curtailing, unilaterally, civil servants' conditions of service and fringe benefits; and

(iv) the proposed legislation, which is to give effect to the implementation of a pay reduction, denies civil servant's rights under their employment contracts, is itself an unprecedented arrangement falling outside the ambit of the long-established pay adjustment mechanism."

The letter continued by saying :

" The Staff Side has therefore concluded that the current disagreement over your 'in-Council' decision, which was made, as traditionally, after taking into account all relevant factors, including the outcome of the pay trend survey, is manifestly not '*a matter of settled public policy*'."

159. The Executive did not agree. The request to appoint a Committee of Inquiry was rejected on the basis that the matter in dispute was a matter of settled public policy. The reasons for that decision were contained in a letter from the Chief Secretary for Administration dated 11 June 2002, portions of which have been cited earlier in this judgment (paragraph 44). For ease of reference, however, the following passage is cited again :

" The Chief Executive is of the opinion that it is a matter of settled public policy that in determining the size of each year's civil service pay adjustment, the Government takes into account the following factors: the net pay trend indicators derived from an independent private sector pay trend survey, the state of the economy, budgetary considerations, changes in the cost of living, the staff sides' pay claims and civil service morale. Some of the considerations under the existing mechanism such as the net pay trend indicators and the cost of living are capable of upward and downward movements. It is thus inherent in the existing mechanism that civil service pay may be increased or decreased. The 2002 civil service pay adjustment exercise has been conducted in strict accordance with the established mechanism and the final decision on a civil service pay reduction has taken account of all the relevant factors mentioned above."

160. I turn now to the nature of the applicants' challenge. As I understand it, it is to the following effect; namely, that, in rejecting the request of the staff unions for the appointment of a committee of inquiry, the Executive acted in contravention of art.8 of the 1978 Convention in that it failed to seek settlement of the dispute concerning terms and conditions of employment—

> "... through negotiation between the parties *or* through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved." [my emphasis]

161. As to the *nexus* between the asserted failure of the Executive to honour its obligations under art.8 of the 1978 Convention (that failure amounting to a breach of art.39 of the Basic Law) and the constitutional validity of the enactment of the Ordinance by the Legislative Council, it has been contended that :

> (a) The Executive proposed the legislation and sought its enactment.
>
> (b) The request for the appointment of a committee of inquiry was made and rejected before the enactment of the Ordinance.
>
> (c) The Chief Executive signs and promulgates bills passed by the Legislative Council (see art.48(3) of the Basic Law).
>
> (d) The Ordinance was therefore carried into effect by the Executive and had the effect of terminating the pay dispute without the parties being able to seek a resolution of the dispute through the machinery mandated by art.8 of the 1978 Convention.

162. Mr Fok has argued that there can be no such *nexus*. Art.8 of the 1978 Convention, he has said, looks solely to procedures to be used in resolving disputes, it does not go to the substance of what must or must not be determined or how, once determined, terms and conditions of employment must be implemented. Accordingly, even if there was a breach of art.8, he has said, purely procedural matters of that kind cannot invalidate a statute that mandates substantive matters which the legislature has decided are required for the good governance of Hong Kong. In my judgment, however, procedural matters are also protected by art.39 of the Basic Law; indeed, procedural matters are often fundamental to Convention rights protected by the Basic Law. Without determining the issue in this case, I have therefore proceeded on the basis that a *nexus* has been demonstrated by the applicants.

163. The sole issue, therefore, is whether the refusal to appoint a committee of inquiry has constituted a breach of art.8 of the 1978 Convention and through that a breach of art.39 of the Basic Law which has the result of rendering the enactment of the Ordinance itself contrary to the Basic Law.

164. On behalf of the applicants, Mr Dykes has submitted that the rejection of the request to establish a committee of inquiry on the ground of settled policy was spurious. There was plainly no settled policy in respect of a pay reduction and the proper implementation of any such reduction. Between 1975 and 2001, civil service pay had either been increased or not adjusted; it had never been reduced.

165. I am unable to agree. As I have said earlier in this judgment, the existing mechanism for determining annual pay adjustments always contained the implication that pay adjustments may result in a reduction. Good fortune in the past made a reduction unnecessary. But how can it be said that a mechanism which attempts to achieve 'broad comparability' between private and public sector pay is limited to achieving that end if pay is maintained or increased but that the comparability principle must be abandoned if it results in a decrease? In my opinion, the possibility of a reduction was therefore so inherent to the working of the existing mechanism and the use of that mechanism was so much part of settled policy that the possibility of a reduction in pay was itself part of settled policy.

166. As to the implementation of any reduction, I do not see that the relevant articles of the 1978 Convention look to matters of implementation, whether by way of agreement, regulation or statute. They look to procedures for determining terms and conditions not to how those terms and conditions, once determined, are to be put into effect.

167. On behalf of the applicants, it was contended, however, that adherence to the strict letter of the 1968 agreement did not relieve the Executive from its obligation under art.8 of the Convention of 1978. The 1968 agreement, it was submitted, was an 'unequal treaty'. It had not been created to ensure the confidence of the parties involved. In terms of the 1968 agreement, only the Chief Executive has the power to appoint a committee of inquiry and may refuse to do so for a broad range of reasons. Accordingly, it was said, the will of the Executive is, in terms of the 1968 agreement, for all practical purposes, completely unfettered.

168. In support of these submissions, reference was made to the 1995 observations of CEACR in respect of a complaint lodged with that committee by the HKCTU, the complaint being that the 1978 Convention was being applied by the Hong Kong Government in a way which denied civil servants the right to an 'independent resolution of their disputes'. I have earlier referred to those observations in paragraph 151. As to the nature of the complaint, CEACR commented that—

> " the HKCTU refers to a recent pay dispute between the Government and the civil servant workforce in which all the unions had asked for arbitration but the Government had refused it even after the Legislative Council had passed a resolution for arbitration."

The CEACR stated the Government position in the following terms :

> " ... that where a dispute between the Government and the staff side cannot be resolved through negotiation, the matter can be referred to an independent committee of inquiry under the 1968 Agreement made between the Government and the main staff associations. However, it is laid down in the Agreement that such a committee will not be invoked on a matter which is trivial, of settled public policy, or affects the security of Hong Kong. The Government indicates, in this respect, that the pay dispute cited by the HKCTU concerns a settled public policy and is outside the purview of arbitration by a committee of inquiry. It is therefore not appropriate to refer to this case as an illustration that civil servants are denied the opportunity of an independent resolution to disputes."

169. The concluding observations of the CEACR were, in my opinion, somewhat ambiguous as to where, if it all, fault lay in that case. It said :

> "The Committee would once again recall that under Article 8, the settlement of disputes in the public service should be sought 'through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved'. The Committee would therefore request the Government to ensure in future that the principles of the Convention will be applied to the settlement of such disputes."

It appears to me that the CEACR did no more than request the Hong Kong Government to ensure that the principles of the Convention are applied in settling disputes. In respect of the present matter, the Government asserts that the principles have been applied.

170. In his submissions in reply, Mr Fok said that, to come within the ambit of art.8 of the 1978 Convention, a dispute must arise in connection with 'the determination of terms and conditions of employment' and not with the method by which such terms and conditions, once determined, are then implemented. In terms of art.7, said Mr Fok, machinery for negotiating terms and conditions has been developed and that machinery — I have described it as the existing mechanism — has been used in an entirely orthodox manner to determine the 2002 pay adjustments. That being the case, the applicants' complaint can only be that the Executive has been in error on this occasion in seeking to put the unchallenged results obtained from the use of that machinery into effect. But that, he said, is an argument as to implementation, certainly in respect of the use of legislation, and not as to the determination itself of terms and conditions.

171. In my judgment, the broad and ample language of the 1978 Convention does not allow for narrow, technical interpretation. Nor can the purposive nature of the language of the Convention be ignored. Even so, I believe there is

substance in Mr Fok's submissions. I say so for the following reasons :

(a) The applicants have asserted that the existing mechanism has not been employed correctly because it does not allow for a reduction. I do not believe that to be a correct assertion. I am satisfied that the existing mechanism has been employed correctly and accordingly a system of machinery for determining terms and conditions of employment which allows for the participation of public servants, has been used in accordance with art.7.

(b) The applicants have asserted that the 'knock-on' effects of the decision to reduce pay, the impact on pensions and the like, should have been resolved in accordance with the Convention and were not. But these again, in my view, are matters of implementation, a question of looking to the consequences that flow from the use of the existing mechanism to determine terms and conditions of employment in so far as they relate to pay for serving officers.

(c) As to the proposal by the Executive to employ legislation to give general effect to the pay reduction that, I am satisfied, is manifestly a matter of implementation not encompassed within the language of either art.8 or art.9 of the Convention. It is a matter of law to be determined by the courts not a committee of inquiry.

172. In the circumstances, I am satisfied that at all material times a system was in place for determining matters under both art.7 and art.8 of the 1978 Convention and that the use of the system, more especially reliance on the provisions of the 1968 agreement, has not on this occasion resulted in the Executive contravening either of those articles.

The challenge that the Ordinance offends the rule of law and thereby the Basic Law

173. This final, all-embracing challenge rests on what has all along been the core contention of the applicants that the 'sole function and purpose' of the Ordinance has been to enable the Executive, as one party to contracts of service between itself and public officers, to vary those contracts to its monetary advantage and, absent any compelling purpose in the greater public good, to use the Ordinance to deny those officers any opportunity to seek the redress in the courts that would otherwise have been available to them.

174. I am satisfied, however, viewing matters in context, that the Ordinance has neither breached the individual articles of the Basic Law which have been placed before me for consideration nor has it offended the principle of the separation of powers contained in that Law. My reasons, either directly or indirectly, have already been set out in this judgment. However, Mr Kwok, for the applicants in the second application, has set out four specific reasons why he contends that the Ordinance is repugnant to the rule of law and it is necessary, even if only briefly, to look to each of those reasons.

(a) The Ordinance applies only to identified persons, lacking generality and equality

175. Earlier in this judgment, I concluded that the Ordinance is not directed to 'identified persons' as such but is directed rather to a class of persons, a class recognised by the Basic Law. Legislation may legitimately look to a class of persons.

176. As to the matter of generality, while the Ordinance does not look to all Hong Kong residents, it does lay down general rules in respect of civil servants as a class. Individual public officers or groups of officers *within* the civil service are not picked out from the class for disadvantageous treatment. The two exceptions contained in the Ordinance, read in context, do not affect the principle of generality of application.

177. As to the matter of equality, all persons within the civil service of the same salary grade are treated equally. As to the fact that civil servants as a class have been treated unequally to Hong Kong residents as a whole by having only their contracts varied, it does not seem to me that legislation to be legitimate must apply equally to all persons within the jurisdiction of that legislation. It may be necessary, for example, in the greater public good to impose restrictions on one class of persons that is not imposed on another class. But that being said, in the present case it is clear, in my view, that the purpose of the Ordinance was to ensure both generality and equality of application to all within the civil service and, on a broader basis, to adhere to a long-accepted pay adjustment mechanism for ensuring

comparability, if not equality, in remuneration between public officers and private sector employees.

(b) The Ordinance serves only the interest of one party to the contracts of service; it does not therefore serve the greater public good

178. For reasons already given, I am satisfied that, in enacting legislation to reduce civil service salaries on a 'one-off" basis, the Executive (in seeking enactment and giving effect to it) and the legislature (in passing the legislation) were constrained not merely by budgetary prudence but in this case, in terms of art.107, by broad constitutional restraints. The purpose of the legislation was not simply to boost the coffers of Government to the disadvantage of civil servants, it was to look to the greater public good by maintaining civil service salaries at a level that was broadly in line with the salaries of private sector employees thereby avoiding perceived inequality at the same time as seeking to achieve (by that and other measures) a reduction of Hong Kong's present financial difficulties.

(c) The Ordinance denies access to the courts thereby usurping judicial power

179. For reasons already given, I am satisfied that there has been no impermissible denial of access to the courts. It follows that there has been no usurpation of judicial power.

(d) The Ordinance legalises a breach of public officers' contracts thereby, instead of commanding right and prohibiting wrong, commanding wrong and prohibiting right

180. I do not know that it can be said that in private law the variation of public officers' contracts of service mandated by the Ordinance would have constituted a breach of those contracts. Uncertainty on the part of the Executive as to its position in private law if it sought to vary contracts without recourse to legislation has never been elevated, in my view, to an admission that any such variation would have amounted to a breach. The issue in private law was never argued before me. In my judgment, all that can be said is that a variation of the contracts of a full class of persons was mandated by legislation for reasons which I have already set out, those reasons looking to the greater public good and not merely to extracate the Executive from what it considered to be, for purely commercial reasons, a disadvantageous set of contracts.

Conclusion

181. For the reasons given in the body of this judgment, both applications for judicial review must therefore be dismissed. There will be an order *nisi* awarding costs to the respondent, that order to be made final 30 days after the handing down of this judgment if there is no prior application made to argue the matter.

(M.J. Hartmann)
Judge of the Court of First Instance,
High Court

HCAL 177/2002

Mr Lau Kwok Fai Bernard, in person, present

HCAL 180/2002

Mr S.H. Kwok, instructed by Messrs Clarke & Kong, for the 1st Applicant

Mr Philip Dykes, SC leading Mr P.Y. Lo, instructed by Messrs Clarke & Kong, for the 2nd and 3rd Applicants

Mr Joseph Fok, SC leading Mr Daniel Wan, instructed by Messrs Wilkinson & Grist, for the Respondent in both cases