FACV Nos 12 & 13 of 2006

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NOS 12 &13 OF 2006 (CIVIL)
(ON APPEAL FROM CACV NOS 73 & 87 OF 2006)

Between:

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

Court:	Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Mr Justice Mortimer NPJ and Sir Anthony Mason NPJ
Date of Hearing:	5 July 2006
Date of Judgment:	12 July 2006

J U D G M E N T

Mr Justice Bokhary PJ:

Questions of law

1. Can a court ever, and if so under what circumstances, make

an order according temporary validity to a law or executive action which it has declared unconstitutional? Failing such an order, can a court ever, and if so under what circumstances, suspend such a declaration so as to postpone its coming into operation? Those are the questions of law which has reached us in this case. The context is covert surveillance under conditions found to be incompatible with freedom and privacy of communication as constitutionally guaranteed. This guarantee is found in art. 30 of our constitution the Basic Law. Article 30 provides:

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

2. Privacy also enjoys constitutional protection under art. 14 of the Bill of Rights as entrenched by art. 39 of the Basic Law. But the breadth of privacy protection provided by art. 30 of the Basic Law leaves no gap for art. 14 of the Bill of Rights to fill in the present context. As to how the present case is to be decided, it makes no difference whether the constitutional provision focused on came into force on 8 June 1991 (as the Bill of Rights did) or on 1 July 1997 (as the Basic Law did).

Covert surveillance

3. By its nature covert surveillance involving the interception of communications impacts upon the privacy of the communications which are intercepted. And the knock-on effect of that is an impact upon freedom of communication, too. For it is only natural that even law-abiding persons will sometimes feel inhibited in communicating at all if they cannot do so with privacy. Nevertheless covert surveillance is an important tool in the detection and prevention of crime and threats to

public security i.e. the safety that the public is entitled to enjoy in a free and well-ordered society. The position reached upon a proper balance of the rival considerations is that covert surveillance is not to be prohibited but is to be controlled. Such control must sufficiently protect — and enjoy public confidence that it sufficiently protects — fundamental rights and freedoms, particularly freedom and privacy of communication. The "legal procedures" requirement contained in art. 30 of the Basic Law exists to ensure such protection.

Proposed scheme of the Interception of Communications Ordinance

4. On 27 June 1997 the Interception of Communications Ordinance, Cap. 532 ("the IOCO") was passed. It is, according to its long title, "[a]n Ordinance to provide laws on and in connection with the interception of communications transmitted by post or by means of a telecommunication system and to repeal section 33 of the Telecommunications Ordinance".

5. Broadly stated the proposed scheme of the IOCO is one for the prohibition of any interception of communication by post or telecommunications save where such interception is authorised by the order of a High Court judge. I describe that scheme as "proposed" because the IOCO has not come into operation. This is because s.1(2) of the IOCO provides that "[t]his Ordinance shall come into operation on a day to be appointed by the Governor by notice in the Gazette". But neither the Governor prior to the handover nor either Chief Executive since has appointed such a day.

Section 33 of the Telecommunications Ordinance

6. Section 33 of the Telecommunications Ordinance, Cap. 106

("the TO") had been enacted in 1963 to provide that:

> " Whenever he considers that the public interest so requires, the Governor, or any public officer authorized in that behalf by the Governor either generally or for any particular occasion, may order that any message or any class of messages brought for transmission by telecommunication shall not be transmitted or that any message or any class of messages brought for transmission, or transmitted or received or being transmitted, by telecommunication shall be intercepted or detained or disclosed to the Government or to the public officer specified in the order."

The omission to bring the IOCO into operation left s.33 of the TO on the statute book.

Executive Order

7. Doubts over the constitutionality of covert surveillance as practised by law enforcement agencies in Hong Kong had been growing over the years. Such doubts developed into an acute problem by reason of what the District Court said in two criminal cases in 2005. On 5 August 2005, with a view to coping with this problem by way of an interim measure pending corrective legislation, the Chief Executive published an executive order meant to serve as a set of "legal procedures" for the purposes of art. 30 of the Basic Law.

8. In resorting to an executive order the Chief Executive no doubt had in mind art. 48 of Basic Law by which it is provided that his powers and functions include issuing executive orders. The full name given to the executive order published on 5 August 2005 is the Law Enforcement (Covert Surveillance Procedure) Order. I will refer to it simply as "the Executive Order".

9. The arrangement brought about by the Executive Order is a departmental one. It requires that covert surveillance be conducted only where authorised at a fairly senior level, and be kept under regular review

at an even more senior level.

Judicial review challenge

10. Within a very short time of its publication the Executive Order came under challenge in the judicial review proceedings out of which the present appeal arises. The proceedings were commenced by Mr Leung Kwok Hung and Mr Koo Sze Yiu against the Chief Executive. Mr Leung and Mr Koo attacked three things as unconstitutional: (i) the Executive Order; (ii) s.33 of the TO; and (iii) the Chief Executive's omission to bring the IOCO into operation. In broad terms the attack can be said to be against covert surveillance as practised by law enforcement agencies in Hong Kong.

11. As to their standing to bring such an attack by way of judicial review, Mr Leung and Mr Koo rely on two matters. For their standing of the conventional kind, they rely on their avowed belief that, as political activists who have had their brushes with the law, they were themselves targets of covert surveillance. They also assert the right to maintain a facial challenge. For their standing to maintain such a challenge, they rely on their interest, as members of the public, in seeing that covert surveillance is not practised save constitutionally. The courts below did not treat them as bereft of standing. Nor, however the matter is best analysed, would I.

12. On 9 February 2006 the High Court (Hartmann J) gave judgment against Mr Leung and Mr Koo on the IOCO, finding nothing unlawful in the omission to bring it into operation. But he gave judgment in their favour on the Executive Order and on s.33 of the TO. His declarations thereon were to the following effect. The Executive

Order comprises administrative directions only and does not constitute a set of "legal procedures" for the purposes of art. 30 of the Basic Law. And s.33 of the TO is unconstitutional in so far as it authorises access to or the disclosure of the contents of any message or class of messages.

Courts below make and affirm a temporary validity order

13. At the same time i.e. 9 February 2006 and to provide a six-month stop-gap measure pending corrective legislation, Hartmann J made, at the Government's request, what I would describe as a "temporary validity order", doing so in the following terms:

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

14. The case then proceeded to the Court of Appeal. Mr Leung and Mr Koo both appealed against the temporary validity order. On his own Mr Leung appealed against the refusal of relief in respect of the omission to bring the IOCO into operation. And the Government cross-appealed against the declaration that the Executive Order did not constitute a set of "legal procedures" for the purposes of art. 30 of the Basic Law. But the Government did not cross-appeal against the declaration regarding s.33 of the TO.

15. On 10 May 2006 the Court of Appeal (Stuart-Moore VP and Yeung and Tang JJA) dismissed the appeals and the cross-appeal, doing so by a judgment given by Tang JA for the court. On the same day Mr Koo took out a notice of motion seeking the Court of Appeal's leave to appeal to us. Mr Leung took out his notice of motion on the following day. On 19 May 2006 the Court of Appeal granted both of

them leave to appeal to us. Mr Koo filed his notice of appeal on 23 May 2006 (and was assigned the final appeal number 12 of 2006). On the following day Mr Leung filed his notice of appeal (and was assigned the final appeal number 13 of 2006). Those two appeals have been treated as a single appeal (bearing those two numbers).

Temporary validity order now lies before us for our decision thereon

16. The appeal to us is against one thing only, namely the temporary validity order. Hence the questions of law now before us, the second question having arisen, or come into focus, in the course of the hearing before us.

Article 160

17. Let me say at once that I agree with the courts below that the cessation of force clause of art.160 of Basic Law does not preclude temporary validity orders. Still less does it preclude suspension. The clause provides that "[i]f 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." That simply does not go to whether temporary validity or suspension can be accorded.

No distinction between s.33 of the TO and the Executive Order

18. I can be equally brief in saying why, like the courts below, I draw no distinction between s.33 of the TO and the Executive Order for present purposes. If temporary validity or suspension is to be justified that will have to be done on considerations so fundamental as to transcend the distinction between legislation and executive action.

Exceptional circumstances may call for exceptional judicial measures

19. Declaring a law or executive action unconstitutional does not normally leave any void in the legal order let alone a void that dissolves society or imperils the rule of law. The effect of such a striking-down may be purely to rid the legal order of an unconstitutional encrustation. That would be normal. So would striking down an unconstitutional way of doing something that would be worthwhile if done constitutionally. In such a situation corrective legislation would be a likely sequel. Mere inconvenience in the meantime would not, however, justify temporary validity or suspension. But what if the circumstances are exceptional and the problem goes well beyond mere inconvenience?

20. As to that, there are six cases to which I would refer at once, having regard to the judgments of the courts below in the present case. The first two, *Federation of Pakistan v. Tamizuddin Khan*, PLR 1956 WP 306 and *Special Reference No. 1 of 1955*, PLR 1956 WP 598, are related decisions of the Federal Court of Pakistan (the predecessor of the Supreme Court of Pakistan). Next comes *Re Manitoba Language Rights* [1985] 1 SCR 721 in which the Supreme Court of Canada placed reliance on those two Pakistani decisions. Then comes two other decisions of the Supreme Court of Canada, namely *R v. Swain* [1991] 1 SCR 933 and *Schacter v. Canada* [1992] 2 SCR 679. The last of these six cases is *Bellinger v. Bellinger* [2003] 2 AC 467. In the present context, the interest in that case lies not so much in what the House of Lords had to decide as in a dictum of Lord Nicholls of Birkenhead.

21. In *Tamizuddin Khan's* case the Federal Court of Pakistan declared certain constitutional amendments invalid. It followed that the

laws enacted under those amendments were likewise invalid. The Governor-General reacted to this emergency by doing two things. He summoned a Constituent Convention to validate those laws. And he issued a proclamation assuming to himself, until the Constituent Convention could act, the power to validate and enforce all laws necessary to preserve the State and maintain its government.

22. The validity of that proclamation was questioned. And in *Special Reference No. 1 of 1955* the Federal Court of Pakistan held as follows. The proclamation was not authorised by the Constitution of Pakistan. But, under the doctrine of necessity, the proclamation was to be treated as valid until the Constituent Convention could act. As to the dire necessity in that case, Muhammad Munir CJ said (at p.671) that the Governor-General had acted "to avert an impending disaster and to prevent the State and society from dissolution".

23. That situation was said by the Supreme Court of Canada in *Re Manitoba Language Rights* at p.764 to be in many respects similar to the one facing the province of Manitoba. Manitoba's situation had arisen thus. Since 1890 nearly all of Manitoba's statutes had been enacted in English only. But s.23 of the Manitoba Act 1870, which was entrenched in the Constitution of Canada, required that Manitoba legislation be printed and published in both English and French. One of the questions put to the Supreme Court of Canada was whether Manitoba statues and regulations not printed and published in both those languages were invalid. The court held that they were invalid, but that they would be "deemed temporarily valid for the minimum period of time necessary for their translation, re-enactment, printing and publication". Explaining the dire necessity for that course, the court said (at p.767) that "[i]t is only

in this way that legal chaos can be avoided and the rule of law preserved".

24. In some circumstances the doctrine of necessity is involved as a source of jurisdiction, and confers on the court powers that are exceptional to the point of being anomalous. But in other circumstances necessity comes into the picture only in the sense of providing justification, in any given case, for exercising jurisdiction that the court has without recourse to the doctrine of necessity.

25. *Swain's* case concerned a criminal code provision requiring the automatic detention at the Lieutenant Governor's pleasure of any person acquitted by reason of insanity. The Supreme Court of Canada held that this provision was unconstitutional as an unjustifiable limit on an insanity acquittee's Charter right to liberty. Accordingly the detention provision was declared to be of no force and effect. At the same time the court acted to avert the danger to the public of all insanity acquittees being immediately released into the community. The way in which the court chose to avert that danger was by according the detention provision six months' temporary validity for corrective legislation to be enacted. Could not the danger have been averted, I feel bound to ask myself, by suspension instead?

26. Suspension was the course adopted in *Schacter's* case which concerned legislation conferring benefits. Regarding those benefits "underinclusive", the Supreme Court of Canada declared that legislation unconstitutional. But the court suspended the declaration pending corrective legislation either cancelling the benefits or extending them. Speaking for himself and four of the other six judges, Lamer CJ said this

at p.715:

> "A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (*R v. Swain*) or otherwise threatens the rule of law (*Re Manitoba Language Rights*). It may also be appropriate to cases of underinclusiveness as opposed to overbreadth."

27. Finally on this group of six cases, I come to *Bellinger v. Bellinger*. I do so for Lord Nicholls of Birkenhead's dictum (at p.481 E). This is that "[i]t may also be that there are circumstances where maintaining an offending law in operation for a reasonable period pending enactment of corrective legislation is justifiable". That objective could, I think, be achieved by postponing the operation of a declaration made against the offending law.

28. The rule of law involves meeting the needs of law and order. It involves providing a legal system able to function effectively. In order to meet those needs and preserve that ability, it must be recognised that exceptional circumstances may call for exceptional judicial measures. Temporary validity or suspension are examples of what courts have seen as such measures. There are other examples. The Court of Appeal gave two. One of these is the example to be found in our decision in *Chen Li Hung v. Ting Lei Miao* (2000) 3 HKCFAR 9. There (at p.21 A-D) we identified "the needs of law and order" as one of the conditions necessary for giving effect to the orders of non-recognised courts. The other example is to be found in Lord Nicholls of Birkenhead's speech in *Re Spectrum Plus Ltd* [2005] 2 AC 680. On the question of whether there can be exceptional circumstances in which limiting a judicial decision to prospective effect would be within the judiciary's constitutional role, he said (at p.699 H) that rigidity in the operation of a

legal system can produce a legal system unable to "function effectively".

29. Mr Philip Dykes SC for Mr Koo conceded — with justification in my view — that limiting a judicial decision to prospective effect was a stronger course than suspending a declaration of unconstitutionality. A decision in favour of such suspension leaves open the question of prospective effect. It being one of some controversy and debate, the question of prospective effect is one which I would leave open.

30. Fiat justitia, ruat coelum (let justice be done, though the heavens fall). That is the saying. Its underlying idea is succinctly put in *Jowitt's Dictionary of English Law*, 2nd ed. (1977), Vol. 1 at p.787: "A court must do its duty without regard to the consequences". The reference given in *Jowitt* is 4 Burr. 2562. It is to what was said on the point in *R v. Wilkes* (1770) 4 Burr. 2527 at p.2562; 98 ER 327 at p.347. There Lord Mansfield CJ said: "We must not regard political consequences; how formidable soever they might be: if rebellion was the certain consequence, we are bound to say 'fiat justitia, ruat coelum' ". That goes to doing justice. And then there arises the question of what justice requires.

31. Can temporary validity or suspension be denied their place among the measures by which the courts do practical justice? The law recognises the existence of what Blackstone called "those eccentrical remedies, which the sudden emergence of national distress may dictate, and which that alone can justify" (taking it from Book 1, Chapter 7, p.251 of the 19th ed. (1836) of his *Commentaries on the Laws of England*). And the maxim of the law is, as Lord Abinger CB said in *Russell v. Smyth*

(1842) 9 M & W 810 at p.818; 152 ER 343 at p.346, "to amplify its remedies, and, without usurping jurisdiction, to apply its rules to the advancement of substantial justice". Plainly the substance of a legal doctrine is to be found not merely in its theoretical formulation but in its practical application pursuant to such formulation. An older and more picturesque statement of the same point is to be found in *Craske v. Johnson* (1613) 2 Bulstrode 74 at p.79; 80 ER 970 at p.975 where Coke CJ said "*applicatio est vita regulæ*" (the application is the life of a rule).

Temporary validity

32. As will appear, this appeal does not call for a decision on whether there can be scenarios in which it would be right for our courts to accord temporary validity to a law or executive action which they have declared unconstitutional. I would leave that question open.

33. A point to be noted in regard to the difference between temporary validity and suspension is as follows. Where temporary validity is accorded, the result would appear to be twofold. First, the executive is permitted, during such temporary validity period, to function pursuant to what has been declared unconstitutional. Secondly, the executive is shielded from legal liability for so functioning. Looking at the decided cases involving scenarios such as a virtual legal vacuum or a virtually blank statute book, it may be that the courts there thought that, absent such a shield, there would be, even after corrective legislation, chaos between persons and the state and also between persons and persons.

Suspension

34. The scenario in the present case is nothing like a virtual legal vacuum or a virtually blank statute book. It is by no means as serious as that. I see nothing to justify temporary validity in the present case.

35. This leaves the question of suspension, which would not involve the shield to which I have been referring. The judicial power to suspend the operation of a declaration is a concomitant of the power to make the declaration in the first place. It is within the inherent jurisdiction. There is no need to resort to the doctrine of necessity for the power. Necessity comes into the picture only in its ordinary sense: not to create the power but only for its relevance to the question of whether the power should be exercised in any given case.

36. In terms of danger to the public, the circumstances of the present case more closely resemble those of *Swain's* case than those of the other decided cases which we have seen. Those cases include yet another case before the Supreme Court of Canada, namely *R v. Feeney* [1997] 2 SCR 117; [1997] 3 SCR 1008. There a declaration relating to the requirement of a warrant to search a dwelling was suspended for an initial period of six months. Then it was suspended for a further period of one month or until corrective legislation was enacted if such enactment occurred earlier.

37. That is not to say that there are no differences between the circumstances of *Swain's* case and those of the present case. As to the differences between them, I would mention two in particular. The first difference is that the danger to be averted by according temporary

validity was more obvious in *Swain's* case than in the present case. Everyone can easily see the danger involved in the immediate release into the community of insane persons of violent tendencies. But the actual matters involved in covert surveillance at any given time is not generally known.

38. The second difference is that an unconstitutional impact on freedom of the person is even more serious than an unconstitutional impact on freedom and privacy of communication. So a court would naturally be even more reluctant to accord temporary validity or suspension to the former than to the latter.

39. As I see it, the upshot is that the first difference points in one direction while the second difference points in the opposite direction, and the two tend to cancel each other out.

40. In *Re Spectrum Plus Ltd* Lord Nicholls of Birkenhead pointed out (at p.694 F) that the decision in *Re Manitoba Language Rights* involved having regard to "unwritten postulates such as the principle of the rule of law". Sometimes the danger to be averted by suspension will be of such a magnitude that suspension of a declaration of unconstitutionality would not offend against the rule of law.

41. Whether or not to suspend in any given case is a question to be decided with that in mind. And it will be decided by an independent judiciary after a full, fair and open hearing, and with reasons given. Suspension would not be accorded if it is unnecessary. And it would not be accorded for longer than necessary. As Lord Mansfield CJ so neatly put it in *Proceedings against George Stratton and others, for deposing*

Lord Pigot (1779) 21 State Trials 1045 at p.1231, "necessity will not justify going further than necessity obliges".

Any viable alternative?

42. Is there any viable alternative to suspension in the present case? The only alternative suggested is that of bringing the IOCO into operation. This was not viewed by the courts below as a viable alternative in the present case. I share their view, doing so for three reasons. First, the IOCO is confined to the interception of communications by post or telecommunications. So it would not cover covert surveillance in all its possible aspects. Secondly, bringing in subsidiary legislation to make the IOCO workable in practice might take considerable time. Thirdly, indirectly forcing the Chief Executive to bring the IOCO into operation would not sit at all comfortably with the refusal of relief against the omission to bring that Ordinance into operation.

Duration

43. The decided case show that once temporary validity or suspension was considered justified, it became a question of whether to set a fixed period (eg. six months as in *Swain's* case) or require expedition by a form of words (eg. "the minimum period of time necessary" as in *Re Manitoba Language Rights*).

44. At least in general, I think that a fixed period should be set, subject to the possibility of further extension for good cause shown. A fixed period makes for greater certainty, and keeps the situation under better control.

Circumstances of the present case

45. While defending the temporary validity order made and affirmed by the courts below in the present case, Mr Kevin Zervos SC for the Government indicated that his client's needs would be met by suspension. Mr Dykes for Mr Koo asks us to set aside the temporary validity order without substituting suspension. So does Mr Leung in person.

46. Mr Dykes did, however, recognise that suspension might be appropriate depending on our view of the danger to be averted. What is really important, Mr Dykes said, is that the Government be not shielded from legal liability. Mr Dykes said that Mr Koo is keen that any claim which he may have is not defeated by such a shield.

47. All things considered, I am of the view that the danger to be averted in the present case is of a sufficient magnitude to justify suspension.

48. In fairness to the courts below, it should be emphasised that they had a lot more to deal with than the Government's request for temporary validity. Indeed, although what the courts below made and affirmed was a temporary validity order, it is to be noted that towards the end of his judgment, Hartmann J spoke of the declarations being "*suspended* for a period of six months". (Emphasis supplied).

Conclusion

49. I would allow the appeal to set aside the temporary validity order. In its place I would, to afford an opportunity for the enactment of corrective legislation, substitute suspension of the declarations of

unconstitutionality so as to postpone their coming into operation, such postponement to be for six months from the date of Hartmann J's judgment of 9 February 2006.

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

51. We have heard the parties on costs on the basis of the various ways in which this appeal might be decided. Mr Leung and Mr Koo have enjoyed a significant measure of success in this appeal. In all the circumstances, I would award them their costs here and below, ordering legal aid taxation of Mr Koo's costs throughout.

Mr Justice Chan PJ:

52. I agree with the judgment of Mr Justice Bokhary PJ.

Mr Justice Ribeiro PJ:

53. I agree with the judgments of Mr Justice Bokhary PJ and Sir Anthony Mason NPJ.

Mr Justice Mortimer NPJ:

54. I agree with the judgment of Mr Justice Bokhary PJ.

Sir Anthony Mason NPJ:

55. I agree with the orders proposed by Mr Justice Bokhary PJ for the reasons which he gives, subject to the comments which appear

below.

56. In the course of argument it was suggested that the Canadian authorities may draw a distinction between (1) an order according temporary validity to a statute held to be unconstitutional and; (2) an order temporarily suspending (or suspending the effect of) a declaration of invalidity of an unconstitutional statute. I do not think that this is so. My understanding of the Canadian authorities is in line with the view expressed by Professor Hogg in his "Constitutional Law of Canada", Loose-leaf Edition Vol.2, 37.1(d) (1997) "Temporary validity", where the learned author treats the exercise of the power to suspend the operation of the declaration of invalidity of an unconstitutional statute as synonymous with the grant of a period of temporary validity to an unconstitutional statute. The learned author says :

> "When a court exercises this power '[that is, the power to postpone the operation of the declaration of invalidity]', the effect is to grant a period of temporary validity to an unconstitutional statute, because the statute will remain in force until the expiry of the period of postponement."

This statement, according to my imperfect understanding of Canadian constitutional law, is an accurate reflection of the case law, in which the Supreme Court of Canada usually speaks of suspending "the *effect*" of the declaration (my emphasis) (see *Schachter v. Canada* (1992) 93 DLR (4th) 1 at 26 d-e, 31a, per Lamer CJC)).

57. Earlier the court spoke of fixing a period of "transition" (*R v. Brydges* [1990] 1 SCR 190 at 217-218, per Lamer J). Whether the period of temporary validity so fixed is entirely prospective or may perhaps have some retrospective operation is not entirely clear to me. But this question has no significance for the present case.

58. In *Schacter v. Canada*, the court stated (at 26 a-d) that it would only grant a temporary period of validity to a law in circumstances where the immediate striking down of the law (1) would pose a danger to the public; (2) would threaten the rule of law; or (3) would result in the deprivation of benefits from deserving persons, though the three categories may not be exhaustive. I do not regard the present case as falling within these three categories. In any event, I am fortified by the statement of Mr Zervos SC that he does not ask for an order of temporary validity and that he is willing to accept a postponement of the declaration of invalidity. The terms of the order pronounced by Mr Justice Bokhary PJ will not endow acts or transactions undertaken in the period of postponement with any greater validity than they would have if the declaration of invalidity were made now.

59. The postponement of the making of the declaration will enable the authorities to decide what course they wish to take, though actions taken pursuant to the legislation which is the subject of the postponed declaration will be affected by the effect of that declaration, subject, of course, to remedial legislation, if any, which might be enacted.

60. Although I agree that a court should not postpone the making of a declaration of invalidity unless it is necessary to do so, the level of necessity in such a case is substantially lower than the level of necessity which would be required before the court would make an order for temporary validity, assuming the court to have power to make such an order.

61. Whether this Court has jurisdiction or power to make an order for temporary validity is a very large question, involving

fundamental doctrinal questions relating to the separation of powers, the role of the courts, the relationship between the courts and the legislative branch of government, as well as the rule of law and considerations of justice, and of community protection and welfare.

62. In considering this question, it may well be that the responsibilities and powers of the courts are no longer to be measured exclusively by reference to the traditional concept of adjudication of disputes between parties. This is the position in England in relation to matters of public law (see, for example, *R v. Home Secretary, ex parte Salem* [1999] 1 AC 450; *R (Limbuela) v. Home Secretary* [2005] 3 WLR 1014; *Bowman v. Fels* [2005] EWCA Civ 226). Further, the protection of wide-ranging human rights and fundamental freedoms has generated new and not infrequent problems arising from the invalidity of statutes, leaving a "gap" in the law, with novel and serious problems for the community (See K Roach, "Constitutional Remedies in Canada", para.14.1480 (2003), with its reference to "a constructive dialogue" between courts and legislatures, which has been a feature of the developing Canadian jurisprudence on this topic).

Mr Justice Bokhary PJ:

63. We allow the appeal. The temporary validity order is set aside. In its place, to afford an opportunity for the enactment of corrective legislation, we substitute suspension of the declarations of unconstitutionality so as to postpone their coming into operation, such postponement to be for six months from the date of Hartmann J's judgment of 9 February 2006. The Government can, during that period of suspension, function pursuant to what has been declared unconstitutional, doing so without acting contrary to any declaration in

operation. But, despite such suspension, the Government is not shielded from legal liability for functioning pursuant to what has been declared unconstitutional. We award Mr Koo and Mr Leung their costs here and below, ordering legal aid taxation of Mr Koo's costs throughout.

(Kemal Bokhary)
Permanent Judge

(Patrick Chan**)**
Permanent Judge

(R A V Ribeiro**)**
Permanent Judge

(Barry Mortimer)
Non-Permanent Judge

(Sir Anthony Mason)
Non-Permanent Judge

Mr Philip Dykes SC and Mr Hectar Pun (instructed by Messrs KM Cheung & Co. and assigned by Legal Aid Department) for the 1st appellant

2nd appellant in person

Mr Kevin Zervos SC (of the Department of Justice) and Mr Alexander Stock (instructed by that Department) for the respondent