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HCAL 107/2005

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 107 OF 2005

BETWEEN

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

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Before : Hon Hartmann J in Court

Dates of Hearing : 28 and 29 November 2005 and 2 February 2006

Date of Handing Down Judgment : 9 February 2006

J U D G M E N T

Introduction

1. The entitlement of Hong Kong residents to enjoy a private life, including the right to communicate with others free of intrusion, is a constitutionally protected right. It is not, however, an absolute right. If law enforcement agencies are unable to carry out covert surveillance, including the secret interception of private communications, they are denied what is universally recognised to be an essential tool in combating crime and safeguarding public security.

2. A tension therefore exists between the right of Hong Kong residents to privacy and the duty imposed on the organs of government to ensure the safe, honest and orderly running of our society

free of the corrosive influence of corruption. The European Court of Human Rights, in respect of the European Convention, has struck the balance by saying :

"Powers of secret surveillance of citizens, characterising as they did the police state, were tolerable under the Convention only so far as strictly necessary for safeguarding democratic institutions." [*Klass v. Germany* (1978) 2 EHRR 214]

3. This application for judicial review raises constitutional issues going to matters of covert surveillance, particularly the secret monitoring of private communications. The applicants, who challenge the validity of the present legislative and administrative framework authorising and regulating secret surveillance in all its forms, have stated that they have no wish to hinder Hong Kong's law enforcement authorities in effectively combating crime and ensuring public security. As Mr Dykes SC, leading counsel for the second applicant put it, they seek only to ensure that the authorities carry out their duties in a manner which respects the constitutionally protected rights of all Hong Kong residents including those reasonably suspected of having committed a crime.

4. During the course of the hearing, on 2 February 2006, this court was informed that the day before the Administration had filed a detailed set of legislative proposals with the Security Panel of the Legislative Council. The proposals are, or will shortly be, supported by a draft bill. The bill incorporates what the Administration has said is a comprehensive and workable legislative regime providing for secret surveillance in all its varied forms, a regime that accords with the requirements of the Basic Law. Although the future of the proposals rests with the Legislative Council, the Administration has expressed the hope that within the next six months the proposals will be enacted into law.

5. In respect of the new legislative proposals, Mr Dykes has commented that, after so many years, the fact that the Administration is now proceeding with some urgency is itself evidence of the success of this application for judicial review.

The applicants

6. Both the first and second applicants are political activists. Both have been arrested and prosecuted for offences arising out of their activism. For example, the first applicant has been prosecuted for burning the national flag.

7. Neither applicant can say for certain that he has been the subject of covert surveillance or that his private communications with others have been monitored by state agencies. However, having regard to their shared history of activism, both believe that it is more likely than not.

8. In any event, both applicants say that, as Hong Kong residents, they enjoy constitutionally guaranteed rights of privacy and it would be unacceptable to prevent them from seeking to protect those rights by the simple fact that they have been kept unaware of whether those rights have in fact been the subject of interference. In the circumstances, they contend that they have sufficient interest in the matters to which this application for judicial review relates to permit them to be heard.

9. When I granted leave to apply for judicial review, I did so on the basis that it was certainly

arguable that both applicants did have sufficient standing and I record that their standing has not been contested at the substantive hearing of their application.

10. In *Klass v. Germany* (*supra*), the European Court observed that, when a state institutes secret surveillance of individuals, if those individuals could not, by reason of their lack of knowledge of the surveillance, challenge the lawfulness of the manner in which the state carries out secret surveillance then the protections afforded under the Convention would largely be rendered a nullity. The court therefore accepted that individuals may, under certain conditions, claim to be victims of alleged violations of their right to privacy by the mere existence of legislation permitting covert measures.

11. I believe that the reasoning in *Klass v. Germany* is sound enough to be essentially self-evident. On the basis of that reasoning, especially having regard to their shared background of political activism and confrontations with the authorities, I am satisfied that both applicants have shown, for the purposes of O.53, r.3(7) of the Rules of the High Court, that they have sufficient interest in all the matters to which this application relates.

The Executive Order

12. In 2005, in the course of two criminal cases heard in the District Court, challenges were made to the lawfulness (and thereby the admissibility) of prosecution evidence obtained by law enforcement agencies by way of the secret recording of private communications.

13. In the first case, that of *HKSAR v. Li Man Tak and Others* (DCCC 689/2005), the court held that the secret interception of communications had been inconsistent with the requirements of art.30 of the Basic Law and thereby unlawful. The court warned that, in future criminal trials, investigating agencies may be held to have acted in bad faith if they continued the practice of the secret monitoring of communications without a legislative basis upon which to do so. That warning, of course, came in the wake of a finding that the existing legislation did not meet the requirements of the Basic Law or the Bill of Rights.

14. In the second case, that of *HKSAR v. Shum Chiu and Others* (DCCC 687/2004), having found that the secret recording of an accused talking with his solicitors constituted an abuse of process so profound as to challenge the integrity of the justice system, the court went on to express the view that legislation regulating the secret monitoring of private communications should be introduced without delay so that the ‘guarding of the guards’ was not left only to the courts.

15. In an affirmation dated 13 October 2005, Mr Ying Yiu Hong, Permanent Secretary for Security, said that the judgments in the two District Court cases caused public concern as to how Hong Kong’s law enforcement agencies could lawfully conduct covert surveillance. The Administration was preparing proposals for legislation to be considered by the Legislative Council and recognised that ultimately covert surveillance would have to be regulated by legislative measures. However, doing the best it could as an interim measure, the Administration introduced administrative directions to ensure that covert surveillance would at least be conducted by all law enforcement agencies for legitimate purposes only and in accordance with measures that ensured

transparency and accountability. These directions were made at the highest level, being contained in an executive order made by the Chief Executive pursuant to the powers vested in him under art.48 of the Basic Law; the order being the Law Enforcement (Covert Surveillance Procedure) Order (‘the Executive Order’) published on 5 August 2005.

16. In his affirmation, Mr Ying emphasised that the Executive Order does not purport to be legislation, it does not purport to create criminal offences, amend legislation or impose obligations on members of the public. Mr Ying has also emphasised the temporary nature of the Executive Order. In this regard, he has said :

“As explained in the Administration’s paper dated 5 August 2005 informing LegCo of the Executive Order, the Administration has made clear its firm view that ultimately there should be legislation governing covert surveillance. However, in the interim, to expeditiously address public concerns in light of the court rulings, the Chief Executive made the Executive Order …”

17. It is the applicants’ case that the Executive Order, while it does not proclaim itself to be a form of legislation, seeks nevertheless to fill a legislative vacuum and thereby take the place of legislation. As such, it purports, by authorising and regulating covert surveillance, including the interception of private communications, to have legislative effect.

18. On behalf of the Chief Executive, it was said that, while the Executive Order is an administrative order only and is not law, nor does it purport to be so, it nevertheless constitutes a comprehensive body of ‘legal procedures’ for the purposes of art.30 of the Basic Law. Art.30, while protecting the freedom and privacy of communication, permits law enforcement authorities to intercept private communications ‘in accordance with legal procedures’ to meet the needs of public security or the investigation of crimes.

19. The applicants, however, contended that the Executive Order does not constitute a body of ‘legal procedures’ for the purposes of art.30. Even if it should be held to be a body of legal procedures for the purposes of art.30, the applicants contended that it is still insufficient to meet the requirements of arts.30 and 39 of the Basic Law in that it does not, nor is it capable of, providing the detailed safeguards demanded by that Law. That can only be achieved by legislation. As the applicants put it, the Executive Order contains no independent or judicial oversight of decision-making to guard against possible abuse by the executive nor is there any civil or criminal remedy for a breach of the Order.

20. In respect of the Executive Order, the applicants seek the following relief :

‘(i) A Declaration that the Law Enforcement (Covert Surveillance Procedure) Order (‘the Executive Order’) issued by the Chief Executive of the Hong Kong Special Administrative Region on or about 4 August 2005 violates arts.30 and 39 of the Basic Law and art.17 of the International Covenant on Civil and Political Rights 1966/art.14 of the Hong Kong Bill of Rights Ordinance, Cap. 383 and is unconstitutional and of no effect insofar as it purports to authorise or regulate covert surveillance conducted by law enforcement agencies; and

(ii) An order of *Certiorari* to bring up and quash the Executive Order.’

The Telecommunications Ordinance

21. At this time, there is no operative Hong Kong legislation that provides for all forms of court surveillance including the interception of private communications.

22. There are, however, a number of operative statutes which provide for the secret interception of limited types of private communication. For example, s.13 of the Post Office Ordinance, Cap. 98, makes provision for an administrative system in terms of which the Chief Secretary for Administration may authorise the Postmaster General 'to open and delay' specified postal packets or specified classes of packets.

23. In respect of telecommunications – the most common subject of the covert monitoring of private communications – s.33 of the Telecommunications Ordinance, Cap. 106, gives a general power to the Chief Executive to order the interception of telecommunications. As the applicants said, it is an open-ended power and has not, in terms of the statute itself or any regulations made under it, been made subject to any restrictions or means of independent oversight.

24. The Telecommunications Ordinance was enacted in 1963. S.33 of the Ordinance reads :

"Whenever he considers that the public interest so requires, the Chief Executive, or any public officer authorized in that behalf by the Chief Executive 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."

25. In a report published in December 1996 entitled 'Report on Privacy : Regulating the Interception of Communications', the Law Reform Commission stated that, in its opinion, s.33 of the Telecommunications Ordinance, is inconsistent with art.17 of the International Covenant on Civil and Political Rights ('the ICCPR'), that article being incorporated into Hong Kong's domestic law in terms of art.14 of the Hong Kong Bill of Rights.

26. The applicants contend that the Law Reform Commission was correct. They go on to contend that, in addition, s.33 violates arts.30 and 39 of the Basic Law. They therefore seek the following relief; namely :

'A Declaration that, insofar as s.33 of the Telecommunications Ordinance, Cap. 106, authorises or allows access to or disclosure of the contents of any message or any class of messages, it is unconstitutional, void and of no legal effect in that it violates arts.30 and 39 of the Basic Law and art.17 of the International Covenant on Civil and Political Rights, 1966/art.14 of the Hong Kong Bill of Rights Ordinance, Cap. 383.'

The Interception of Communications Ordinance

27. The Law Reform Commission report published in December 1996 recommended that all secret interception of communications by state agencies be authorised in terms of a warrant scheme. Applications for warrants would have to be made to a judge of the High Court who, in deciding whether to grant the warrant, would be obliged to take into account a number of factors such as the immediacy and gravity of the criminal activity or threat to public security being investigated and the likelihood of obtaining relevant information by way of the proposed course of secret surveillance.

The Law Reform Commission further recommended that a supervisory authority, in the person of a sitting or former judge of the Court of Appeal, be appointed to monitor the warrant system.

28. In his affirmation, Mr Ying, the Permanent Secretary for Security, said that, given the complexity of the issues raised in the Law Reform Commission report and their wide-ranging implications, the Administration at the time considered it necessary to consult interested parties in the community before seeking to introduce any legislation to regulate covert surveillance, including the secret interception of communications, by state agencies. Accordingly, a consultation paper and a white bill (the Interception of Communications Bill) was published in February 1997.

29. However, concerned apparently that the Administration would not be able to submit proposals for legislation before the coming into effect of the Basic Law, in December 1996, shortly after the Law Reform Commission's report, a member of the Legislative Council submitted a member's bill based extensively on the recommendations contained in the report. The bill was the Interception of Communications Bill.

30. The bill was opposed by the Administration. The reasons for this opposition are contained in a letter dated 24 June 1997 sent by the Secretary for Security to members of the Legislative Council. The letter commenced :

"Having carefully studied the Bill and the proposed CSAs [Committee Stage Amendments], we strongly oppose them as their implementation would jeopardize the security of Hong Kong, and pose serious operational problems to our law enforcement agencies, particularly in the investigation and detection of serious crimes, e.g. kidnapping, smuggling and money laundering.

The Bill and the CSAs have been drawn up without prior consultation with our law enforcement agencies, and hence [are] thoroughly unworkable. The Administration will not be in a position to bring them into operation. The enactment of such a bill would seriously and adversely affect law enforcement work, which would only benefit the criminals. It is important that we should not rush to enact this Bill in this area, without detailed consultation with all parties affected and careful deliberation by the legislature." [my emphasis]

31. Despite the Administration's opposition, the bill was read for a third time and passed on 27 June 1997, just three days before the change of sovereignty. The purpose of the new statute, the Interception of Communications Ordinance, Cap.532 ('the IOC Ordinance') was to :

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

The Ordinance, therefore, does not seek to provide for all forms of invasion of privacy by law enforcement agencies. It provides only for the interception of communications by way of post or telecommunications.

32. As to the commencement of the IOC Ordinance, the Legislative Council recognised that it could not, for sound practical reasons, be brought into operation on the day of its publication in the Gazette. It therefore provided for it to be brought into operation on a later date in accordance with s.20(2)(b) of the Interpretation and General Clauses Ordinance, Cap. 1. In deferring its commencement date, the IOC Ordinance provides as follows in s.1(2) :

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

However, although the IOC Ordinance was enacted more than eight years ago, the Chief

33. However, although the IOC Ordinance was enacted more than eight years ago, the Chief Executive has not yet determined a day on which it would be appropriate for it come into operation.

34. The applicants contend that the Chief Executive, acting on the advice of the Administration, has never intended to bring the Ordinance into operation. The result therefore – after more than eight years – has been that the Chief Executive has effectively repealed legislation passed by the Legislative Council. In terms of the Basic Law, however, it is for the legislature, not the executive, to repeal legislation.

35. The applicants further contend that, in terms of art.48(3) of the Basic Law, the Chief Executive has a duty to sign bills passed by the Legislative Council and to promulgate laws. The Chief Executive has no general power to disallow laws. In terms of arts.49 and 50 of the Basic Law, his power is limited to returning bills that, in his view, are not compatible with the interests of Hong Kong so that the Legislative Council may reconsider them. The applicants contend that, if the Chief Executive does not employ the powers given to him under arts.49 and 50 to return bills, he must sign them and take such steps as are required to bring them into force. In respect of the IOC Ordinance, the Chief Executive has not employed the powers given to him under those articles. It has been his duty therefore – both in terms of the Basic Law and s.1(2) of the Ordinance itself – to take such steps as are required to bring it into force. By failing to do so, he has acted outside of his powers.

36. As I understand it, while the applicants assert that the Chief Executive has been in breach of his duty, it is not suggested that he has acted in bad faith. What instead has been suggested, certainly by Mr Dykes for the second applicant, is that, when the duties of the Chief Executive under the Basic Law and s.1(2) of the IOC Ordinance are properly understood, it can be seen that what the Chief Executive has done, or omitted to do, is contrary to law.

37. Accordingly, the applicants seek the following declaratory relief in respect of the IOC Ordinance :

'(i) A Declaration that the Chief Executive by failing or refusing to bring into force the Interception of Communications Ordinance, Cap. 532 had acted unlawfully in breach of his duty under s.1(2) of the Ordinance and arts.48(2) of the Basic Law of the Hong Kong Special Administrative Region; and

(ii) A Declaration that the Chief Executive has a legal obligation forthwith to appoint a day by notice in the Gazette for the Ordinance to come into operation in its present form.'

38. In addition, should declaratory relief not be effective, the applicants seek leave to apply for mandatory relief to the following effect :

'An order of Mandamus directing the Chief Executive of the Hong Kong Special Administrative Region to appoint a date for the commencement of the Interception of Communications Ordinance, Cap. 532.'

A summary of the issues raised by the applicants

39. Underscoring the applicants' various challenges, most certainly those of the first applicant, is the assertion that, while the Executive Order and s.33 of the Telecommunications Ordinance fail to meet constitutional requirements, there does exist a body of law which regulates the secret surveillance of private communications (if not covert surveillance in all its forms) in a manner that is both effective and constitutional. That body of law is the IOC Ordinance.

40. S.1(2) of the Ordinance imposes the duty on the Chief Executive to determine an appropriate date for it to come into operation. The applicants contend that, in failing to determine a date, the Chief Executive has acted unlawfully. This, it seems to me, is the first issue. It is one, however, that turns, not so much on an examination of the Basic Law, but on the construction of s.1 (2) of the IOC Ordinance itself.

41. The second issue goes to the constitutionality of s.33 of the Telecommunications Ordinance in so far as it gives a general power, free of any legislative safeguards, to the Chief Executive to order the interception of private communications.

42. The third issue goes to the constitutionality of the Executive Order which the applicants have said purports to have legislative effect in that it seeks to meet the requirements of arts.30 and 39 of the Basic Law by laying down 'legal procedures' in terms of which covert surveillance and the interception of private communications is authorised.

'Temporary validity'

43. On behalf of the Chief Executive, Mr Zervos SC submitted that the applicants' challenges must fail. If, however, this court should strike down s.33 of the Telecommunications Ordinance and/or the Executive Order, Mr Zervos said that law enforcement agencies will for a period of time be unable to undertake covert surveillance, including the secret interception of communications, and would be deprived of a vital weapon in combating crime and ensuring public security. To avoid such a consequence, Mr Zervos submitted that this court should adopt what is admittedly the entirely exceptional remedy of suspending any declaration of invalidity until time has been given to bring into force an appropriate statutory regime. Put succinctly, a period of temporary validity should be allowed.

44. In a recent, as yet unpublished, judgment of the Court of Appeal, Stock JA has described the remedy in the following terms :

"There is a further category of case, wholly exceptional, where a limit or stay has been placed upon the effect of a declaration of invalidity by the device of *suspending* its effect, where the objective of this variant is to avoid chaos or extraordinary administrative dislocation that would occur but for temporal limitation. Such a case was *Reference re Manitoba Language Rights under the Manitoba Act 1870* (1985) 19 DLR (4th) 1, where the Supreme Court of Canada declared legislation that had not been published and printed bilingually to be unconstitutional and where the Court invoked the doctrine of state necessity to enable it to deem the laws temporarily valid pending corrective legislative action, so as to avoid the legal vacuum and chaos that otherwise would ensue." [*HKSAR v. Hung Chan Wa and Another*, CACC 411/2003 and CACC 61/2004 dated 26 January 2006 : para.39]

45. As to when the Administration hopes to fill any void that may result from this court's

findings, as I have said, detailed legislative proposals were placed before the Security Panel of the Legislative Council on 1 February 2006. It is the Administration's hope that within the next six months a comprehensive statutory regime will be enacted into law, one that meets the requirements of arts.30 and 39 of the Basic Law.

46. Should this court declare s.33 of the Telecommunications Ordinance and/or the Executive Order to be invalid, Mr Zervos has sought an order to the following effect; namely that —

'S.33 of the Telecommunications Ordinance and the Executive Order, notwithstanding the judgment of the court, are valid and of legal effect for a period of six months from the date hereof, the parties having liberty to apply.'

The IOC Ordinance

47. In terms of s.1(2) of the IOC Ordinance, the Chief Executive has the duty to determine an appropriate day on which it is to come into operation. To date, however, he has not done so. The applicants contend that, in failing to do so, he has acted unlawfully. They seek a declaration not only that he has acted unlawfully but that he has an obligation to immediately appoint a day by notice in the Gazette for the Ordinance to come into effect in its present form.

48. By way of background, it is to be noted that in the limited time available to him before the change of sovereignty – a matter of three days – it was open to the Governor, in terms of his powers under arts.8 and 10 of the Letters Patent, to refuse his assent to the Ordinance or to disallow it. The Governor, however, chose not to exercise his powers under the Letters Patent.

49. Upon the change of sovereignty, the Basic Law came into effect. Under that Law the Chief Executive has no general power to disallow. That does not mean, however, that, if the Chief Executive believes that a bill passed by the Legislative Council is not in Hong Kong's best interests, he is obliged nevertheless to bring it into law. The Chief Executive has certain powers to refer a bill back to the Legislative Council for reconsideration. In this regard, arts.49 and 50 of the Basic Law state the following :

"**Article 49**

If the Chief Executive of the Hong Kong Special Administrative Region considers that a bill passed by the Legislative Council is not compatible with the overall interests of the Region, he or she may return it to the Legislative Council within three months for reconsideration. If the Legislative Council passes the original bill again by not less than a two-thirds majority of all the members, the Chief Executive must sign and promulgate it within one month, or act in accordance with the provisions of Article 50 of this Law.

Article 50

If the Chief Executive of the Hong Kong Special Administrative Region refuses to sign a bill passed the second time by the Legislative Council, or the Legislative Council refuses to pass a budget or any other important bill introduced by the government, and if consensus still cannot be reached after consultations, the Chief Executive may dissolve the Legislative Council.

The Chief Executive must consult the Executive Council before dissolving the Legislative Council. The Chief Executive may dissolve the Legislative Council only once in each term of his or her office."

50. However, like his predecessor, although the Administration strongly opposed the IOC

Ordinance, the Chief Executive chose not to exercise his constitutional powers in respect of the Ordinance.

51. That being the case, while the respective powers of the Chief Executive and the Legislative Council under the Basic Law form an important part of the context within which this application is to be determined, it turns essentially on the interpretation of s.1(2) of the IOC Ordinance.

52. As to the construction of s.1(2), both Mr Zervos and Mr Dykes relied on the judgment of the House of Lords in *R. v. Secretary of State for the Home Department, ex parte Fire Brigades Union & Ors* [1995] 2 AC 513. It is a judgment that requires close examination. The factual background may be summarised as follows :

(i) In 1964, a non-statutory scheme was introduced to compensate victims of violent crime. In terms of the scheme, a body known as the Criminal Injuries Compensation Board assessed *ex gratia* payments on the basis broadly of what the victim would have been entitled to recover in an action for tort. In 1978 a royal commission recommended that the scheme be put on a statutory basis. A subsequent working group made the same recommendation.

(ii) In light of this, the Government introduced legislation which was contained in ss.108 to 117 and Schedules 6 and 7 to the Criminal Justice Act 1988. In terms of s.171(1) of the 1988 Act, the provisions were to come into force —

"on such day as the Secretary of State may by order made by statutory instrument appoint …"

(iii) As it was, no commencement day was appointed by the Secretary of State.

(iv) In 1992, the Secretary of State announced that a new non-statutory scheme would be introduced, fundamentally altering the basis of compensation. As to the statutory scheme contained in the 1988 Act, a government white paper stated that the provisions in the 1988 Act would not be implemented and would be repealed when a suitable legislative opportunity occurred.

(v) The new non-statutory scheme came into operation in April 1994, the intention being that it would remain a non-statutory scheme until it had time 'to settle down and any teething problems have been resolved' after which consideration would be given to putting it on a statutory basis.

(vi) The applicants, believing that their members would be significantly disadvantaged under the new non-statutory scheme, sought declarations that the Secretary of State, by failing to bring the statutory scheme into effect in terms of s.171(1) of the 1988 Act, and by introducing a new non-statutory scheme, had acted unlawfully in breach of his duty under the 1988 Act.

53. By a majority, Lord Keith and Lord Mustill dissenting, it was held that, while s.171(1) of the 1988 Act did not impose a legally enforceable duty on the Secretary of State to bring the enacted provisions into force at any particular time, it did impose a continuing obligation on the Secretary of State to consider whether to bring them into force. Accordingly, the Secretary of State's decision not to bring ss.108 to 117 into force at all and instead to introduce what was in reality a permanent

non-statutory scheme had been unlawful.

54. Before turning to certain of the speeches, it is necessary to compare the wording of s.171(1) of the 1988 Act considered by the House of Lords with the wording of s.1(2) of the IOC Ordinance. S.17(1) directs that provisions of the 1988 Act 'shall come into force on such day as the Secretary of State may … appoint.' S.1(2) directs simply that the Ordinance 'shall come into operation on a day to be appointed by the Chief Executive.' The use of the word 'may' in s.171(1) may give a more permissive colour to the meaning and intent of that section but essentially I am satisfied that the two sections have the same meaning and intent.

55. It must be recognised that commencement provisions of the kind contained in s.171(1) of the 1988 Act and s.1(2) of the IOC Ordinance are common devices which bring practical advantages. In his text, *Statutory Interpretation* (4th Edn) F.A.R. Bennion has described the advantages in the following terms :

"Before a new Act is brought into operation, any necessary regulations or other instruments which need to be made under it can be drafted. Full consultations can be held with the interests concerned. Explanatory material for the guidance of officials and the public can be prepared and absorbed. *Further consideration can be given to the wisdom of any doubtful provisions and, if necessary, amendments to the Act can be sought from Parliament.* The matter is under government control, and the government, paying regard to political factors, can choose the most advantageous moment. These are the reasons which cause the commencement order method to be chosen for a large proportion of modern Acts." [my emphasis]

56. What must also be recognised is that, in deciding when and in what circumstances an Ordinance shall come into operation, the Legislative Council has a number of choices open to it. When the *Fire Brigades Union* case was before the Court of Appeal, Hobhouse LJ (at 536E) explained the position by saying that Parliament —

"… may provide that the relevant Act or part of the Act shall come into force on a specific day. Alternatively, Parliament may leave it to some other person or body to appoint the day. Another alternative open to Parliament is to leave the choice of the day upon which the Act shall come into force to a minister but go on to require that he shall make his appointment by a certain date; that was what Parliament did in section 5(2) of the Domestic Violence and Matrimonial Proceedings Act 1976:

'This Act shall come into force on such day as the Lord Chancellor may appoint … Provided that if any provisions of this Act are not in force on 1 April 1977 the Lord Chancellor shall then make an order … bringing such provisions into force.'

Similar provision was made in the Consumer Credit Act 1974. There are a whole number of permutations open to Parliament in making its choice of provision for the commencement of any statute or part. It has used these variants in the past and it must be taken that Parliament, and Parliamentary draftsmen, are familiar with all those available choices of wording."

Hobhouse LJ went on to observe :

"Parliament will also be aware that when it has used the words which leave it to a minister to appoint the day upon which a statutory provision shall come into force, this has meant that, on occasions, the minister has never made any appointment and the provision has never come into force … It is no doubt because Parliament are aware that some parts of statutes may not be brought into force by the minister that they have on occasions used wording such as that used in the Domestic Violence and Matrimonial Proceedings Act 1976."

57. In the present case, it was open to the Legislative Council to restrict the discretionary duty imposed on the Chief Executive, for example, by providing in s.1(2) that the Ordinance must be brought into operation within a specified period of time. The Legislative Council chose not to do so.

58. During the course of submissions, Mr Dykes emphasised that the Basic Law defines the limits of the Chief Executive's powers in respect of enacted laws which he does not consider to be in Hong Kong's interests. That being the case, he has said, this court should be careful to avoid carving out some form of 'public interest exemption' which allows the Chief Executive to side-step the limits of his powers under arts.49 and 50 of the Basic Law and, by means of that public interest exemption, to effectively block legislation not to the liking of the Administration. In my judgment, however, whatever the interpretation of the meaning and intent of the statutory provision contained in s.1(2), it will not act to carve out a form of public interest exemption in terms of which the Chief Executive is able to side-step the limits of his constitutional powers. I say that because, in respect of all legislation, it lies squarely within the power of the Legislative Council, if it chooses to give to the Chief Executive the discretion to determine when a law should become operative, to ensure, by the use of appropriate language, that the limits of that discretion are defined.

59. I turn now to consider certain of the speeches in the *Fire Brigades Union* case.

60. In giving his speech, one of the majority speeches, Lord Browne-Wilkinson made the fundamental observation that s.171(1) of the Act, while it provided for the coming into force of certain provisions, was itself in force and thereby imposed a statutory duty. The same must apply to s.1(2) of the IOC Ordinance. Upon enactment, it came into force and imposed a statutory duty, albeit a discretionary one, upon the Chief Executive. The question, of course, is the exact nature of that duty.

61. Lord Browne-Wilkinson set out the opposing interpretations of s.171(1) in the following terms :

"It is the applicants' case that, although the section confers a discretion as to the date on which the statutory scheme is to be brought into force, it in addition imposes on him a statutory duty to bring the sections into force at some time. In the cryptic formulation of Mr. Elias, the Secretary of State has a discretion as to when but not whether the sections are to come into force. The Lord Advocate, on the other hand, contends that section 171(1) confers on the Secretary of State an absolute and unfettered discretion whether or not to bring the sections into force." [p.552A-B]

62. Lord Browne-Wilkinson rejected the 'cryptic formulation' of the applicants that s.171 (1) conferred on the Secretary of State a discretion as to *when* but not *whether* ss.108 to 117 were to come into force. In this regard he said :

"The words of section 171(1) are consistent only with the Secretary of State having some discretion: indeed even the applicants concede that he has a discretion. What is it then which suggests that there will come a time when that discretion is exhausted and that, whatever the change of circumstances since the sections in question were passed by the Queen in Parliament, the Secretary of State becomes bound to bring the sections into force? I can see nothing in the Act which justifies such an implied restriction on the discretion. Moreover I can foresee circumstances in which it would plainly be undesirable for the Secretary of State to be under any such duty." [p.550C-D]

63. I believe s.1(2) of the IOC Ordinance must be approached in the same way. It would be a misreading of s.1(2) to say that it gives to the Chief Executive a discretion only as to *when* but not *whether* the Ordinance shall come into operation. If s.1(2) was to be read in that restrictive manner, it would mean, as Lord Browne-Wilkinson observed, that a time would come when the Chief Executive's discretion would be exhausted and that, whatever the change of circumstances since

the enactment of the Ordinance, he would then become bound to bring the Ordinance into force even though to do so would run contrary to the interests of Hong Kong, perhaps manifestly so.

64. In any event, as Lord Browne-Wilkinson pointed out, where the legislature intends to impose a duty on the executive to bring legislation into force within a specific period of time or in accordance with a specific timetable, it is able to do so by the use of express language. S.1(2) of the IOC Ordinance contains no such language.

65. Lord Lloyd, in his majority speech, came to what may be described as a more restrictive interpretation of the nature of the statutory duty imposed by s.171(1) :

"… I would read section 171 as providing that sections 108 and 117 shall come into force when the Home Secretary chooses, and not that they may come into force if he chooses. In other words, section 171 confers a power to say when, but not whether.

If that is the right construction of section 171, then the intention of Parliament in enacting that section is exactly, and happily, mirrored by the reaction of the hypothetical man on the Clapham omnibus. The Home Secretary has power to delay the coming into force of the statutory provisions in question; but he has no power to reject them or set them aside, as if they had never been passed." [570H]

66. Lord Lloyd, however, did not say that a time would therefore come when the discretion vested in the Secretary of State would be exhausted and, whatever the change in circumstances, he would then have to bring the statutory provisions into effect. I have not read his speech as implying any finite timetable. What he went on to say was this :

"I can find nothing in section 171 which, on its true construction, justifies the Home Secretary's refusal to implement the statutory scheme. Whether that refusal should be regarded as an abuse of the power which he was given under section 171, or as the exercise of a power which he has not been given, does not matter. The result is the same either way. By renouncing the statutory scheme, the Home Secretary has exceeded his powers, and thereby acted unlawfully." [571E]

67. Although Lord Browne-Wilkinson rejected the contention that s.171(1) gave to the Secretary of State only a limited discretion as to when he brought the relevant provisions into effect, he also rejected the contention made on behalf of the Secretary of State that the Secretary enjoyed an absolute and unfettered discretion whether or not to bring the relevant provisions into force at all :

"It does not follow that, because the Secretary of State is not under any duty to bring the section into effect, he has an absolute and unfettered discretion whether or not to do so. So to hold would lead to the conclusion that both Houses of Parliament had passed the Bill through all its stages and the Act received the Royal Assent merely to confer an enabling power on the executive to decide at will whether or not to make the parliamentary provisions a part of the law. Such a conclusion … is not only constitutionally dangerous but flies in the face of common sense. … Surely, it cannot have been the intention of Parliament to leave it in the entire discretion of the Secretary of State whether or not to effect such important changes to the criminal law." [p.550H]

68. Lord Nicholls came to the same conclusion:

"… although he is not under a legal *duty to appoint* a commencement day, the Secretary of State is under a legal *duty to consider* whether or not to exercise the power and appoint a day. That is inherent in the power Parliament has entrusted to him. He is under a duty to consider, in good faith, whether he should exercise the power. Further, and this is the next step, if the Secretary of State considers the matter and decides not to exercise the power, that does not end his duty. The statutory commencement day power continues to exist. The minister cannot abrogate it. The power, and the concomitant duty to consider whether to exercise it, will continue to exist despite any change in the holders of the office of Secretary of State … So although he has decided not to appoint a commencement day for sections 108 to 117, the Secretary of State remains under an obligation to keep the matter under review. This obligation will cease only when the power is exercised or Parliament repeals the legislation. Until then the duty to keep under review will continue." [575P]

69. That again, I believe, must be a correct interpretation, one that goes equally to the meaning and intent of s.1(2) of the IOC Ordinance. Whatever the turbulent legislative circumstances in which the Ordinance was enacted, it did lay down a new and comprehensive system for the manner in which covert surveillance activities by Hong Kong's law enforcement agencies would be regulated, a system which it was believed would, contrary to the existing legislative and administrative arrangements, meet Hong Kong's international and domestic human rights obligations. That being the case, it cannot have been the intention of the Legislative Council to leave it to the entire discretion of the Chief Executive whether or not to effect such important changes.

70. In light of the observations which I have outlined, Lord Browne-Wilkinson went on to interpret the meaning and intent of s.171(1) of the 1988 Act as follows :

"In the absence of express provisions to the contrary in the Act, the plain intention of Parliament in conferring on the Secretary of State the power to bring certain sections into force is that such power is to be exercised so as to bring those sections into force when it is appropriate and unless there is a subsequent change of circumstances which would render it inappropriate to do so."

71. With respect to the force of the other speeches, it seems to me that those words of Lord Browne-Wilkinson constitute an entirely correct interruption of the meaning and intent of s.1 (2) of the IOC Ordinance.

72. In respect of the present case, therefore, the Chief Executive, while not bound by any finite timetable, has at all times remained under a statutory duty, to be discharged in good faith, to actively keep under consideration whether or not an appropriate time has come to bring the IOC Ordinance into operation. That duty cannot be abrogated.

73. Equally, for the Chief Executive to procure events to take place which would prevent him from discharging his statutory duty would amount to an intentional frustration of that duty and would be an act outside of his powers.

74. How then, lawfully, is the Chief Executive to discharge the duty imposed upon in terms of s.1(2) if, after due consideration, he reaches the view that, even with amendments, it would not be in Hong Kong's best interests to bring the Ordinance into operation? What is he to do if he concludes that it is simply unworkable? In his speech, Lord Nicholls described what is, of course, in constitutional terms, the obvious and common sense solution (p.577G) :

"… pending the exercise of the commencement day power or its repeal the Secretary of State can act only within the constraint imposed by the duty attendant upon the continuing existence of that power. He cannot lawfully do anything in this field which would be inconsistent with his thereafter being able to carry out his statutory duty of keeping the exercise of the commencement day power under review. *If he wishes to act in a manner or for a purpose which would be inconsistent in this respect, he must first return to Parliament and ask Parliament to relieve him from the duty it has imposed on him. Parliament should be asked to repeal sections 108 and 117 and the relating commencement day provision."* [my emphasis]

75. In the present case, the applicants contend that the failure of the Chief Executive over a period of more than eight years to bring the IOC Ordinance into operation is evidence of the fact that he has not honoured his obligation to keep under consideration whether or not an appropriate time has come to appoint a commencement date. When considered in the light of the

Administration's original opposition, the applicants have submitted that it is clear, even if acting in good faith, that the Chief Executive has discarded his duty under the statute. That abrogation, the applicants have said, is unlawful and it is the duty of this court to declare it so.

76. For the Chief Executive, it has been submitted that, since the enactment of the Ordinance in 1997, the Administration has been engaged in a constant process of review as to the suitability of the Ordinance for implementation. In his affirmation, Mr Ying, the Permanent Secretary for Security, denied that the Chief Executive has simply refused to bring the IOC Ordinance into effect, defying the Legislative Council. He expressed the Administration's past position as follows :

"… the Administration had no intention to defer indefinitely the implementation of the [Ordinance]. However, to implement the [Ordinance] in its current form would pose serious operational difficulties to the Police and ICAC and thus would be prejudicial to law and order and the security of Hong Kong."

77. As to the Administration's intentions (at the time when he made his affirmation in October 2005) Mr Ying said the following :

"In view of the public concerns, the Administration is working actively on draft legislation governing both interception of communications and covert surveillance. However, the issue is a complex one and the implications may be wide-reaching and wide-ranging … the Administration has had to respond to changing circumstances. The Administration has publicly committed to presenting legislative proposals to LegCo as soon as possible …"

78. In respect of the 'changing circumstances' to which Mr Ying made reference, he spoke in his affirmation of heightened security concerns in the 'post 9/11 era', the rapid development of technology in the communications field and the fact that, in response to the threat of terrorism, there have been many changes to legislative regimes in other common law countries.

79. Mr Ying spoke of an inter-departmental working group formed in late 1999 and its work in the area, including visits to Australia and the United Kingdom, to study the legislative regimes there and any proposed changes in those regimes. Mr Ying concluded :

"… the review has continued to be actively pursued, and one option which cannot be ruled out at this stage is to bring IOCO into operation subject to appropriate amendments."

80. As I understood their arguments, the applicants contended that the search for a new form of legislation supports their submission that the Chief Executive has at all times simply refused to implement the Ordinance and that it would be artificial to find otherwise. On a study of the history of the matter, however, I am unable to agree. Further consideration given to the wisdom of doubtful provisions in the Ordinance and the consideration of possible amendments does not, in my view, amount to a refusal to bring the legislation into effect at an appropriate time or a refusal to return to the Legislative Council to seek amendments to, or a repeal of, the statute : see the comments of F.A.R. Bennion in *Statutory Interpretation* (*supra*).

81. Yes, of course, there has been what some may describe as an inordinate delay but equally, as Mr Ying said, there have been rapid developments in the technology of communications and the rising up of the threat of global terrorism. In the course of his submissions, Mr Zervos said the Administration had been working at all times against 'a moving landscape'. Delay itself therefore, in my view, even taken with the Administration's strong opposition to the IOC

Ordinance, does not demonstrate that the Chief Executive has abandoned his duty under s.1(2) of the IOC Ordinance.

82. In his speech in the *Fire Brigades Union* judgment, Lord Nicholls spoke of the infinite range of matters, many political in nature, which may prevent or delay the Secretary of State from implementing the provisions of a statute :

"… although the purpose of the commencement day provision is to facilitate bringing legislation into effect, the width of the discretion given to the minister ought not to be rigidly or narrowly confined. The common form commencement day provision is applicable to all manner of legislation and it falls to be applied in widely differing circumstances. The range of unexpected happenings is infinite. In the course of drafting the necessary regulations, a serious flaw in the statute might come to light. An economic crisis might arise. The government might consider it was no longer practicable, or politic, to seek to raise or appropriate the money needed to implement the legislation for the time being. In considering whether the moment has come to appoint a day, as a matter of law the minister must be able to take such matters into account. Of particular relevance for present purposes, as a matter of law the minister must be entitled to take financial considerations into account when considering whether to exercise his power and appoint a day. It goes without saying that the minister will be answerable to Parliament for his decision, but that is an altogether different matter."

83. I turn now to an overview of historical matters.

84. When the IOC bill was read for a second time, the then Secretary for Security stated the Administration's opposition in plain terms :

"[This] bill, drawn up without prior consultation with the law enforcement agencies, is entirely unworkable and the Administration will not be able to bring it into operation. It would be irresponsible to rush through legislation on this area especially since the change to an entirely new system is involved. In other jurisdictions, changes of this nature take years to work out and to reach a broad consensus on the sensitive aspect of law enforcement. It would be reckless to pass legislation which would deprive our law enforcement agencies of a useful tool to safeguard the security of Hong Kong."

The Secretary of Security concluded :

"Let me make one last point abundantly clear. If the Bill were passed today, the Administration will have no option but to seek to repeal it as soon as possible thereafter."

85. Seeking a repeal of unworkable legislation by coming back to the Legislative Council and asking to be relieved of the duty of bringing it into operation is not the same as refusing to discharge a duty, as I have defined that duty, under s.1(2) of the Ordinance. Indeed, as Lord Nicholls made clear, it is a legitimate procedure.

86. On 8 July 1997, shortly after the change of sovereignty, the Chief Executive ordered that the coming into operation of the IOC Ordinance should be withheld. In a brief to the Provisional Legislative Council, the Chief Executive proposed that the Ordinance should not be brought into operation 'at this time' for the following reasons :

"The Interception of Communications Ordinance will seriously affect the effectiveness of the law enforcement agencies in carrying out their duties particularly in the investigation and detection of serious crime, for example, kidnapping, smuggling and money laundering. The Administration has already published a While Bill on the same subject, and this Bill is being revised by incorporating relevant comments upon completion of the public consultation exercise. We therefore consider that it is not in the public interest to bring this legislation into operation."

87. The following day, the Chief Secretary for Administration, addressing the Provisional Legislative Council, spoke of conducting a review of the Ordinance (along with other legislation passed in the days before the change of sovereignty) :

"In the course of our review, we will also study the impact of the Ordinance … which [was] introduced by Members of the previous Legislative Council *before deciding whether [it] should come into operation.*" [my emphasis]

88. Mr Dykes, for the second applicant, laid emphasis on these comments. They demonstrated, he said, that the Administration's purpose was not simply to withhold the coming into operation of the Ordinance for the time being but was to decide whether it should come into operation at all. That may be so. But if the decision was made – as it appears now to have been made – that it should not come into operation at all, then, it seems to me, it was legitimate for the Administration to return to the Legislative Council, as it has now done, to seek the repeal of the Ordinance.

89. As to the progress of the Administration's review, in March 2004 a brief was submitted by the Administration to the Security Panel of the Legislative Council. The brief advised members of the Panel that, as part of the ongoing review, legislative developments in other jurisdictions had been studied. In this regard, the brief said :

"We note that a diversity of models are adopted by various overseas authorities and each has to be fully analysed having regard to our local circumstances, developments and needs. *In addition, after the '911' incident some overseas countries including the UK and US have introduced legislative amendments in this area. This is an important and significant development which the working group is examining.*" [my emphasis]

The brief concluded :

"*The review is still ongoing, and has taken longer than anticipated due to a number of factors.* First, the review covers highly technical matters. The rapid development of communications technologies over the past decade or so has added to the complexity of the task. During the review we also need to take into full account the significant legislative amendments that have been introduced in other jurisdictions since the '911' incident. Moreover, the Security Bureau has had to give a higher priority to other matters in 2002 and 2003, including the implementation of the requirements imposed by the United Nations Security Council resolution on combating terrorism." [my emphasis]

90. At a meeting of the Security Panel held a year later on 10 June 2005, one of the members of the Panel put it to the Secretary for Security that the Executive should not keep deferring the implementation of the Ordinance which had been passed by the Legislative Council. In response, the Secretary for Security said that there was no intention to indefinitely defer the implementation of the Ordinance. He emphasised, however, that the Ordinance, as it stood, presented a number of difficulties.

91. In answer to a question from another member of the Panel, the Secretary for Security is recorded as saying :

"… after the '911' incident, many countries were very concerned about terrorist activities. Australia and New Zealand had introduced legislative amendments in the area of interception of communications. Countries such as Canada, UK and US had introduced new elements in the authorisation for interception of communications. US had introduced legislative amendments to provide for the interception of communications for the purpose of preventing terrorist activities. Some countries had strengthened the requirements on and protection for telecommunication service providers."

92. At this point, I would record the obvious; namely, that the Chief Executive must be entitled, in matters of Hong Kong's security, to take into accounting the changing nature and extent of any threats to that security.

93. During the course of submissions before me, reference was made to an article which

appeared in the Hong Kong Daily News on 13 August 2005. In that article, the Secretary for Security was reported as saying that the Ordinance would be 'abandoned'. However, the accuracy of this report has been disputed; on the evidence, I believe rightly so.

94. In August 2005, the Chief Executive made the Executive Order. I shall turn shortly to consider its true nature and effect. But whatever that may be, it cannot be disputed, I think, that it has always been intended to be a temporary measure only. In this important respect, the facts of the present case are to be distinguished from those in the *Fire Brigades Union* case. In that case, the House of Lords found that the Secretary of State had put into effect a non-statutory scheme that was not simply a stop-gap measure but was intended for the foreseeable future to replace the scheme that Parliament had embodied in the Act. By the introduction of that permanent, alternative scheme, the Secretary of State had effectively prevented himself from honouring his statutory obligations in terms of s.171(1) of the 1988 Act.

95. In concluding an examination of what Mr Zervos described as the 'long and arduous' history of the review of the IOC Ordinance and possible legislative alternatives to it, I was informed during the course of submissions that, on 15 August 2005, the first applicant, himself a member of the Legislative Council, wrote to the Chief Executive condemning the coming into force of the Executive Order and requesting that the IOC Ordinance be brought into effect. There was, I am told, no response to this letter. Whatever the reasons for a failure to respond, I do not think it casts much light on the issue of the Chief Executive's continuing adherence to his duties under s.1(2) of the IOC Ordinance.

96. In the final analysis, it seems to me that, if the Chief Executive was to advocate his position as to the discharge of his statutory duty under s.1(2) of the IOC Ordinance, he would be able to do so accurately (in fact and law) as follows: "After an in-depth review, taking into account such matters as the changing technology of communications and the rise of global terrorism, I have come to the conclusion that the scheme contained in the Ordinance, which the Administration has always opposed as being unworkable, has, against the moving landscape of recent history, shown itself very definitely to be so. That being the case, I have now returned to the Legislative Council seeking to be relieved of the statutory duty imposed upon me in terms of s.1(2) of the Ordinance by asking for a repeal of the Ordinance and its replacement by a new statutory regime. But these matters will, of course, be for the Legislative Council to determine."

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

98. Of course, as to the *manner* in which the Chief Executive has discharged his statutory obligations under s.1(2), that is a matter for the Legislative Council and the Chief Executive, not this court.

The Telecommunications Ordinance

99. S.33 of the Telecommunications Ordinance gives the power to the Chief Executive, when he considers it is in the public interest, to order that any telecommunication message be intercepted and its contents examined. A telecommunications message is one that is transmitted by means of electromagnetic energy. This includes fixed line and mobile telephone communication as well as intercourse generated through computer systems, for example, by e-mail. To cite it again, s.33 reads :

"Whenever he considers that the public interest so requires, the Chief Executive, or any public officer authorized in that behalf by the Chief Executive 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."

100. The power of the Chief Executive to order the interception and examination of private communications under s.33 is not qualified by any subsidiary legislation made under the Ordinance nor by any other Hong Kong statute or subsidiary legislation. As Mr Dykes put it, the power is open-ended and not subject to any judicial or other independent oversight.

101. As I have said earlier, in late 1996 the Law Reform Commission, having considered existing international jurisprudence, concluded that s.33 is inconsistent with art.17 of the ICCPR. The applicants have adopted the criticisms of s.33 contained in the Commission's report. In so far as s.33 authorises access to and disclosure of the contents of any message or class of message, the applicants have submitted that it violates arts.30 and 39 of the Basic Law and through art.39, art.17 of the ICCPR.

102. To determine whether s.33 is inconsistent with arts.30 and 39, the meaning and intent of the two articles must first be determined. Both articles are, of course, constitutional provisions and, as such, to use the words of the Court of Final Appeal in *Ng Ka Ling and Others v. Director of Immigration* [1999] 1 HKC 291, are expressed in language that is 'ample and general'. As the Court observed, this is usual for constitutions which are living instruments intended to meet changing needs and circumstances. As to the interpretation of this ample and general language, the Court defined the approach in the following passage :

"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."

103. While the language in the Basic Law cannot, of course, be given a meaning which it cannot bear, in identifying the meaning of the language, considered in the light of its context and purpose, too 'literal, technical, narrow or rigid' an approach must be avoided. Importantly, in matters going to fundamental constitutional rights that protect individual liberties, such as the right to the freedom and privacy of communication, the Court of Final Appeal said that such rights must be

given a generous interpretation. In *Leung Kwok Hung and Others v. HKSAR* [2005] 3 HKLRD 164, at 178G, the Court expressed this by saying :

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

104. On the basis that both arts.30 and 39 protect fundamental rights and must therefore be given a generous interpretation, I turn to the articles themselves. Art.30 (which appears in Chapter 111, being headed 'Fundamental Rights and Duties …) provides that :

"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."

105. Art.39 (which is also set in Chapter 111) provides, in so far as it is relevant, that :

"(1) The provisions of the International Covenant on Civil and Political Rights ['ICCPR'] … as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

(2) 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."

106. In accordance with art.39, the provisions of the ICCPR as applied to Hong Kong are to be found in the Hong Kong Bill of Rights Ordinance, Cap. 383. Art.14 of the Bill of Rights corresponds exactly to art.17 of the ICCPR. Art.14 provides that :

"(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks."

107. The word 'correspondence', as used in art.14, incorporates all forms of communication, including intercourse by telecommunication.

108. The Basic Law therefore requires that the fundamental right to freely and privately communicate with others shall be protected 'by law'. First, it does so 'directly' by way of art.30. Second, it does so, in terms of art.39, by the indirect means of incorporating the provisions of the ICCPR, in so far as they have been applied to Hong Kong, thereby giving constitutional recognition to art.14 of the Bill of Rights.

109. By way of a general observation, I am of the view that, if both articles protect the same right, both requiring that the right be protected by law, they should, as far as the language allows, be interpreted so that they complement rather than contradict each other.

110. Art.39(2) states that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. The phrase 'as prescribed by law' in the article has been

judicially defined by the Court of Final Appeal and I will turn to that shortly. Art.39(2) goes on to state that any restrictions that are prescribed by law must not contravene the provisions of art.39(1). As the Court of Final Appeal observed in *Leung Kwok Hung and Others (supra)*, this means that any restrictions must not contravene the provisions of the ICCPR as applied to Hong Kong; that is, therefore, the provisions of the Bill of Rights.

111. Concerning the right to freely and privately communicate with others, art.14(1) of the Bill of Rights provides that any interference with that right must not be 'arbitrary' or 'unlawful'. Art.14(2) directs that Hong Kong residents are entitled to the 'protection of the law against such interference. The constitutional requirements of art.14, therefore, are :

(i) that any interference must be lawful in the sense of being in accordance with protections provided by law, and

(ii) that any interference must be reasonable in the sense of not being arbitrary.

112. The United Nations Human Rights Committee has interpreted the requirement of reasonableness to imply that any interference with the right to private communication must be proportional to the end sought and be necessary in the circumstances of any given case.

113. In its 'General Comment 16', the United Nations Committee said that the obligations imposed by art.17 of the ICCPR (art.14 of the Bill of Rights) demand the adoption of legislative and other measures to give effect to the protection of the right. That, it seems to me, must be correct. First, the article states clearly that the right shall be protected by law. As a qualified right, the enshrinement of it in the article is not of itself sufficient to afford effective protection. Second, ascertainable measures enforceable at law must be in place to allow for a proportionate limitation of the right while at the same time providing adequate safeguards to prevent executive abuse.

114. In matters going to fundamental rights, the principle of proportionality is part of Hong Kong law. In this regard, in *Leung Kwok Hung & Others (supra)*, the Court of Final Appeal said the that proportionality test should be formulated in these terms :

(a) the restriction must be rationally connected with one or more of the legitimate purposes; and

(b) the means used to impair the right must be no more than was necessary to accomplish the legitimate purpose in question.

115. Determinations under the principle of proportionality, by their very nature, therefore, demand legal certainty. Without legal certainty, for example, how else can it be determined that a limitation on a right is no more than is necessary to accomplish a legitimate purpose? That being the case, it is clear, in my view, that art.14 of the Bill of Rights incorporates the principle of legal certainty.

116. If there must be legal certainty, it follows that the right to the protection of the law in terms of art.14(2) means that any limitation on the right must be 'in accordance with law' or be

'prescribed by law', both phrases which Hong Kong jurisprudence confirms encompasses the principle of legal certainty. In *Shum Kwok Sher v. HKSAR* (2002) 5 HKCFAR 381, at 401J, the Court of Final Appeal observed that the phrase 'prescribed by law' in art.39 was now widely recognised in international human rights jurisprudence to mandate the principle of legal certainty.

117. That any interference must be 'in accordance with law' or 'prescribed by law' also accords with the qualification contained in art.39(2) of the Basic Law that the rights and freedoms enjoyed by Hong Kong residents under the ICCPR, as applied to Hong Kong, shall not be restricted unless as 'prescribed by law'.

118. Before moving to the principle of legal certainty, reference should also be made to art.30 of the Basic Law. Art.30 commences by stating that the freedom and privacy of communication of Hong Kong residents 'shall be protected by law'. As I have said earlier, art.30 and art.14 of the Bill of Rights therefore guarantee the same right and both require that the right shall enjoy the protection of the law. That being the case, it seems to me that the phrases 'protected by law' and 'the protection of the law', as used in the two articles, require, both on a plain comparative reading and in context, to be interpreted in the same way.

119. As with art.17 of the ICCPR (art.14 of the Bill of Rights), art.30 allows for the right to freely and privately communicate with others to be subject to limitations. Indeed, it states the nature and extent of those limitations. As a constitutional provision, however, it does so in broad terms only, allowing 'relevant authorities' to intercept private communications to meet the needs of 'public security' or to investigate criminal offences provided they do so 'in accordance with legal procedures'.

120. But, as I have indicated earlier, if the right to privacy guaranteed by art.30 is to be 'protected by law', how can that protection be of any practical value or effect unless the circumstances in which it may be limited are spelt out in detail and unless provisions are made for preventing abuse by the 'relevant authorities'? In my view, therefore, as with art.14 of the Bill of Rights, art.30 incorporates the principle of legal certainty.

121. Art.30 does not in specific terms require that any limitation on the right to free and private communication must be reasonable. I am satisfied, however, on a purposive reading of the article as a whole, that a protection against arbitrariness is implied. The right after all must be protected by law and any interference with that right may only be for certain limited purposes. If the right contained in art.30 is to be protected so that it may be enjoyed in full measure, then 'legal procedures' must be adopted to ensure accessibility and certainty and through those characteristics, the avoidance of arbitrary limitations.

122. When the framework of art.30 is considered as a whole, the requirement that the right to freely and privately communicate with others 'shall be protected by law' must, in my view, be read as being complemented by the provision that any limitation of the right must be 'in accordance with legal procedures'. Those legal procedures, therefore, are not distinct from but are part and parcel of the protection of the right which must be provided by law.

123. The protection of the law demanded by both art.30 of the Basic Law and art.14 of the Bill of Rights does not mean that legislation only will be sufficient even though legislation invariably is employed. It is clear to me, however, that purely administrative directions which are not themselves part of any framework of substantive law, and therefore have no general effect, will not be sufficient. In this regard, the Executive Order, although made pursuant to constitutional power, is no more than a body of administrative directions binding only on government servants.

124. In respect of art.30, without saying this is decisive, for it is not, I would add that, interpreting the article purposively and in context, I am satisfied that it is also qualified by the provisions of art.39(2). The article states that 'the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law'. That, it seems to me, to be a statement of general application not just to the rights protected in art.39(1) but to all rights protected in Chapter 111.

125. What then is encompassed by principle of legal certainty? In *Leung Kwok Hung and Others*, the Court of Final Appeal summarised its earlier findings in *Shum Kwok Sher* in respect of the principle :

"To satisfy this principle [of legal certainty], certain requirements must be met. It must be adequately accessible to the citizen and must be formulated with sufficient precision to enable the citizen to regulate his conduct. As pointed out by Sir Anthony Mason NPJ (at para.63), the explanation of these requirements in the often quoted passage in the majority judgment of the European Court of Human Rights in *Sunday Times v. United Kingdom (No.1) (A/130)* (1979-1980) 2 EHRR 245 (at para.49, p.271), the 'thalidomide' case, is of assistance:

'First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct : he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty : experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.'"

The Court continued :

"A law which confers discretionary powers on public officials, the exercise of which may interfere with fundamental rights, must give an adequate indication of the scope of the discretion. The degree of precision required of the law in this connection will depend upon the particular subject matter of the discretion."

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

127. S.33, as enacted, does not in any detail regulate the scope of the Chief Executive's discretion or the manner in which it may be exercised. It is plainly inadequate.

128. It has been argued that I should use the constitutional device of reading into s.33 the

safeguards contained in art.30 of the Basic Law. By that measure, it has been said, s.33 will then be in conformity with the Basic Law. As I understand it, the reading in would mean that s.33 would have to be read as containing the following two qualifications; first, that the term 'public interest' would be restricted to meeting the needs of public security or of investigation of crime and, second, the unfettered discretion of the Chief Executive in s.33 would be subject to compliance with 'legal procedures'.

129. The first point I make is that the Basic Law, unlike a number of other constitutions, does not contain a provision to the effect that, upon it coming into force, existing laws are to be construed with all necessary modifications in order to bring them into conformity. Indeed, art.160 of the Basic Law directs that, if any laws are discovered to be inconsistent with it, they must be amended or cease to have effect. In this regard, art.160(1) 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."

130. Although as a constitutional provision, art.160 must be read purposively, without deciding the issue, I doubt whether the reference to amendment extends to reading in to the extent advocated by Mr Zervos which, in my view, requires substantial modification of the true meaning and intent of s.33 as enacted.

131. The Canadian authority of *Schacter v. Canada* [1992] 2 SCR 679, 93 DLR (4th) 1 held that reading in would be appropriate only in the clearest of cases. Among other considerations, this would mean that it would only be appropriate in cases where the modification would be consistent with the legislative objective of the statutory provision. Remembering that the Telecommunications Ordinance was brought into effect in 1963, it seems clear to me that the legislature at the time intended to give an unfettered discretion to the Chief Executive which he would exercise, as he saw fit, not only in the interest of public security or investigating crime but generally in the interests of Hong Kong. Accordingly, on this basis alone, I can find no grounds for reading in as advocated by Mr Zervos.

132. In any event, I do not see how the reading in suggested by Mr Zervos would render s.33 consistent with the requirements of art.30. I reject the submission that the purely administrative directions contained in the Executive Order are capable, on a purposive reading of art.30, of constituting 'legal procedures' for the purposes of that article. That being the case, even if I accede to Mr Zervos' submission as to reading in, there is no body of detailed law to support the broad and inadequate provisions contained in s.33. By this I mean there is not sufficient clarity as to the scope of the Chief Executive's discretion nor is there any measure of legal protection provided to protect against abuse of executive power. There is certainly no measure of any independent control.

133. It is plain, I think, on an ordinary reading, that s.33 has not been formulated with sufficient precision to enable Hong Kong residents, with legal advice if necessary, to foresee to a degree that

is reasonable in the circumstances the consequences of any telecommunication intercourse they may have with others even if those consequences may not be foreseeable with absolute certainty.

134. Accordingly, I am satisfied that s.33 is inconsistent with the constitutional guarantees contained in the Basic Law; that is, arts.30 and 39 of the Basic Law and, through art.39, art.14 of the Bill of Rights.

135. Even if I was able to make a fine distinction between the meaning, intent and effect of the requirements of art.30 of the Basic Law and art.14 of the Bill of Rights, both are constitutional provisions and the violation of one, even if it is not a violation of the other, will be sufficient to render s.33 of no force or effect.

The Executive Order

136. The powers and functions of the Chief Executive are defined in art.48 of the Basic Law. As the head of the government, while the Chief Executive is responsible for the implementation of laws; that is, for their discharge or execution, he is given no legislative powers himself. In terms of art.48(4), he may, however, issue executive orders.

137. Executive orders are therefore one of the constitutionally recognised means by which the Chief Executive discharges his executive powers. As I have earlier indicated, they are directions of an administrative kind only which are made by the Chief Executive for the purpose of implementing laws and carrying out government policies.

138. The Executive Order itself, published in August 2005, is directed to and binds officers of the public service responsible for law enforcement. It directs that no exercise in covert surveillance may be carried out without authorisation. To this end, s.5 of the Order states that :

"(1) No officer may, directly or through any other person, carry out any covert surveillance without an authorization granted under this Order.

(2) Any officer of any department may apply to an authorization officer of the department for an authorization for any covert surveillance to be carried out by or on behalf of any of the officers of the department."

139. An 'officer' means any officer of a department whose duties include law enforcement investigations. A 'department' means any department of the Government which undertakes law enforcement investigations and includes the Independent Commission Against Corruption.

140. To prevent a misuse of the system of authorisation, the Executive Order mandates regular reviews by monitoring authorities. These monitoring authorities, however, are not independent of Government. The Order has no such reach. They are instead members of Government, officers bound by the Order. In this regard, ss.15 and 16 of the Order state :

"15. The head of any department may designate in writing any officer not below a rank equivalent to that of senior superintendent of police to be an authorizing officer for the purposes of this Order.

16. Where the head of any department has made any designation under section 15, he shall make arrangements for officers of a rank higher than those held by the authorizing officers of the department to keep under regular review the exercise and performance by the authorizing officers of the powers and duties conferred or imposed on them by this Order."

To repeat, without detracting from its importance, the Executive Order is no more than a set

141. To repeat, without detracting from its importance, the Executive Order is no more than a set of administrative directions given to employees of the Government by the head of the Government. It does not bind Hong Kong residents generally. It does not purport to be legislation nor do I see how it can be taken to be legislation.

142. The applicants have submitted that the Order seeks to fill a legislative vacuum thereby assuming the place of legislation. They contend that, by authorising and regulating secret surveillance of all kinds, it purports to have legislative effect.

143. I do not read the Executive Order that way. It is to be read, I believe, in the way that the Order explains itself to public servants. I say that because there is an explanatory note to the Order which reads :

"This Order is made by the Chief Executive under Article 48(4) of the Basic Law to set out the legal procedures in accordance with which covert surveillance may be carried out by or on behalf of officers of Government departments which undertake law enforcement investigations or operations."

144. The Executive Order, therefore, purports to be a set of 'legal procedures'. It is an unusual description for a purely administrative order. The phrase of course is drawn from art.30 of the Basic Law which permits the authorities to intercept private communications in order to protect public security and investigate crime provided it is done in accordance with 'legal procedures'.

145. For the Chief Executive, Mr Zervos has submitted that, on a proper construction of art.30 of the Basic Law, the phrase 'in accordance with legal procedures', being broad in its language, includes procedures that are legally established under a statutory or other legal power, duty or function and is not to be equated with the phrases 'in accordance with law' or 'prescribed by law'. I disagree. In this regard, I can do no better than repeat what I have said in para.122 of this judgment; namely that, when the framework of art.30 is considered as a whole, the requirement that the right to freely and privately communicate with others 'shall be protected by law' must be read as being complemented by the provision that any limitation of the right must be 'in accordance with legal procedures'. Those legal procedures, therefore, are not distinct from but are part and parcel of the protection of the right which must be provided by law.

146. In support of his submissions, Mr Zervos relied on the observations of KeithJ (as he then was) in *The Association of Expatriate Civil Servants of Hong Kong v. The Chief Executive* [1988] 1 HKLRD 615, at 622. In looking to this judgment, I accept of course, just as Keith J accepted, that the phrase 'in accordance with legal procedures' is a broad and general phrase and, depending on the context, is capable of different meanings. The phrase appears several times in the Basic Law in different contexts. In his judgment, Keith J observed that the phrase appears in arts.30, 48(6), 48 (7), 73(1) and 74. He was, however, unable to find a common meaning and intent :

"On the whole, I have not been assisted by these provisions. The meaning of a particular provision, whether in an ordinance or in a constitutional instrument such as the Basic Law, depends very much on its context, and I have not discerned a clear pattern as to the rationale behind the use of one phrase and not another in the Basic Law."

147. In his judgment, Keith J was required to determine the meaning of the phrase as it appears

in art.48(7), that article being to the effect that the Chief Executive shall exercise the power to appoint or remove holders of public office in accordance with legal procedures. Keith J considered the meaning of the phrase in the context not only of art.48 itself but art.103, an article providing for the appointment, promotion, training, discipline and remuneration of public servants. In *that* context, the judge concluded that the phrase ‘in accordance with legal procedures’ meant ‘in accordance with such procedures as are lawfully established to maintain Hong Kong’s previous system of recruitment and discipline for the public service’, certain of those procedures being laid down by way of executive orders.

148. In interpreting the phrase as it appears in art.48(7), however, as I have said, Keith J recognised that it was not necessarily to be interpreted in the same manner elsewhere in the Basic Law. In my judgment, the context in which the phrase is to be interpreted in art.30 is very different – art.30 for a start goes to fundamental rights guaranteed to all Hong Kong residents – and by reason of that very different context demands a different interpretation.

149. In my view, it is a formalistic outcome to say that the fundamental right contained in art.30, which the article requires shall be protected by law, may nevertheless be restricted by a body of purely administrative procedures which are not law and which bind only public servants who, in the event of abuse, are subject only to internal disciplinary proceedings. That, in my view, would derogate substantially from the practical and effective value of the right guaranteed by the article. That, I am satisfied – giving the article a generous interpretation in order to protect the full measure of the value of the right it guarantees – cannot have been the intention of those who drafted the Basic Law.

150. I am satisfied, therefore, that the use of the phrase ‘in accordance with legal procedures’ in art.30 means procedures which are laid down by law in the sense that they form part of substantive law, invariably, in order to comply with the requirements of legal certainty, within legislation, primary and/or secondary.

151. That being the case, having found that the Executive Order does not purport to be legislation of any kind or to have the effect of legislation, I am further satisfied that the Executive Order, while it is entirely legitimate and of value as an administrative tool in regulating the internal conduct of law enforcement agencies, is not capable of constituting a set of ‘legal procedures’ for the purposes of art.30.

The remedy of ‘temporary validity’

152. I have determined that a declaration should be made that s.33 of the Telecommunications Ordinance, insofar as it permits the interception and inspection of telecommunication messages, is inconsistent with the Basic Law. I have further determined that the Executive Order, while it remains a valid body of administrative directions, is not capable of constituting a body of ‘legal procedures’ for the purposes of art.30 of the Basic Law.

153. I have been informed that, if I should come to these findings, until a new or amended body of law has been made effective, there will be no operative body of law in place which, in

compliance with the Basic Law, regulates covert surveillance by law enforcement agencies.

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

155. The first applicant argued that the crisis prophesied by Mr Zervos can easily be avoided. There need be no vacuum. If there is to be a crisis, he said, it will be of the administration's own making. Legislation has been enacted regulating covert surveillance, including the secret interception of communications. It is legislation that is constitutionally acceptable. That legislation is the IOC Ordinance. As the first applicant put it, it needs only to be taken down from the shelf, dusted off and put into effect by the Chief Executive for it to come into effect.

156. With respect, that solution ignores the fact that, whether for good reasons or bad, if the IOC Ordinance is to be put into effect in a workable manner considerable measures will still have to be put in hand including perhaps the enactment of subsidiary legislation. That will take time.

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

158. At this juncture, let me state plainly that I agree with the concerns that Mr Zervos has expressed on behalf of the Administration. If the ability of the police and other agencies to carry out covert surveillance is to be made unlawful, even if only for a period of weeks, the well-being of our civil society will be placed in peril.

159. This court has no knowledge of the number and nature of threats facing Hong Kong. That they exist, however, can be assured. Hong Kong is prosperous, free, open and in equal measure, if its guard is down, it is vunerable. Rendering covert surveillance unlawful creates an amnesty for conspirators. No lurid examples are necessary to illustrate the dangers that presents.

160. Earlier in this judgment, I referred to a remedy advocated by Mr Zervos. It is admittedly an exceptional remedy, one that has never been used in the relatively short time that Hong Kong has enjoyed a written constitution. I am satisfied, however, for reasons to which I shall refer, if the need arises to avoid a vacuum of law, that this court has the jurisdiction to employ the remedy.

161. The remedy may be stated as follows. If this court is required to declare that a legislative

provision is inconsistent with the Basic Law and thereby invalid, it may assume the power to postpone the operation of the declaration of invalidity to allow the Administration and the Legislative Council time to enact corrective legislation.

162. Canada, like Hong Kong, has a written constitution. The courts of Canada have on several occasions been forced to employ the remedy. To my understanding, the greatest body of jurisprudence on the subject comes from that jurisdiction. The Supreme Court of Canada first assumed the power to hold that unconstitutional laws were to be given temporary force and effect in its judgment in *Manitoba Language Rights* [1985] 1 SCR 721. In that case, the legislature of Manitoba had failed to enact laws in French as well as English and had thereby invalidated almost the entire Manitoba statute book. Although declaring the legislation invalid and of no force and effect, the Supreme Court invoked an inherent jurisdiction based on the principle of the rule of law in order to keep the unconstitutional statutes temporarily in force. In his text, *Constitutional Law of Canada*, Professor Peter Hogg has commented that the decision was at the time a radical exercise of judicial power, a body of unconstitutional law being maintained in force solely by virtue of the order of the court.

163. The manner in which the Supreme Court concluded that it had an inherent jurisdiction based on the rule of law needs to be examined in some detail. I can do no better than cite extensively from the findings of the court in this regard :

"In the present case, declaring the Acts of the Legislature of Manitoba invalid and of no force or effect would, without more, undermine the principle of the rule of law. The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. Indeed, it is because of the supremacy of law over the government, as established in s.23 of the *Manitoba Act, 1870*, and s.52 of the *Constitution Act, 1982*, that this court must find the unconstitutional laws of Manitoba to be invalid and of no force and effect.

Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life. 'The Rule of Law in this sense implies … simply the existence of public order.' (I. Jennings, *The Law and the Constitution*, 5th ed. (1959), at p. 43.) As John Locke once said, 'A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society' (quoted by Lord Wilberforce in *Carl Zeiss-Stiftung v. Rayner & Keeler Ltd.*, [1966] 2 All E.R. 536 (H.L.) at p. 577). According to Wade and Phillips, *Constitutional Administrative Law*, 9th ed. (1977), at p. 89:

… the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife. In this sense, the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions.

It is this second aspect of the rule of law that is of concern in the present situation. The conclusion that the Acts of the Legislature of Manitoba are invalid and of no force or effect means that the positive legal order which has purportedly regulated the affairs of the citizens of Manitoba since 1890 will be destroyed and the rights, obligations and other effects arising under these laws will be invalid and unenforceable. As for the future, since it is reasonable to assume that it will be impossible for the Legislature of Manitoba to rectify *instantaneously* the constitutional defect, the Acts of the Manitoba Legislature will be invalid and of no force or effect until they are translated, re-enacted, printed and published in both languages.

Such results would certainly offend the rule of law. As we stated in the *Patriation Reference*, *supra*, at p. 46 D.L.R., pp. 805-6 S.C.R.:

The 'rule of law' is a highly textured expression … conveying, for example, a *sense of orderliness, of subjection to known legal rules* and of executive accountability to legal authority.

Dr. Raz has said: ' 'The rule of law' means literally what it says: the rule of the law … It has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it' : *The Authority of Law* (1979), at pp. 212-3. The rule of law simply cannot be fulfilled in a province

that has no positive law.'

...

The only appropriate solution for preserving the rights, obligations and other effects which have arisen under invalid Acts of the Legislature of Manitoba and which are not saved by the *de facto* or other doctrines is to declare that, in order to uphold the rule of law, these rights, obligations and other effects have, and will continue to have, the same force and effect they would have had if they had arisen under valid enactments, for that period of time during which it would be impossible for Manitoba to comply with its constitutional duty under s. 23 of the *Manitoba Act, 1870*. The Province of Manitoba would be faced with chaos and anarchy if the legal rights, obligations and other effects which have been relied upon by the people of Manitoba since 1890 were suddenly open to challenge. The constitutional guarantee of rule of law will not tolerate such chaos and anarchy.

Nor will the constitutional guarantee of rule of law tolerate the Province of Manitoba being without a valid and effectual legal system for the present and future. Thus, it will be necessary to deem temporarily valid and effective the unilingual Acts of the Legislature of Manitoba which would be currently in force, were it not for their constitutional defect, for the period of time during which it would be impossible for the Manitoba Legislature to fulfil its constitutional duty. Since this temporary validation will include the legislation under which the Manitoba Legislature is presently constituted, it will be legally able to re-enact, print and publish its laws in conformity with the dictates of the Constitution once they have been translated."

164. The Supreme Court held that the constitutional status of the Rule of Law in Canada was beyond question. The preamble to the constitution of Canada stated specifically that it had been founded upon principles that recongised the rule of law. In addition, the Supreme Court held that the principle of the rule of law was implicit in the very nature not only of the constitution but of constitutions generally :

"... the principle is clearly implicit in the very nature of a constitution. The Constitution, as the supreme law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution."

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

166. I would add that the remedy of suspending declarations of invalidity has been recognised by the Strasbourg Court. In this regard, by way of illustration, in *Walden v. Liechtenstein* App no.33916/96 (16 March 2000, unreported), the Court recognised that the temporary preservation of a law by the domestic courts of Liechtenstein, even though it violated the rights of the applicant served the legitimate aim of maintaining legal certainty.

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

168. In my judgment, the time sought by the Administration to put corrective measures into effect is proportionate. That period is one of six months.

169. It is to be recognised that the Supreme Court of Canada did not rely *directly* upon the doctrine of necessity although it treated cases concerning that doctrine as supplying an 'analogous support'. Professor Hogg, in his text, *Constitutional Law of Canada*, has observed that the decision could as easily have been framed in terms of necessity as of the rule of law. To avoid ambiguity, I confirm that I find the inherent jurisdiction of this court to rest not on the doctrine of necessity but, as with the Canadian courts, on the rule of law.

170. During the course of submissions, while Mr Dykes accepted that the remedy of temporary validity had a pragmatic attraction. He argued, however, that, if the Basic Law allowed for such a provision it would have made specific provision. In this regard, he made reference to the South African constitution which provides that the courts there, in deciding a constitutional matter, may suspend any declaration of invalidity of a legislative provision for any period and on any conditions it sees fit to allow the competent authorities to enact corrective legislation.

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

172. Mr Dykes was concerned that art.160 of the Basic Law, by its specific wording, prohibits the assumption by the courts of any power to declare invalid laws temporarily valid. I do not agree. Art.160 provides that, if any laws are discovered to be in contravention of the Basic Law, they shall be amended or shall cease to have effect in accordance with the procedures prescribed in the Basic Law itself. Art.160 is silent on the issue of the result of any legal vacuum that may come into existence when laws cease to have effect or while they are under a process of amendment. In terms of art.8, however, the Basic Law states that the common law and rules of equity shall remain the law of Hong Kong. To my understanding, the inherent jurisdiction identified by the Supreme Court of Canada in *Re Manitoba Language Rights* sprung from our common inheritance of the common law.

173. It is important to emphasise that the common law has never been written in stone, a once and for all system of laws and customs rigid in its inability to change. In this regard, it is apt to make reference to a recent judgment of the House of Lords in *re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680. In that judgment, the House considered the circumstances in which, if at all, it would be appropriate for a court to give a judgment over ruling what previously the law was thought to be without that overruling having any retroactive effect. The House held that it would be going too far to say that prospective overruling – as it is termed – could never be justified. Lord Nicholls noted that the traditional approach that judgments as to points of law declare what the law has always been had largely emerged out of the principle of judicial precedent. Judicial precedent was, however, a practice derived from the common law and constitutionally, he

said, common law judges have always had the power to modify this practice. Lord Nicholls went on to emphasise that the strength of the common law lay in its ability to adapt to changing needs :

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

174. In the result, it seems to me that the remedy of temporary validity, whether it is incorporated into the direct language of a constitution or is employed by a court as a constitutional remedy, is today a recognised means by which, in admittedly exceptional circumstances only, the provisions of a constitution may be protected by the striking down of invalid subsidiary laws without that process itself pulling down the pillars of the constitution upon itself.

175. Finally, in respect of covert surveillance generally, excluding the secret interception of private communications, Mr Dykes said that there is at this time no law in place and the Administration is therefore no worse of than it was before. There is, however, a body of administrative directions contained in the Executive Order which it has been argued constitute legal procedures for the purposes of art.30 of the Basic Law. While I have declared that those directions do not validly constitute legal procedures for the purposes of art.30, I see no reason why that declaration cannot be temporarily suspended.

176. I am therefore satisfied that an order of temporary validity for six months should be made.

Conclusion

177. For the reasons given in this judgment, I have come to the following determinations :

(i) The IOC Ordinance

178. The Ordinance was enacted in June 1997. In terms of s.1(2), the Chief Executive has the duty to bring it into effect on a day to be appointed by him. The applicants claim that, by failing to set a day, the Chief Executive has acted in breach of that duty and therefore unlawfully. The applicants have sought a declaration to that effect together with a declaration that the Chief Executive has a legal obligation forthwith to appoint a day to bring it into effect in its present form.

179. It has not been demonstrated, however, that the Chief Executive has acted in breach of his statutory duty nor that he is in breach of it at this time. The application for declaratory relief is therefore dismissed.

(ii) The Telecommunications Ordinance

180. S.33 of the Ordinance gives the power to the Chief Executive, when he considers it to be in

the public interest, to order the interception of telecommunication messages. This power is not subject to any legislative controls. The applicants claim that s.33, in so far as it authorises such interception, is inconsistent with arts.30 and 39 of the Basic Law which guarantee the right to freely and privately communicate with others. They claim that s.33 is unconstitutional, void and of no effect. They have sought a declaration to that effect.

181. I am satisfied that s.33 , in so far as it authorises or allows access to, or the disclosure of, the contents of telecommunication messages is inconsistent with arts.30 and 39 of the Basic Law and, through art.39, with art.14 of the Bill of Rights. The applicants are granted a declaration to that effect in the terms of the declaration contained in para.26 of this judgment.

(iii) The Executive Order

182. The Executive Order was made in August 2005 pursuant to the powers of the Chief Executive under art.48(4) of the Basic Law. It is an administrative order having no legislative effect. Its purpose is to lay down ‘legal procedures’ governing all forms of covert surveillance. The applicants claim that the Order, insofar as it purports to authorise and regulate covert surveillance by law enforcement agencies, purports to have legislative effect and in that regard is inconsistent with arts.30 and 39 of the Basic Law and, through art.39, with art.14 of the Bill of Rights. They have sought a declaration to that effect together with an order of *certiorari* to quash the Order.

183. I am satisfied that the Executive Order does not purport to have legislative effect. I am satisfied that it is no more than an administrative order and, being such, is lawfully made.

184. That being said, however, I am also satisfied that the contention made on behalf of the Chief Executive that the Executive Order, in laying down a body of ‘legal procedures’, complies with the requirements of art.30 of the Basic Law is incorrect. The Executive Order, as an administrative order, does not comply with art.30 nor is it capable of doing so. For the purposes of clarity, there will be a declaration to this effect.

(iv) The remedy of temporary validity

185. I am satisfied that any legal vacuum brought about by the declarations I make will constitute a real threat to the rule of law in Hong Kong if law enforcement agencies are unable to conduct covert surveillance, including the interception of private communications, until corrective legislation can be put in place. I am informed that it may take six months to put that corrective legislation into place.

186. That being the case, I order that the effect of the declarations that I have made will be suspended for a period of six months. There will therefore be an order in terms of the order contained in para.46 of this judgment.

187. The orders made under this judgment include an order that there be liberty to apply.

Costs

Considering the question of costs, while I accept that all three parties have been partially

188. Considering the question of costs, while I accept that all three parties have been partially successful and partially unsuccessful, and while this may normally result in an order of no order as to costs, I do not feel able at this time to come to a decision in respect of costs. The present proceedings must be viewed, at least to some extent, I think, in light of the fact that, when the application was first filed, there was no indication that urgent steps were being taken by the Administration to bring into force a comprehensive and constitutionally acceptable body of law governing covert surveillance in all its forms. Mr Dykes observed during the course of the proceedings that this application has been successful in that, if nothing else, it has precipitated a move by the Administration to achieve early constitutional regularity. If he is correct in this regard, it may be argued that it would not be equitable to either visit costs on the applicants or deprive them of costs if the reason for this is to be laid at their feet. I have come to no view on the matter. I simply record it as being of potential relevance in the exercise of my discretion. In the circumstances, I will hear from the parties, if they are unable to agree otherwise, as to costs.

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

1st Applicant, in person, present

Mr Philip Dykes, SC leading Mr Hectar Pun, instructed by Messrs K.M. Cheung & Co., for the 2nd Applicant

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