LEVITATING UNCONSTITUTIONAL LAW

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The Court of Final Appeal postponed the operation of declarations of unconstitutionality in the recent judicial review against the statutory power and the claimed legitimate basis of the HKSAR Government for conducting interception of telecommunications and covert surveillance, to give a specified period of time for the enactment of "corrective legislation". This analysis examines the Court's judgment and considers, by reference to the nature of declaratory orders, that the claimed inherent basis of the judicial power to suspend a declaration of unconstitutionality so as to postpone its operation to another date does not necessarily justify; and that for such an exceptional withholding of remedy to properly apply, truly exceptional circumstances must be shown.

The compatibility of the statutory powers of the Hong Kong Government to intercept communications has been the subject of academic and public concern since at least the early 1990s.[1] The United Nations Human Rights Committee had since 1995 considered as a principal subject of concern the potential for abuse such intrusive powers had on the privacy of individuals and urged for their early amendment.[2] The Government, however, had not sought the prompt modification of those powers to comply with the International Covenant on Civil and Political Rights (ICCPR) and had not brought into effect a private member's bill enacted to curb the abuse,[3] preferring to emphasise the existence of internal safeguards in the form of the high level officer(s) vested with the power of authorising interception operations and the standing orders and guidelines that controlled access to information intercepted.[4]

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1 The statutory powers were the power to intercept postal packets under s 13 of the Post Office Ordinance (Cap 98) and the power to intercept telecommunications under s 33 of the Telecommunications Ordinance (Cap 116). For a historical study of the statutory power to authorise the conduct of telephone tapping, *see* Fu and Cullen, "Political Policing in Hong Kong" (2003) 33 *HKLJ* 199, 218–224. *See* also Raymond Wacks (ed), *Human Rights in Hong Kong* (Oxford, New York and Hong Kong: Oxford University Press, 1992) p 337 and n 101 (Ch 9, *Privacy* by Raymond Wacks).

2 *See* Concluding Observations of the Human Rights Committee, CCPR/C/79/Add57 (9 Nov 1995) para 18; Concluding Observations of the Human Rights Committee, CCPR/C/79/Add117 (12 Nov 1999) para 13; and Concluding Observations of the Human Rights Committee, CCPR/C/HKG/CO/2 (21 Apr 2006) para 12.

3 ie the Interception of Communications Ordinance (Cap 532).

4 *See* Report of the Hong Kong Special Administrative Region of the People's Republic of China in the light of the International Covenant on Civil and Political Rights (Dec 1998) paras 315–317.

Eventually, the trigger for the process of collapse of these statutory powers was squeezed in 2005 by defendants in criminal trials challenging the admissibility of recordings obtained through covert means. Judges of the District Court found substance in these challenges in two cases.[5] The public concern on the legality of covert operations by law enforcement agencies was such that the Chief Executive of the HKSAR made the Law Enforcement (Covert Surveillance Procedure) Order (the Executive Order), which came into operation on 6 August 2005. The Executive Order itself attracted much criticism,[6] particularly in relation to the claim that it supplied "legal procedures" for covert surveillance operations by law enforcement agencies in compliance with Article 30 of the Basic Law of the HKSAR (Basic Law).[7] Two political activists, Leung Kwok Hung and Koo Sze Yiu, drove this process towards the terminal stage with their application for judicial review for declarations, *inter alia*, that the statutory power to authorise interception of telecommunications was unconstitutional for violation of the Basic Law, the ICCPR and the Hong Kong Bill of Rights; and that the Executive Order was also unconstitutional for violation also of those instruments.[8]

Leung and Koo were successful in persuading the courts of the unconstitutionality of the statutory power and also of the non-legislative nature of the Executive Order. The courts said so in their judgments.[9] Leung and Koo were, however, unsuccessful in having the two measures invalidated; it was a legislative act and an executive act respectively that brought the effect of the two measures to an end.[10] The courts, including the Court of Final Appeal to which Leung and Koo appealed on the question of remedies only, withheld

5 ie *HKSAR v Li Man Tak and Others* (unrep, 22 Apr 2005, DCCC 689/2004) and *HKSAR v Shum Chiu and Others* (unrep, 5 July 2005, DCCC 687/2004).

6 *See*, for example, *Statement of the Hong Kong Bar Association on the Law Enforcement (Covert Surveillance Procedure) Order* (15 Aug 2005) (LC Paper No CB(2) 2446/04-05(01)). For a discussion on the provenance of the Executive Order, *see* Simon N. M. Young,, "The Executive Order on Covert Surveillance: Legality Undercover?" (2005) 35 *HKLJ* 265.

7 Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990) (1990) 29 ILM 1511. Article 30 provides: "The freedom and privacy of communications 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."

8 ie HCAL 107/2005.

9 *Leung Kwok Hung and Another v Chief Executive of the HKSAR* (unrep, 9 Feb 2005, HCAL 107/2005), CFI (CFI Judgment) at [134], [151]; *Leung Kwok Hung and Another v Chief Executive of the HKSAR* (unrep, 10 May 2006, CACV 73, 87/2006), CA (CA Judgment) at [16], [38]. The further appeal to the Court of Final Appeal did not relate to these two issues.

10 ie Interception of Communications and Surveillance Ordinance (20 of 2006) (now assigned Cap 589) s 68; Sched 5, para 5 (commencing on 9 Aug 2006) and Executive Order No 1 of 2006 (revoking the Executive Order upon the commencement of the Interception of Communications and Surveillance Ordinance).

the declaratory remedies they purported to grant to give six months' time for "corrective legislation" to be made.

This novel judicial move of giving the HKSAR Government and the Legislative Council time to enact "corrective legislation" received mixed reviews. Albert Chen considered the action taken by the Court of First Instance of providing for temporary validity of the impugned provisions reasonable and in accordance with the modern trend of courts exercising constitutional review flexibly by adopting a "middle ground" technique between activism and restraint.[11] On the other hand, Johannes Chan, while noting the flexibility the new approach would give to the courts in hearing constitutional cases, expressed reservation on the appropriateness of the giving of time in the present case.[12]

This article takes the discussion further by reviewing the two judgments of the Court of Final Appeal on the proper approach to give time for "corrective legislation" to be made in respect of unconstitutional legislation.[13]

Declaration Made . . . Postponed

Bokhary PJ began his judgment by framing the questions to be considered:

> "Can a court ever, and if so under what circumstances, make an order according temporary validity to a law or executive action which it has declared unconstitutional? Failing such an order, can a court ever, and if so under what circumstances, suspend such a declaration so as to postpone its coming into operation?"[14]

Bokhary PJ therefore made and maintained in his judgment a distinction between an order providing for temporary validity to legislative or executive act a court *has declared* unconstitutional (temporary validity order) and a suspension of a declaration of unconstitutionality so as to postpone its coming into operation (postponed declaration). This distinction was reinforced by his understanding that a postponed declaration, unlike a temporary validity order, would not shield the executive "from legal liability for functioning pursuant to what *has been declared* unconstitutional" (emphasis supplied).[15] He

[11] Albert Chen, "Setting a Time Limit in relation to Unconstitutionality in Covert Surveillance: A Breakthrough in Hong Kong Legal System", *Hong Kong Economic Times* (14 Feb 2006) A 35.

[12] "Judge Setting a Precedent: Greater Flexibility in Handling Constitutional Cases", *Hong Kong Economic Times* (10 Feb 2006) A 26.

[13] The Court of Final Appeal hearing the appeal was composed of Bokhary, Chan and Ribeiro PJJ and Mortimer and Sir Anthony Mason NPJJ. Bokhary PJ gave the principal judgment, to which all other members expressed agreement. Sir Anthony Mason gave a concurring judgment stating his views.

[14] *Koo Sze Yiu and Another v Chief Executive of the HKSAR* [2006] 3 HKLRD 455 (CFA Judgment), [1].

[15] CFA Judgment, [33], [35], [50].

proceeded to set aside the temporary validity order made at first instance[16] and in place thereof suspended the declarations of unconstitutionality so as to postpone their coming into operation for six months.[17]

Sir Anthony Mason appeared to understand the distinction to be less than a real one,[18] but he did not find it necessary to demur, being content with the position taken by the HKSAR Government that a postponement of the declaration of invalidity would be accepted. Sir Anthony observed that Bokhary PJ's proposed order "will not endow acts or transactions undertaken in the period of postponement with any greater validity than they would have if the declaration of invalidity were made now."[19]

Accordingly, the gravamen of the CFA Judgment lies in the Court's development of a judicial power of suspending a declaration of unconstitutionality of legislation to afford an opportunity for the enactment of "corrective legislation". It is this development the critique that follows will address.

Bokhary PJ addressed the nature of the judicial power to suspend a declaration in his judgment. In his words:

16 ie "[notwithstanding] the judgment of the order and the declarations [of unconstitutionality] herein, section 33 of the Telecommunications Ordinance and the Executive Order, are valid and of legal effect for a period of six months from the date hereof, the parties having liberty to apply"; *see* CFI Judgment, [46]. On the other hand, Bokhary PJ noted, with understanding, at [48] of the CFA Judgment that Hartmann J, when making at [186] of the CFI Judgment an order in terms of [46] thereof, intended that the effect of the declarations that he had made should be *suspended* for a period of six months.

17 CFA Judgment, [49]. The HKSAR Government understood the Court's order to be that "[the] law enforcement agencies are therefore permitted to continue to undertake covert surveillance operations and interception of communications until 8 August 2006"; *see* Security Bureau, "Legislative Council Panel on Security: Interception of Communications and Covert Surveillance: Impact of the Judgment Delivered by the Court of Final Appeal in *Leung Kwok-hung and Koo Sze Yiu v Chief Executive of the Hong Kong Special Administrative Region* on Law Enforcement before the Enactment of the Interception of Communications and Surveillance Bill and the Preparatory Work Undertaken by the Administration for the Implementation of the Bill as Enacted" (July 2006) (LC Paper No CB(2)2860/05-06(01)). No distinction was made between the power under the Telecommunications Ordinance and the Executive Order, even though the declaration in relation to the Executive Order was that it "comprises administrative directions and only and does not constitute a set of 'legal procedures' for the purpose of Article 30 of the Basic Law" and was not a declaration of unconstitutionality; *see* CA Judgment, [11].

18 CFA Judgment, [56], quoting Peter W. Hogg, *Constitutional Law of Canada* (Looseleaf edn) (Scarborough, Ontario: Thomson Carswell, 2005) 37.1(d), where, under the heading of "temporary validity", Hogg considers that while the supremacy clause in the Canadian Constitution Act 1982 "requires a court to hold that an unconstitutional statute is invalid, the courts have *assumed* the power to postpone the operation of the declaration of invalidity. When a court exercises this power, the effect is to grant a period of temporary validity to an unconstitutional statute, because the statute will remain in force until the expiry of the period of postponement" (emphasis supplied). Cf Kent Roach, *Constitutional Remedies in Canada* (Aurora, Ontario: Canada Law Books, 2005) Ch 14, where Roach describes the remedy in question as a "delayed declaration of invalidity". His analysis of case law indicates that the usage of the Canadian courts has evolved over time to "suspend" the declaration.

19 CFA Judgment, [58].

> "[the] judicial power to suspend the operation of a declaration is a concomitant of the power to make the declaration in the first place. It is within the inherent jurisdiction. There is no need to resort to the doctrine of necessity for the power. Necessity comes into the picture only in its ordinary sense: not to create the power but only for its relevance to the question of whether the power should be exercised in any given case."[20]

Yet, he had not taken into account the nature of the remedy of a declaration.

Young, writing on declaratory orders, emphasises that "the word 'declaratory' is used in apposition to the word 'executory', executory orders being court orders which are enforceable by execution".[21] Zamir and Woolf agreed, making the point that a declaratory judgment is "a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs . . . but does not contain any order which can be enforced against the defendant. . . . In other words, the declaration simply pronounces on what is the legal position."[22]

Young, thus in discussing the question of staying a declaratory order, again emphasises that "[the] effect of the court's order is not to create rights but merely to indicate what they have always been" and therefore:

> "[because] of this, if an appeal is lodged against a declaratory order, conceptually there can be *no* stay of proceedings. Thus if it is held that the decision of a licensing authority is void and accordingly the licences issued are null and void, there is no procedure whereby the court can validate those licences pending the hearing of an appeal" (emphasis supplied).[23]

This passage was recently cited before the New Zealand High Court in relation to an attempt by Christchurch City Council to obtain relief in the nature of a stay pending the determination of an appeal in respect of a declaratory order that quashed one of the council's bylaws relating to the location of brothels in Christchurch. Panckhurst J rejected the application, holding that there was no jurisdiction to grant such relief, by reason that:

> "[it] is one thing to stay a proceeding which is extant, or to stay an order which is executory in nature, but the present declaration became operative when it was made. To contemplate the revival at this point of a bylaw which I have found to be invalid impresses me as conceptually

[20] CFA Judgment, [35].
[21] P. W. Young, *Declaratory Orders* (Sydney: Butterworths, 2nd edn, 1984) [101].
[22] Zamir and Woolf, *The Declaratory Judgment* (London: Sweet & Maxwell, 3rd edn, 2002) 1.02.
[23] See n 21 above, [2408].

> wrong. . . . Once a Court has determined that a particular provision is invalid, it is antithetical to that determination to contemplate recognition of the provision as lawful, even in the short term."[24]

The discussion of the nature of a declaratory order above is apparently applicable to a declaration of unconstitutionality of legislation since, like a declaration of invalidity of a bylaw, such a declaration is a pronouncement of the validity of the legislation in question. It is, as it was submitted before the New Zealand High Court, "not merely *inter partes*, but *in rem*".[25] Since the CFA Judgment indicates what the Court purported to do was to suspend the operation of declarations of unconstitutionality that *had been made* (the Court having stated that "[the] Government can, during that period of suspension, function pursuant to *what has been declared unconstitutional*" (emphasis supplied)),[26] there is room for doubting the doctrinal basis of the Court's assertion of inherent jurisdiction to suspend its operation. Like an arrow shot from a bow, once a provision has been declared unconstitutional, the declaration has operated and arguably cannot be put back.

The CFA Judgment is not necessarily impugned thereby. One must remember that it is the constitutional jurisdiction of the Court one is considering. As Sir Anthony Mason advised, in considering such large questions pertaining to the exercise of this jurisdiction:

> "it may well be that the responsibilities and powers of the courts are no longer to be measured exclusively by reference to the traditional concept of adjudication of dispute between parties".[27]

Bokhary PJ also indicated that "exceptional circumstances may call for exceptional judicial remedies" and "[sometimes] the danger to be averted . . . will be of such a magnitude that suspension of a declaration of unconstitutionality would not offend against the rule of law".[28] A more emphatic statement is probably Justice Jackson's reproach:

[24] *Willowford Family Trust v Christchurch City Council* [2006] 1 NZLR 791, NZ HC. Cf CA Judgment, [94], where Tang JA, without relying on any authorities, stated that "[when] important constitutional points are involved, and where it is legitimate for the parties to want a determination of the Court of Final Appeal, it may be that the court can stay the effect of the declarations pending appeal."

[25] *See* n 24 above, [16].

[26] CFA Judgment, [63]. Cf CFA Judgment, [59] where Sir Anthony Mason might have differed when he considered that "[the] postponement of the *making* of the declaration will enable the authorities to decide what course they wish to take, though actions taken pursuant to the legislation which is the subject of the postponed declaration will be affected by the effect of that declaration, subject, of course, to remedial legislation, if any, which might be enacted" (emphasis supplied). It is therefore difficult to contemplate the agreement Ribeiro PJ expressed at [53] to *both* judgments.

[27] CFA Judgment, [62].

[28] CFA Judgment, [28], [40].

> "The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[29]

This imperative of practicality would have moderated the Court of Final Appeal with the pragmatism of ruling, as opposed to the "legalism" of rules. A court of final adjudication setting an effective date of a declaration of unconstitutionality may assume that "corrective legislation" should be what publicly spirited litigants would want. That may be assuming too much, since "corrective legislation" takes away, at least in theory, the unconstitutionality they started off to show and have been successful in showing. A better view is that a court of final adjudication in so setting an effective date of a declaration of unconstitutionality prescribes a fiat to the lower courts that, by the "brute force" of *stare decisis*,[30] the courts shall not adjudicate and enforce on the same issue of unconstitutionality during the specified period to allow for deliberation among the political branches to transit legislation on the offending topic in accordance with the findings in the final appeal.

What the Court of Final Appeal did in the present case to suspend the operation of declarations of unconstitutionality thus squares with Roach's comment on Canadian practice: "Delay declarations of invalidity are a means for the court to limit the immediate and retroactive effects of its rulings. They allow the court to engage in prospective rulings."[31] If suspension of operations of declarations of unconstitutionality is being treated as a form of prospective ruling in Canada, then the present case should be read with the subsequent decision of the Court in *HKSAR v Hung Chun Wa and Another*[32] where the question of whether judicial power under the Basic Law included prospective overruling was discussed, but with the Court declining to reach a conclusion.[33]

[29] *Terminiello v City of Chicago* 337 US 1 (1949), US SC, at 37 (Justice Jackson, dissenting). *See* also *Knnedy v Mendoza-Martinez* 372 US 144 (1963), US SC, at 160 (Justice Goldberg for the Court).

[30] This author is grateful to Professor Albert Chen for observing in e-mail exchanges on the futility of first instance constitutional rulings and thus first instance decisions to postpone the operation of declarations of unconstitutionality: "The fact that a court of first instance has taken the view that a provision of an Ordinance is unconstitutional should not be regarded as a definitive statement that it is invalid and void. Another court of first instance may still enforce the law in another case, and even if the Government still enforces it in another case, it can only be said to have taken the risk of having relied on an invalid law (should the invalidity of the law be definitively settled by a higher court in future)." The implication, in this author's view, is that the Government should appeal at least to the Court of Appeal even where the first instance court agrees to postpone the operation of a declaration of unconstitutionality in order to secure the necessary hierarchical binding force.

[31] *See* n 18 above, 14.1810.

[32] ie *HKSAR v Hung Chun Wa and Another* [2006] 3 HKLRD 841, CFA.

[33] *Ibid.*, [18] (Chief Justice Li), [34] (Bokhary PJ).

In the course of the discussion on prospective overruling in *Hung Chun Wa*,[34] the Chief Justice considered the present case. The Chief Justice understood the Court of Final Appeal to have in the present case:

> "left open the question whether the courts have the power to grant a declaration of temporary validity of a law or executive action which has been declared unconstitutional. See paras 32, 60 and 61. It should be noted that such a remedy is even more far reaching than prospective overruling. With prospective overruling, the court's judgment would take effect from the date of the judgment. But where a declaration of temporary validity is made, the judgment would not even take effect at that time. It would only take effect after the expiry of the period as specified in the declaration sometime after the judgment."[35]

The same observation might also be made in respect of a postponed declaration of unconstitutionality, which denies the declaratory order the immediate effect it by nature should have and *recognises* its effect only at the specified date in the future, when, it is intended, the object to which its effect was sought to be directed in the first place will have been removed, leaving the persons affected and the Government to sort out the legal liability for functioning pursuant to what has been declared unconstitutional in the meantime.[36] The question of the power to postpone the operation of a declaration of unconstitutionality was obviously *not* left open in the present case.

Justification for Suspension

The exceptional, extraordinary or eccentric nature of the decision to temper the remedy of a declaration of unconstitutionality with suspension for a specified period of time has been demonstrated. But is the suspension justified in the present case?

Blackstone, to whom Bokhary PJ drew succour, considered that only "the sudden emergence of national distress" could justify "eccentrical remedies".[37] Both Bokhary PJ and Sir Anthony Mason agreed that "suspension would not be accorded if it is unnecessary".[38] The fact that suspension was given indicated that the Court of Final Appeal was satisfied with the necessity

[34] The Chief Justice found the essence of the imprecise term of "prospective overruling" to involve the court being "asked to impose a temporal limitation on its judgment so that its retrospective effect would be limited to the extent specified"; *see* n 32 above, [5].

[35] *See* n 32 above, [30].

[36] Cf CFA Judgment, [29] where Bokhary PJ accepted the concession by counsel for Koo that "limiting a judicial decision to prospective effect was a stronger course than suspending a declaration of unconstitutionality. A decision in favour of such suspension leaves open the question of prospective effect."

[37] *See* CFA Judgment, [31].

[38] CFA Judgment, [41], [60].

therefor. This was articulated principally in one paragraph where an alternative to suspension of the declarations of unconstitutionality, namely the bringing into operation of the Interception of Communications Ordinance, was discussed and rejected as not viable.[39] There was no further discussion of the "distress" that letting the declarations of unconstitutionality run their natural trajectories would bring. Where the matter was considered at first instance, it was phrased in terms of expressing agreement with the Government's submission that the community's well-being would be put in peril if the law enforcement agencies could not lawfully conduct covert surveillance. It was suggested that "rendering covert surveillance unlawful" would create "an amnesty for conspirators" without any need to cite examples to illustrate the accompanying dangers.[40]

The failure on the part of the Court to find justification for suspension of declarations of unconstitutionality on the basis of evidence, as opposed to assumptions, is unsatisfactory. This runs not only the precarious course of taking "on faith" what is stated on behalf of the executive authorities,[41] but also the inconsistent course when the approach is compared with that adopted at the prior stage of demanding "cogent evidence" for justification of restrictions to fundamental rights.[42] This unsatisfactory aspect is all the more so when the consequences of the declaratory orders are analysed. The effect of invalidating section 33 of the Telecommunications Ordinance would have been that the on-going interceptions would lack authority and telecommunications operators would have no compulsion to cooperate with the law enforcement agencies. This however should not be taken to mean that telecommunications operators would never render assistance. Were the Executive Order put immediately into the proper perspective of being mere administrative rules and not purporting to be legal procedures for the purposes of Article 30 of the Basic Law, covert surveillance would continue to be undertaken and the law enforcement agencies would continue to have to persuade the

39 CFA Judgment, [42].

40 CFI Judgment, [158], [159].

41 The CFI Judgment indicates at [77] that it was put before the court affirmation evidence from Security Bureau referring to "changing circumstances" including heightened security concerns in the "post-9/11 era", rapid development in communications technology, and changes in the legislative regimes in common law countries since 2001. The Security Bureau had also put before the court illustrative cases on the use of covert surveillance techniques; *see* Security Bureau, "Bills Committee on Interception of Communications and Surveillance Bill: Response to Issues Raised by Members at the Meeting of 16 March 2006" (March 2006) Annex D (LC Paper No CB(2)1516/05-06(01)). It is not known if the Government had placed before the Court of Appeal and the Court of Final Appeal information on the number of cases of interception of communications and covert surveillance by law enforcement agencies in Hong Kong; *see* letters of the Security Bureau to the Clerk to LegCo Panel on Security dated 25 February 2006 and 9 June 2006 (LC Paper Nos CB(2)1258/05-06(01), CB(2)2361/05-06(01)).

42 *See R v Sin Yau Ming* [1992] 1 HKCLR 127, CA at 145 and *Leung v Secretary for Justice* [2006] 4 HKLRD 211, CA.

trial court to admit the evidence gathered in exercise of its discretion.[43] The carrying on by the Government through its officers of any interception or covert surveillance after the making of the declaratory orders may attract civil and criminal liabilities. It would be likely for the Government to have to pay damages for tortious acts committed without lawful authority but the Government may resist against injunctions on the grounds of balance of convenience and the public interest. Regarding potential criminal liability of public officers, the Department of Justice may, as a matter of upholding the public interest, have to decline to prosecute. A price would have to be paid, but not necessarily beyond monetary and reputational prices. Such a burden, though undesirable, would not have the appearance of being intolerable, or perilous to the community.

Concluding Remarks

Roach observed, again in relation to Canada, that:

> "The delayed declaration of invalidity can be criticized both for being too conservative in avoiding the usual implication of declaring unconstitutional laws to be of no force, and being too radical in engaging in a form of prospective ruling and requiring prompt legislative action."[44]

The analysis undertaken in this article finds the Court of Final Appeal between two very similar criticisms in its judgments in the present case. Every time a court of final adjudication postpones the operation of a declaration of unconstitutionality by a specified period of time, the Government is given time to have "corrective legislation" enacted while in the meantime functioning as before pursuant to what *has been declared unconstitutional*. It is the courts that are withholding sanction against the Government and remedy for the citizen in order for the legislative process to be properly undertaken with "all deliberate speed". In other words, the courts *levitate* the unconstitutional law to palliate its removal. It needs repeat emphasis therefore that like justifying a restriction to constitutionally guaranteed fundamental rights, the Government bears, and the courts ensure the discharge of, the burden of justification. Otherwise, it would be the courts that apply the necessary traction on something that one hopes to be more substantial than shoe-strings.[45]

[43] See, for example, *HKSAR v Chan Kau Tai* [2006] 1 HKLRD 400, CA; *HKSAR v Lam Hon Kwok Popy and Others* (unrep, 21 July 2006, CACC 528/2004), CA; and *HKSAR v Li Man Tak and Others* (unrep, 13 Sept 2006, CACC 303/2005), CA, where the Court of Appeal upheld the discretionary admission by trial courts of evidence obtained through covert surveillance in violation of the right to private communications under Art 30 of the Basic Law.

[44] See n 18 above, 14.1480.

[45] See *R v East Berkshire Health Authority ex p Walsh* [1985] QB 152, CA (Eng) at 162A-C, per Sir John Donaldson MR.