

shall be triable either on indictment or summarily". Mr McCoy advanced to us an argument, albeit faintly, that since each of the summonses alleged the offences to be contrary to s.3(1)(a) and s.3(2)(b) those offences must be summary ones. The answer to that is that the manner of trial does not determine the category of the offence.

There is no time limit generally imposed for the prosecution of indictable offences. Given that s.3 of the LFETO creates an indictable offence the answer to the second certified question depends entirely upon the proper construction of s.67 of the same Ordinance. It begins with the words, "Notwithstanding s.26 of the Magistrates Ordinance ...". That section deals exclusively with offences other than indictable offences which are mentioned only to remove them from its ambit. That being so, the opening words of s.67 show that it, also, is dealing with offences other than indictable offences. It is also to be noted that it appears to have been the policy of the legislature to extend the time for prosecutions under the LFETO having regard to the complexities usually involved. Any construction of s.67 that it includes both summary and indictable offences necessarily means that a time limit has been introduced to the more serious offences fit to be tried on indictment, which will presumably be even more complex, when none existed before. It would also mean that the gravity of cases fit to be tried summarily and those fit to be tried upon indictment has been equated. That construction cannot be accepted. The Judge was right in her conclusion.

The first question certified must be answered in favour of the appellants and the appeal is upheld on that ground with costs both here and upon their application on motion to the Judge in the Court of First Instance. They fail on the second question certified but, on the basis that the motion should have been granted and that the case stated should never have been heard, they will also have their costs on the case stated. They have not sought an order for their costs in the Magistracy and none is ordered.

Nazareth NPJ:

I agree with the judgment of Mr Justice Ching PJ.

Lord Hoffmann NPJ:

I agree.

Li CJ:

The Court unanimously allows the appeal with costs both in this appeal and in the proceedings before the Court of First Instance.

HKSAR Appellant
and
Ng Kung Siu & Another Respondent

(Court of Final Appeal)
(Final Appeal No 4 of 1999 (Criminal))

C Li CJ, Litton, Ching and Bokhary PJJ and Sir Anthony Mason NPJ
20-22 October and 15 December 1999

Criminal law and procedure — criminalisation of defacing of national or regional flag — not contrary to freedom of expression — National Flag and National Emblem Ordinance (No 116 of 1997) s.7 — Regional Flag and Regional Emblem Ordinance (No 117 of 1997) s.7

Human rights — freedom of expression — should be given generous interpretation — permissible restrictions — should be narrowly construed — criminalisation of defacing of national or regional flag — restriction was necessary for protection of public order (ordre public) — International Covenant on Civil and Political Rights art.19

Words and phrases — "public order (ordre public)" — International Covenant on Civil and Political Rights art.19

F [National Flag and National Emblem Ordinance (No 116 of 1997) s.7; Regional Flag and Regional Emblem Ordinance (No 117 of 1997) s.7; Basic Law art.39; International Covenant on Civil and Political Rights art.19]

G 刑法與刑事訴訟程序 — 損污國旗或區旗刑事化 — 不違反發表自由 — 《國旗及國徽條例》(1997年第116號)第7條 — 《區旗及區徽條例》(1997年第117號)第7條

H 人權 — 發表自由 — 應給予寬鬆解釋 — 可允許的限制 — 應給予狹窄的解釋 — 損污國旗或區旗刑事化 — 為保護公共秩序須作出限制 — 《公民權利和政治權利國際公約》第19條

I 詞彙 — "公共秩序" — 《公民權利和政治權利國際公約》第19條
[《國旗及國徽條例》(1997年第116號)第7條;《區旗及區徽條例》(1997年第117號)第7條;《基本法》第39條;《公民權利和政治權利國際公約》第19條]

J Ds were convicted of desecrating the national flag and the regional flag by publicly and wilfully defiling them, contrary to s.7 of the National Flag and National Emblem Ordinance (No 116 of 1997) and s.7 of the Regional Flag and Regional Emblem Ordinance (No 117 of 1997). Ds took part in a public procession, during which they carried defaced national and regional flags. They

successfully appealed to the Court of Appeal (see [1999] 1 HKLRD 783) and the prosecution appealed. At issue was whether s.7 of each Ordinance, as a restriction (the restriction) to the freedom of expression, was contrary to art.19 of the International Covenant on Civil and Political Rights (ICCPR) and accordingly contravened art.39 of the Basic Law. The prosecution argued that the restriction was justified, pursuant to art.19(3), as it was necessary for the protection of public order (*ordre public*).

Held, allowing the appeal, that (*per Li CJ*):

- (1) The offence under s.7 of each Ordinance was the desecration of the flag in question by defiling it. The ordinary meaning of "defiling" plainly included dishonouring. By carrying and waving the defaced flags during the procession and then tying them to some railings at the end of the procession, Ds were clearly dishonouring the flags. These acts clearly amounted to desecration by defiling. (See p.919F-G.)
- (2) Freedom of expression was a fundamental freedom in a democratic society. It lay at the heart of civil society and of Hong Kong's system and way of life. The courts must give a generous interpretation to its constitutional guarantee. (See p.920I-J.)
- (3) However the freedom of expression was not an absolute. Article 19(3) itself recognised that its exercise might be subject to certain restrictions. But these restrictions should only be such as were provided for by law and were necessary: "(a) For respect of the rights or reputation of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals." (See pp.921I-922B.)
- (4) In considering the extent of a restriction, it was well settled that any restriction must be narrowly interpreted. The burden rested on the Government to justify any restriction (*Ming Pao Newspapers Ltd v A-G* [1996] AC 906 applied). (See p.922B-C.)
- (5) The concept of public order (*ordre public*) was an imprecise and elusive one. Its boundaries could not be precisely defined. It included what was necessary for the protection of the general welfare or for the interests of the collectivity as a whole. Examples included: prescription for peace and good order; safety; public health; aesthetic and moral considerations and economic order (consumer protection, etc). Further, the concept must remain a function of time, place and circumstances (*Tam Hing Yee v Wu Tai Wai* [1992] 1 HKLR 185, *SJ v The Oriental Press Group Ltd & Others* [1998] 2 HKLRD 123, [1998] 2 HKC 627, *Wong Yeung Ng v SJ* [1999] 2 HKLRD 293, [1999] 2 HKC 24 considered). (See pp.922E-925B.)
- (6) Here the restriction was for the protection of public order (*ordre public*). As to the time, place and circumstances, Hong Kong had a new constitutional order. On 1 July 1997, the PRC resumed the exercise of sovereignty over Hong Kong being an inalienable part of the PRC and established the HKSAR under the principle of "one country, two systems." In these circumstances, the legitimate societal interests in protecting the national flag, and the legitimate community interests in the protection of the regional flag, were

- interests which were within the concept of public order (*ordre public*). These legitimate interests formed part of the general welfare and the interests of the collectivity as a whole. (See p.925B-E.)
- (7) That these legitimate interests were within public order (*ordre public*) did not conclude the question. One must consider whether the restriction on the guaranteed right to freedom of expression was necessary for the protection of public order (*ordre public*). (See p.925E-F.)
- (8) The restriction was necessary: (*Ming Pao Newspapers Ltd v A-G* [1998] AC 906 applied). (See pp.925E-926H)
 - (a) In considering the test of necessity, the Court should give due weight to the views of the HKSAR's legislature. (See p.925I.)
 - (b) The restriction was not a wide restriction of the freedom of expression, but a limited one. It banned one mode of expressing whatever the message the person concerned might wish to express, that was the mode of desecrating the flags. It did not interfere with the person's freedom to express the same message by other modes. (See p.921F-G.)
 - (c) Having regard to what was only a limited restriction the test of necessity was satisfied. (See p.926C.)
 - (d) It was proportionate to the aims sought to be achieved, namely the protection of the national flag as a unique symbol of the Nation and the regional flag as a unique symbol of the HKSAR in accordance with what were unquestionable legitimate societal and community interests. It did not go beyond what was proportionate. (See p.926A-C.)
 - (e) The implementation of the principle of "one country, two systems" was a matter of fundamental importance, as was the reinforcement of national unity and territorial integrity. Protection of the national and regional flags from desecration, having regard to their unique symbolism, would play an important part in the attainment of these goals. (See p.926D-E.)
- Per Bokhary PJ* (concurring):
- (9) Upon an examination of the position in a number of overseas jurisdictions, there appeared to be essentially two coherent approaches in this area of constitutional law. One approach would be to say that even though there were always far more effective ways of making a point than by desecrating the national or regional flag or emblem, such desecration, however boorish and offensive, should nevertheless be tolerated as a form of expression. The other approach would be to say that by reason of the reverence due to them for what they represented and because so protecting them would never prevent anyone from getting his or her point across in any one or more of a wide variety of ways, those flags and emblems should be protected from desecration (*Texas v Johnson* 491 US 397 (1989), *United States v Eichman* 496 US 310 (1990), *Re Paris Renato*, Judgment No 1218 of the Corte Suprema di Cassazione, General Registry No 3355 of 1988, *81 Entscheidungen des Bundesverfassungsgericht* 278 (FRG) (*German Flag Desecration Case*) considered). (See p.932B-D.)

- (10) Whether the legislature's choice of the approach which protected the national and regional flags and emblems from desecration was constitutional depended on whether the laws providing such protection were reconcilable with the freedom of expression guaranteed by the constitution. (See p.932E-G.) A
- (11) A symbol such as a flag, emblem or totem impartially representing the whole of a group, be it a small band or a large nation, was inherently and essentially different, both in substance and form, from a statement conveying a specific message whether bland or controversial. (See p.932I-J.) B
- (12) Given the difference between symbols and statements it was possible – even if by no means easy – for a society to protect its flags and emblems while at the same time maintaining its freedom of expression. (See p.933A.) C
- (13) This was possible if its flag and emblem protection laws were specific, did not affect the substance of expression, and touched upon the mode of expression only to the extent of keeping flags and emblems impartially beyond politics and strife. (See p.933B.) D
- (14) Our laws protecting the national flags and emblems from public and willful desecration met such criteria in that:
- (a) They placed no restriction at all on what people might express.
- (b) Even in regard to how people might express themselves, the only restriction placed was against the desecration of objects which hardly anyone would dream of desecrating even if there was no law against it.
- (c) No idea would be suppressed by the restriction.
- (d) Neither political outspokenness nor any other form of outspokenness would be inhibited. (See p.933B-C.) E
- (15) These restrictions lay just within the outer limits of constitutionality. (See p.933D.) F
- (16) Beneath the national and regional flags and emblems, all persons in Hong Kong were – and could be confident that they would remain – equally free under our law to express their views on all matters whether political or non-political: saying what they liked, how they liked. (See p.933D-E.) G
- Mr Gerard McCoy SC, Mr Andrew Bruce SC, Senior Assistant Director of Public Prosecutions, and Mr Kenneth Chow, instructed by the Department of Justice, for the appellant. H
- The first respondent in person.
- Ms Audrey Eu SC, Mr Lo Pui Yin, Mr Paul Harris and Mr Lawrence Lau, instructed by Ho, Tse, Wai & Partners and assigned by the Director of Legal Aid, for the second respondent. I
- Legislation mentioned in the judgment:**
- Basic Law of the Hong Kong Special Administrative Region arts.10(1), (2), 18(2), (3), 27, 39, 39(2), Annex III, Preamble
- Criminal Law of the People's Republic of China art.299
- Hong Kong Bill of Rights Ordinance (Cap.383) Pt.II art.16 J

- A National Flag and National Emblem Ordinance (No 116 of 1997) ss.3(1), (2), 4, 5(1), (2), 6(1), (3), 7, 9
Regional Flag and Regional Emblem Ordinance (No 117 of 1997) ss.3(1), (2), 4, 5(1), 6(1), (2), 7, Sched.3
- B Cases cited in the judgment:**
- 81 Entscheidungen des Bundesverfassungsgericht 278 (FRG) (German Flag Desecration Case)
HKSAR v Ng Kung Siu & Another [1999] 1 HKLRD 783, [1999] 2 HKC 10
Levy v Victoria (1997) 189 CLR 579
- C Ming Pao Newspapers Ltd v A-G (1996) 6 HKPLR 103, [1996] AC 906
Paris Renato, Re, Judgment No 1218 of the Corte Suprema di Cassazione, General Registry No 3355 of 1988
SJ v The Oriental Press Group Ltd & Others [1998] 2 HKLRD 123, [1998] 2 HKC 627
- D Tam Hing Yee v Wu Tai Wai [1992] 1 HKLR 185
Texas v Johnson 491 US 397 (1989)
United States v Eichman 496 US 310 (1990)
Wong Tak Yue v Kung Kwok Wai & Another (No2) (1997-98) 1 HKCFAR 55, [1998] 1 HKLRD 241, [1998] 1 HKC 1
- E Wong Yeung Ng v SJ [1999] 2 HKLRD 293, [1999] 2 HKC 24

Other materials mentioned in the judgment:

- American Convention on Human Rights arts.30, 32(2)
Constitution of the People's Republic of China art.136
- F Constitution of the United States of America, First Amendment
First Plenary Session of the Chinese People's Political Consultative Conference, 27 September 1949, para.4
Ghai, "Derogations and Limitations in the Hong Kong Bill of Rights" in *The Hong Kong Bill of Rights: A Comparative Approach* (Johannes Chan and Yash Ghai eds., 1993), Ch.8 at p.192
- G Ghai, "Freedom of Expression" in *Human Rights in Hong Kong*, (Raymond Wacks ed., 1992), Ch.11 at p.391
Inter-American Court of Human Rights Advisory Opinion No OC-6/86 (1986) 7 Human Rights Law Journal 231
- H International Covenant on Civil and Political Rights art.19, 19(3)
Law Commission Report, 30 May 1990, on the 14th Meeting of the Standing Committee of the 7th National People's Congress, 20 June 1990
Portuguese Penal Code art.332(1)
(1985) 7 Human Rights Quarterly 3-14

I Li CJ:

- The Basic Law contains constitutional guarantees for the freedoms that are of the essence of Hong Kong's civil society. We are concerned with the freedom of expression. The question in this appeal is whether the statutory provisions which criminalise desecration of the national flag and the regional flag are

inconsistent with the guarantee of the freedom of expression. The statutory provisions in question are s.7 of the National Flag and National Emblem Ordinance (No 116 of 1997) (the National Flag Ordinance) and s.7 of the Regional Flag and Regional Emblem Ordinance (No 117 of 1997) (the Regional Flag Ordinance).

The flags as symbols

A national flag is the symbol of a nation. It is a unique symbol. All nations have flags. National emblems are also common.

The national flag is the symbol of the People's Republic of China. It is the symbol of the State and the sovereignty of the State. It represents the People's Republic of China, with her dignity, unity and territorial integrity.

The regional flag is the unique symbol of the Hong Kong Special Administrative Region as an inalienable part of the People's Republic of China under the principle of "one country, two systems". In this judgment, I shall refer to the People's Republic of China in full or as "PRC", and the Hong Kong Special Administrative Region in full or as "HKSAR" or as "the Region".

The intrinsic importance of the national flag and the regional flag to the HKSAR as such unique symbols is demonstrated by the fact that at the historic moment on the stroke of midnight on 1 July 1997, the handover ceremony in Hong Kong to mark the People's Republic of China's resumption of the exercise of sovereignty over Hong Kong began by the raising of the national flag and the regional flag. And the speech, which the President of the People's Republic of China then delivered, began with the words:

The national flag of the People's Republic of China and the regional flag of the Hong Kong Special Administrative Region of the People's Republic of China have now solemnly risen over this land.

The question

The society in the People's Republic of China, the country as a whole, including the Hong Kong Special Administrative Region, has a legitimate interest in protecting their national flag, the unique symbol of the Nation. Similarly, the community in the Hong Kong Special Administrative Region has a legitimate interest in protecting the regional flag, the unique symbol of the Region as an inalienable part of the People's Republic of China under the principle of "one country, two systems". The existence of these legitimate interests has not been challenged in argument before us.

The question before us is whether these legitimate interests justify the restriction on the freedom of expression by the criminalisation of desecration of the national and regional flags. As is accepted by Mr McCoy SC, for the HKSAR Government, in the absence of such justification, the statutory provisions would be unconstitutional as contravening the Basic Law and the courts have the power and duty so to declare.

A *The National Flag*

The PRC Law on the National Flag

The national flag was originally adopted by resolution of the First Plenary Session of the Chinese People's Political Consultative Conference on 27 September 1949, shortly before 1 October 1949, the founding date of the People's Republic of China. Paragraph 4 of that resolution read:

It is unanimously adopted that the national flag of the People's Republic of China shall be a flag with five stars on a field of red, symbolizing the great unity of the revolutionary Chinese people.

The national flag is now prescribed in art.136 of the present Chinese Constitution.

The PRC Law on the National Flag was adopted by the Standing Committee of the National People's Congress and promulgated by the President of the People's Republic of China on 28 June 1990 and became effective as of 1 October 1990. Article 1 states that this Law is enacted in accordance with the Constitution "with a view to defending the dignity of the National Flag, enhancing citizens' consciousness of the State and promoting the spirit of patriotism". Article 2 prescribes that the national flag shall be a flag with five stars and that it shall be made according to the specified directions. Article 3 provides:

The National Flag of the People's Republic of China is the symbol and hallmark of the People's Republic of China. All citizens and organisations shall respect and care for the National Flag.

Matters relating to the display of the national flag, such as the places, time and manner of display are dealt with.

Article 17 provides that no damaged, defiled, faded or substandard national flag shall be displayed. Article 18 prohibits the use of the national flag and the design thereof as a trade mark for advertising purposes and in private funeral activities. Article 19 provides:

Whoever desecrates the National Flag of the People's Republic of China by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling upon it shall be investigated for criminal responsibilities according to law; where the offence is relatively minor, he shall be detained for not more than 15 days by the public security organ in reference to the provisions of the Regulations on Administrative Penalties for Public Security.

I On 28 June 1990, the same day as the adoption and promulgation of the PRC Law on the National Flag, the decision of the Standing Committee of the National People's Congress regarding the punishment of crimes of desecrating the national flag and the national emblem of the People's Republic of China was adopted and promulgated to make supplementary provision to the Criminal Law as follows:

Whoever desecrates the National Flag or the National Emblem of the People's Republic of China by publicly and wilfully burning, mutilating, scrawling on, defiling, or trampling upon it shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights.

A

It was considered that the best method of providing for the criminal offence was to make such a supplemental provision to the Criminal Law. See the report dated 30 May 1990 of the Law Commission examining the draft law at the 14th meeting of the Standing Committee of the 7th National People's Congress held on 20 June 1990. That provision has now been replaced by a similar provision in art.299 of the Criminal Law of the People's Republic of China.

B

The Basic Law

The application of national laws in the Hong Kong Special Administrative Region is governed by art.18(2), which provides:

C

National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.

E

Article 18(3) provides that the Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. It further provides that:

F

Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law.

G

On 1 July 1997, pursuant to art.18(2), the Standing Committee of the National People's Congress added to the list of laws in Annex III, among others, the PRC Law on the National Flag.

H

The National Flag Ordinance

With this addition to Annex III of the Basic Law, the HKSAR was obliged by virtue of art.18(2) of the Basic Law to apply the PRC Law on the National Flag locally by way of promulgation or legislation. Accordingly, the legislature (then the Provisional Legislative Council) applied it in the HKSAR by legislation by the enactment of the National Flag Ordinance. Legislation as opposed to promulgation was appropriate since the national law had to be adapted for application in the HKSAR. The Ordinance provides for the use and protection of the national flag in the Region. The national flag must be displayed at main Government buildings.

I

J

A Section 3(1). The Chief Executive may stipulate the organisations which must display or use the national flag and the other places at which, the occasions on which, the manner in which and the conditions under which, the national flag must be displayed or used. Section 3(2). Section 4 provides that a national flag which is damaged, defiled, faded or substandard must not be displayed or used. The national flag for flying may be manufactured in the Hong Kong Special Administrative Region only by enterprises designated by the Central People's Government and must be manufactured in accordance with the prescribed specifications. Section 5(1) and 5(2). The national flag or its design must not be displayed or used in trademarks or advertisements, private funeral activities or other occasions or places stipulated by the Chief Executive. Contravention is a criminal offence. Section 6(1) and 6(3). The provision in issue in this appeal, s.7, provides:

C

A person who desecrates the national flag ... by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable on conviction to a fine at level 5 [ie \$50,000] and to imprisonment for 3 years.

D

A copy of the national flag that is not an exact copy but so closely resembles the national flag as to lead to the belief that the copy in question is the national flag is taken to be the national flag for the purposes of the Ordinance.

E

Section 9 provides:

- (1) Offences in relation to the national flag and the national emblem in the Hong Kong Special Administrative Region are investigated and persons are prosecuted according to the laws in force in the Hong Kong Special Administrative Region.
- (2) If there are inconsistencies between this Ordinance and a national law promulgated under Annex III of the Basic Law, this Ordinance is to be interpreted and applied as a special application or adaptation of the national law.

F

G

The Regional Flag

The Basic Law

H Article 10(1) and art.10(2) of the Basic Law provide:

Apart from displaying the national flag and national emblem of the People's Republic of China, the Hong Kong Special Administrative Region may also use a regional flag and regional emblem.

I

The regional flag of the Hong Kong Special Administrative Region is a red flag with a bauhinia highlighted by five star-tipped stamens.

The regional flag had been endorsed at the Fourth Plenum of the Preparatory Committee of the Hong Kong Special Administrative Region on 10 August 1996. The decision of the National People's Congress on the Basic Law on

J

4 April 1990 adopted the Basic Law and the designs of the regional flag and regional emblem of the Hong Kong Special Administrative Region. Before that decision was made, the Chairman of the Drafting Committee of the Basic Law, in his address of explanation to the National People's Congress, referred to the selection process for the regional flag and emblem and explained the design of the regional flag and emblem. As regards the regional flag, he said:

The regional flag carries a design of five bauhinia petals, each with a star in the middle, on a red background. The red flag represents the motherland and the bauhinia represents Hong Kong. The design implies that Hong Kong is an inalienable part of China and prospers in the embrace of the motherland. The five stars on the flower symbolize the fact that all Hong Kong compatriots love their motherland, while the red and white colours embody the principle of "one country, two systems".

The Regional Flag Ordinance

This was enacted to provide for the use and protection of the regional flag. The Ordinance gives the Chief Executive a power, similar to that in the National Flag Ordinance, to stipulate for the display and use of the regional flag. Section 3(1). Section 3(2) and Schedule 3 set out the arrangements for the use and display of the regional flag. These provisions had originally been passed by the Preparatory Committee as provisional arrangements. They were made "to safeguard the dignity" of the regional flag and to ensure its correct use. They state that the regional flag and emblem:

are the symbol and ensign of the Hong Kong Special Administrative Region. Each and every Hong Kong resident and organisation should respect and cherish the regional flag and the regional emblem.

The arrangements for use and display of the regional flag when flown together with the national flag are provided for, with prominence given to the latter. Section 3(2) and Schedule 3. A regional flag which is damaged, defiled, faded or substandard must not be displayed or used. Section 4. It must be manufactured in accordance with the prescribed specifications. Section 5(1). It or its design must not be displayed or used in trademarks or advertisements or other occasions or places stipulated by the Chief Executive. Contravention is a criminal offence. Section 6(1) and 6(2).

Section 7, the provision in issue in this appeal, provides:

A person who desecrates the regional flag or regional emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable:

(a) on conviction on indictment to a fine at level 5 [ie \$50,000] and to imprisonment for 3 years; and

(b) on summary conviction to a fine at level 3 [ie \$10,000] and to imprisonment for 1 year.

There is a provision similar to that in the National Flag Ordinance that a copy of the regional flag is taken to be a regional flag for the purposes of the Ordinance.

The charges

The respondents faced two charges of desecration of the national flag and the regional flag contrary to s.7 of the National Flag Ordinance, and s.7 of the Regional Flag Ordinance respectively. The particulars of each offence were that the respondents on 1 January 1998 in Hong Kong desecrated the national flag and the regional flag respectively by publicly and wilfully defiling the same.

The convictions

On 18 May 1998, both respondents were convicted of the two offences. Each respondent was bound over to keep the peace on his own recognisance of \$2,000 for 12 months for each offence (see [1999] 1 HKLRD 783, [1999] 2 HKC 10 at pp.13-16).

The facts

The facts which formed the basis of the convictions were not disputed before the Magistrate and can be briefly stated for the purposes of this appeal. As was stated in the case for the second respondent (paras.2 and 3):

This case arises from a public demonstration in Hong Kong on 1 January 1998, organised by the Hong Kong Alliance in Support of the Patriotic Democratic Movement in China. The demonstration consisted of a public meeting and a public procession from Victoria Park to the Central Government Offices of the Hong Kong Government at Lower Albert Road. The public meeting and the public procession were both lawful and orderly.

During the public procession, the respondents were seen carrying in their hands and waving in the air along the route what appeared to be a defaced national flag and a defaced regional flag. At the end of the procession, they tied those two objects to the railings of the Central Government Offices. The Police seized the two objects ...

Both flags had been extensively defaced. As to the national flag, a circular portion of the centre had been cut out. Black ink had been daubed over the large yellow five-pointed star and the star itself had been punctured. Similar damage appeared on the reverse side. Further, the Chinese character "shame" had been written in black ink on the four small stars and on the reverse side, a black cross had been daubed on the lowest of the four small stars.

As to the regional flag, one section had been torn off obliterating a portion of the bauhinia design. A black cross had been drawn across that design. Three of the remaining four red stars had black crosses daubed over them. The Chinese character "shame" was written on the flag in black ink. As was part of a Chinese character which had been rendered illegible by the tear in the flag. Similar damage appeared on the reverse side.

During the procession, the respondents chanted "build up a democratic China". The second respondent was reported to have stated to the press that "the damaging and defiling of the national and regional flags was a way to express the dissatisfaction and resistance to the ruler who was not elected by the people".

Court of Appeal

The respondents appealed against conviction to Beeson J in the Court of First Instance. On 8 December 1998 on the parties' joint application, she reserved the appeals to the Court of Appeal. On 23 March 1999, that Court (Power V-P, Mayo and Stuart-Moore JJA) allowed the appeals and quashed the respondents' convictions (see [1999] 1 HKLRD 783; also reported at [1999] 2 HKC 10).

Both before the Magistrate and the Court of Appeal, the only issues were whether s.7 of the National Flag Ordinance and s.7 of the Regional Flag Ordinance contravened the Basic Law. It was contended by the defence both before the Magistrate and the Court of Appeal that these provisions were inconsistent with art.19 of the International Covenant on Civil and Political Rights (ICCPR) and accordingly contravened art.39 of the Basic Law.

Leave to appeal

On 20 May 1999, the Appeal Committee (the Chief Justice, Litton and Ching PJJ) granted leave to appeal to the Court of Final Appeal, certifying two points of law of great and general importance, namely: (1) Does s.7 of the National Flag Ordinance contravene the Basic Law? (2) Does s.7 of the Regional Flag Ordinance contravene the Basic Law? These were the same issues as those before the Magistrate and the Court of Appeal and in essence were the only questions raised on the application for leave.

The new point

In his written case, the second respondent raised for the first time the new argument that there is no evidence to support the convictions. It ran as follows:

There is no evidence of either respondent desecrating the flags by publicly defiling them. The agreed facts record that the two defendants were carrying or waving defaced national and regional flags (para.8); that they continued to do so during the procession from Causeway Bay to Central (para.10); and that at the end of the procession the two defendants tied

A the defaced flags they had brandished to some railings outside Government Headquarters.

It is not an offence to publicly and wilfully display a damaged or defiled flag. Section 4 of the National Flag Ordinance provides that a damaged or defiled flag must not be displayed or used but it creates no offence. Section 4 of the Regional Flag Ordinance is in similar terms. What the second respondent did in public falls exactly within the terms of s.4. Since s.4 does not criminalise such action, it follows that what he did in public cannot amount to an offence.

C The circumstances must be very exceptional before the Court of Final Appeal entertains a new point which had not been raised below. See *Wong Tak Yue v Kung Kwok Wai & Another (No 2)* (1997-98) 1 HKCFAR 55, [1998] 1 HKLRD 241, [1998] 1 HKC 1.

D Both respondents were represented by counsel before the Magistrate. Before the Court of Appeal, the first respondent was represented by counsel instructed by the Director of Legal Aid; the second respondent did not appear. At the hearing of the application for leave to appeal, both respondents were represented by counsel instructed by the Director of Legal Aid and opposed the application. Immediately after the leave application, the first respondent declined the further assistance of the Legal Aid Department and has since been unrepresented and has appeared before us in person.

E At no stage was this new point raised by counsel for the respondents. And this point was not raised by the Magistrate or the Court of Appeal.

F It is not surprising that this new point was not raised below by counsel or the Court. It is devoid of any merit. The offence under s.7 of each Ordinance was the desecration of the flag in question by defiling it. The ordinary meaning of "defiling" plainly includes dishonouring. By carrying and waving the defaced flags during the public procession and then tying them to some railings at the end of the procession, the respondents were clearly dishonouring the flags.

G These acts clearly amount to desecration by defiling.

Freedom of speech and freedom of expression

The freedom of speech is guaranteed by art.27 of the Basic Law. This provides:

H Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.

I The freedom of expression is enshrined in art.19 of the ICCPR. This article is in these terms:

- I 1. Everyone shall have the right to hold opinions without interference.
- J 2. Everyone shall have the right to freedom of expression; this right shall

include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

As is accepted by Mr McCoy SC, for the Government, art.19 of the ICCPR is incorporated into the Basic Law by its art.39 which provides:

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

The Hong Kong Bill of Rights Ordinance (Cap.383), in fact provides for the incorporation of the provisions of the ICCPR into the laws of Hong Kong. Article 16 in Part II of that Ordinance is in identical terms to art.19 of the ICCPR.

Flag desecration is a form of non-verbal speech or expression. Mr McCoy SC, for the Government, accepts that the freedom of speech or the freedom of expression are engaged in this case. He accepts that s.7 criminalising flag desecration in both ordinances constitutes a restriction of such freedoms. For the purposes of this appeal, it makes no difference whether the restriction is considered as a restriction of the freedom of speech or the freedom of expression. This is because, as is accepted by Mr McCoy, by virtue of art.39(2) of the Basic Law, a restriction on either freedom cannot contravene the provisions of the ICCPR. Both the Magistrate and the Court of Appeal have referred to the freedom of expression rather than the freedom of speech. I shall do likewise. But my judgment would apply equally if the restriction is considered in relation to the freedom of speech.

Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong's system and way of life. The courts must give a generous interpretation to its constitutional guarantee. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticise governmental institutions and the conduct of public officials.

A *The extent of restriction*

It is common ground that the statutory provisions criminalising desecration of the national and regional flags restrict the freedom of expression. Before considering whether the restriction is justified, it is important to examine first the extent of the restriction. This is because when one comes to consider the issue of justification, one must have in mind what it is that has to be justified, in particular, whether it is a wide or limited restriction that has to be justified. The wider the restriction, the more difficult it would be to justify. The appellant submits that the freedom of expression is implicated only in a minor way as only one mode of expression is prohibited. The respondent argues that the restriction is wide. The argument is that it prohibits not merely one mode of expression but by rendering unlawful one form of political protest also the substance of what may be expressed.

As has been observed, flag desecration is symbolic expression or non-verbal expression. A person desecrating a national flag as a means of expression would usually be expressing a message of protest. But the message he seeks to convey may not be clear. The message may be one of hatred or opposition directed to the nation. Or it may be one of protest against the ruling government. Or the person concerned may be protesting against a current policy of the government. Or some other message may be intended. One has to consider the surrounding circumstances of the flag desecration in question to ascertain the message which is sought to be communicated. In the present case, the respondents were protesting against the system of government on the Mainland. This appears from the fact that the Chinese character "shame" had been written on the flags taken together with the chanting of "build up a democratic China" during the procession and what the second respondent was reported to have stated to the press at the time.

The prohibition of desecration of the national and regional flags by the statutory provisions in question is not a wide restriction of the freedom of expression. It is a limited one. It bans one mode of expressing whatever the message the person concerned may wish to express, that is the mode of desecrating the flags. It does not interfere with the person's freedom to express the same message by other modes. Further, it may well be that scrawling words of praise on the flags (as opposed to words of protest which is usually the message sought to be conveyed) would constitute offences within s.7 of both Ordinances, namely, that of desecrating the flag by scrawling on the same. If this be right, then it would mean that the prohibition not only bans expression by this mode of a message of protest, but also other messages including a message of praise. But a law seeking to protect the dignity of the flag in question as a symbol, in order to be effective, must protect it against desecration generally.

Is the restriction justified?

Freedom of expression is not an absolute. The Preamble to the ICCPR recognises that the individual has duties to other individuals and to the community to

which he belongs. Article 19(3) itself recognises that the exercise of the right to freedom of expression carries with it special duties and responsibilities and it may therefore be subject to certain restrictions. But these restrictions shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputation of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The requirement that the restriction be provided by law is satisfied by the two statutory provisions which are in question in this case. In considering the extent of a restriction, it is well settled that any restriction on the right to freedom of expression must be narrowly interpreted. See *Ming Pao Newspapers Ltd v A-G* [1996] AC 906 at p.917B-C. It is common ground that the burden rests on the Government to justify any restriction.

Here, the Government principally relies on the restriction as necessary for the protection of public order (*ordre public*). Two questions arise. First, are the legitimate societal and community interests in the protection of the flags in question, which I have held to exist, within the concept of public order (*ordre public*)? Secondly, if the answer is in the affirmative, is the restriction to the right to freedom of expression necessary for their protection?

Within public order (ordre public)?

Mr McCoy SC, for the Government, submits that whatever its boundaries, the concept of public order (*ordre public*), includes these legitimate interests in the protection of the flags in question. Ms Eu SC for the second respondent asserts the contrary, that whatever its boundaries, those interests are incapable of coming within the concept.

It is important to recognise that the concept of public order (*ordre public*) is not limited to public order in terms of law and order. This is well recognised by textwriters and has been accepted in decisions in Hong Kong. See *Tam Hing Yee v Wu Tai Wai* [1992] 1 HKLR 185 at p.190 and *SJ v The Oriental Press Group Ltd & Others* [1998] 2 HKLRD 123 at p.161 (CJHC and Keith J at first instance) (also reported at [1998] 2 HKC 627) and on appeal to the Court of Appeal *Wong Yeung Ng v SJ* [1999] 2 HKLRD 293 at p.307I (also reported at [1999] 2 HKC 24). The expression used is not merely "public order" but "public order (*ordre public*)". The inclusion of the words "*ordre public*" makes it clear that the relevant concept is wider than the common law notion of law and order. In this case, both the Magistrate and the Court of Appeal appear to have dealt with the concept of public order (*ordre public*) as limited to public order in terms of law and order. That approach is not correct.

One of the few judicial discussions counsel has been able to locate in Hong Kong or elsewhere on public order (*ordre public*) was contained in the first instance judgment in *SJ v The Oriental Press Group Ltd & Others* [1998] 2 HKLRD 123 at p.161B-H, [1998] 2 HKC 627 at p.669B-G:

... the objective in art.16(3)(b) [of the Hong Kong Bill of Rights Ordinance which is equivalent to art.19 of the ICCPR] which is said to justify the restriction is "the protection of ... public order (*ordre public*)". The inclusion of the words in brackets shows that the phrase "public order" should be given a wider meaning than the words normally have in common law jurisdictions. The meaning which should be given to the words "public order" is one which includes the concept familiar to European lawyers of "*ordre public*". Defining "*ordre public*" has been elusive, especially as the phrase has different meanings in private and public law, and its meaning differs depending on the context in which it is being used. For example, in art.10 of the Hong Kong Bill of Rights Ordinance (Cap.383), its meaning is more akin to the prevention of disorder. However, in the context of public law:

... *ordre public* includes the existence and the functioning of the state organisation, which not only allows it to maintain peace and order in the country but ensures the common welfare by satisfying collective needs and protecting human rights". (Kiss, "*Permissible Limitations on Rights*", in Henkin (ed.), *The International Bill of Rights*, 1981, p.301)

The courts represent a vitally important institution in the "state organisation". They are the embodiment of the rule of law, which plays a pivotal role in the satisfaction of the "collective needs" of the community and the protection of "human rights". Once public order has been defined in this way (and is not limited to the prevention of disorder), the phrase "the protection ... of public order" in art.16(3)(b) in our view plainly includes the protection of the rule of law — at least to the extent that the rule of law is eroded if public confidence in the due administration of justice is undermined.

In that case, the Court held that the contempt of court offences under the common law of scandalising the court and of interference with the administration of justice as a continuing process constituted permissible restrictions on the freedom of expression. This decision was upheld by the Court of Appeal. The Court at first instance held that the due administration of justice is within public order (*ordre public*). This was conceded before the Court of Appeal ([1999] 2 HKLRD 293 at p.307I, [1999] 2 HKC 24 at p.39E).

In the work quoted in the passage in the judgment set out above, the author said that the concept of public order (*ordre public*) "is not absolute or precise, and cannot be reduced to a rigid formula but must remain a function of time, place and circumstances" and concluded his discussion in these terms:

In sum: "public order" may be understood as a basis for restricting some specified rights and freedoms in the interest of the adequate functioning of the public institutions necessary to the collectivity when other conditions, discussed below, are met. Examples of what a society may deem

appropriate for the *ordre public* have been indicated: prescription for peace and good order; safety; public health; esthetic and moral considerations; and economic order (consumer protection, etc). It must be remembered, however, that in both civil law and common law systems, the use of this concept implies that courts are available and function correctly to monitor and resolve its tensions with a clear knowledge of the basic needs of the social organisation and a sense of its civilised values. (Kiss at p.302)

The *Siracusa Principles* on the limitation and derogation provisions in the ICCPR, agreed to in 1984 by a group of experts, contained the following statement on "public order (*ordre public*)":

22. The expression "public order (*ordre public*)" as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*).
23. Public order (*ordre public*) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.
24. State organs or agents responsible for the maintenance of public order (*ordre public*) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.

See (1985) 7 Human Rights Quarterly 3-14.

In 1986, in Advisory Opinion No OC-6/86, on the word "laws" in art.30 of the American Convention on Human Rights, the Inter-American Court of Human Rights expressed the view:

The requirement that the laws be enacted for reasons of general interest means they must have been adopted for the "general welfare" (art.32(2)), a concept that must be interpreted as an integral element of public order (*ordre public*) in democratic states, the main purpose of which is "the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness" (American Declaration of the Rights and Duties of Man, ... First Introductory Clause). (para.29)

Reported at (1986) 7 Human Rights Law Journal 231. Article 30 of that Convention provides that the restriction on rights or freedoms may not be applied "except in accordance with laws enacted for reasons of general interest and for the purpose of which the restrictions have been established". Article 32(2) provides: "The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society".

The following points can be drawn from the materials referred to above. First, the concept is an imprecise and elusive one. Its boundaries cannot be precisely

- A defined. Secondly, the concept includes what is necessary for the protection of the general welfare or for the interests of the collectivity as a whole. Examples include: prescription for peace and good order; safety; public health; aesthetic and moral considerations and economic order (consumer protection, etc). Thirdly, the concept must remain a function of time, place and circumstances.
- B As to the time, place and circumstances with which we are concerned, Hong Kong has a new constitutional order. On 1 July 1997, the People's Republic of China resumed the exercise of sovereignty over Hong Kong being an inalienable part of the People's Republic of China and established the Hong Kong Special Administrative Region under the principle of "one country, two systems". The resumption of the exercise of sovereignty is recited in the Preamble of the Basic Law, as "fulfilling the long-cherished common aspiration of the Chinese people for the recovery of Hong Kong". In these circumstances, the legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag are interests which are within the concept of public order (*ordre public*). As I have pointed out, the national flag is the unique symbol of the one country, the People's Republic of China, and the regional flag is the unique symbol of the Hong Kong Special Administrative Region as an inalienable part of the People's Republic of China under the principle of "one country, two systems". These legitimate interests form part of the general welfare and the interests of the collectivity as a whole.

Whether necessary

F That these legitimate interests are within public order (*ordre public*) does not conclude the question. One must examine whether the restriction on the guaranteed right to freedom of expression is necessary for the protection of such legitimate interests within public order (*ordre public*).

G The Privy Council and the Hong Kong courts have held that the word "necessary" in this test should be given its ordinary meaning and that no assistance is to be gained by substituting for "necessary" a phrase such as "pressing social need", see *Tam Hing Yee v Wu Tai Wai* [1992] 1 HKLR 185 at p.191, *Ming Pao Newspapers Ltd v A-G* [1996] AC 906 at p.919G-H, *Wong Yeung Ng v SJ* [1999] 2 HKLRD 293 at pp.308I-309A, 321I-322A, 328A, [1999] 2 HKC 24 at pp.40E-F, 53C-D, 59B. This approach is sound.

H On 1 July 1997, the Standing Committee added the PRC Law on the National Flag to Annex III so that the Hong Kong Special Administrative Region has to apply it by legislation or promulgation in the Region. And the HKSAR's legislature discharged that obligation by enacting the National Flag Ordinance. At the same time, the HKSAR's legislature considered it appropriate to enact the Regional Flag Ordinance.

I In considering the question of necessity, the Court should give due weight to the view of the HKSAR's legislature that the enactment of the National Flag Ordinance in these terms including s.7 is appropriate for the discharge of the Region's obligation to apply the national law arising from its addition to Annex III by the Standing Committee. Similarly, the Court should accord due weight

to the view of the HKSAR's legislature that it is appropriate to enact the Regional Flag Ordinance. A

In applying the test of necessity, the Court must consider whether the restriction on the guaranteed right to freedom of expression is proportionate to the aims sought to be achieved thereby. See *Ming Pao Newspapers Ltd v A-G* [1996] AC 906 at p.917D-E. As concluded above, by criminalising desecration of the national and regional flags, the statutory provisions in question constitute a limited restriction on the right to freedom of expression. The aims sought to be achieved are the protection of the national flag as a unique symbol of the Nation and the regional flag as a unique symbol of the Hong Kong Special Administrative Region in accordance with what are unquestionably legitimate societal and community interests in their protection. Having regard to what is only a limited restriction on the right to the freedom of expression, the test of necessity is satisfied. The limited restriction is proportionate to the aims sought to be achieved and does not go beyond what is proportionate. B C

Hong Kong is at the early stage of the new order following resumption of the exercise of sovereignty by the People's Republic of China. The implementation of the principle of "one country, two systems" is a matter of fundamental importance, as is the reinforcement of national unity and territorial integrity. Protection of the national flag and the regional flag from desecration, having regard to their unique symbolism, will play an important part in the attainment of these goals. In these circumstances, there are strong grounds for concluding that the criminalisation of flag desecration is a justifiable restriction on the guaranteed right to the freedom of expression. D E

Further, whilst the Court is concerned with the circumstances in the Hong Kong Special Administrative Region as an inalienable part of the People's Republic of China, the Court notes that a number of democratic nations which have ratified the ICCPR have enacted legislation which protects the national flag by criminalising desecration or similar acts punishable by imprisonment. These instances of flag protection indicate that criminalisation of flag desecration is capable of being regarded as necessary for the protection of public order (*ordre public*) in other democratic societies. F G

Accordingly, s.7 of the National Flag Ordinance and s.7 of the Regional Flag Ordinance are necessary for the protection of public order (*ordre public*). They are justified restrictions on the right to the freedom of expression and are constitutional. H

Having regard to this conclusion, it is unnecessary to deal with other arguments that were canvassed. H

Order

The answers to the certified questions of law are therefore as follows: I

- (1) Does s.7 of the National Flag Ordinance contravene the Basic Law? The answer is no.
- (2) Does s.7 of the Regional Flag Ordinance contravene the Basic Law? The answer is no. J

A I would allow the appeal and would restore the convictions and the binding over ordered by the Magistrate.

Finally, I must record the Court's indebtedness for the invaluable assistance given to the Court by the arguments both written and oral presented and the materials produced by the respective teams of counsel led by Mr G McCoy SC, for the Government, and Ms Audrey Eu SC for the second respondent. We also thank the first respondent who appeared in person and made a submission. Neither leading Counsel appeared in the Court of Appeal. As I understand the position, the range and depth of the arguments and materials before us extended far beyond those before the Court of Appeal. Unfortunately, that Court did not have the benefit of these much fuller arguments and materials. B C

Litton PJ:

I agree with the judgment of the Chief Justice.

D Ching PJ:

I also agree with the judgment of the Chief Justice.

Bokhary PJ:

My thinking in this case is in harmony with that of the Chief Justice. E

The constitutional issue

The issue before the Court is whether our laws which protect the national and regional flags and emblems from desecration are constitutional. Those laws are contained in two statutory provisions. The first is s.7 of the National Flag and National Emblem Ordinance (No 116 of 1997). It prohibits desecration of the national flag or emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on the same. The second is s.7 of the Regional Flag and Regional Emblem Ordinance (No 117 of 1997). It lays down a similar prohibition in respect of the regional flag and emblem. The maximum penalty for contravention is the same under each section: a fine of up to \$50,000 and imprisonment for up to three years. F G

The charges

H On 1 January 1998 the respondents took part in a street procession. During the procession they carried defaced national and regional flags. At the end of the procession they tied the defaced flags to some railings.

I Two charges were brought against them. Each charge was against both of them jointly. The 1st charge was of desecration of the national flag, contrary to s.7 of the National Flag and National Emblem Ordinance. The particulars were that they desecrated the national flag by publicly and wilfully defiling it. The second charge was of desecration of the regional flag, contrary to s.7 of the Regional Flag and Regional Emblem Ordinance. The particulars were that they desecrated the regional flag by publicly and wilfully defiling it. J

In the courts below

They challenged the constitutionality of the statutory provisions under which they were charged, basing their challenge on the right to freedom of expression. Their challenge failed at their trial in the Magistrate's Court. They were each convicted and bound over in a personal recognizance of \$2,000 to keep the peace for a period of 12 months. They appealed against conviction to the High Court which referred the appeal to the Court of Appeal. Their constitutional challenge succeeded before the Court of Appeal which quashed their convictions. The prosecution appealed to this Court. So this constitutional issue is now before us.

Mere disobedience of s.4 directions?

Apart from her points on this constitutional issue, Counsel for the second respondent has taken a point on a lower plane by arguing along the following lines. All that the respondents did was to disobey the directions contained in s.4 of each of the two ordinances mentioned above (for the disobedience of which directions no criminal sanctions are provided) that a national or regional flag or emblem which is damaged, defiled, faded or substandard must not be displayed or used.

I am unable to accept this argument. The purpose of the s.4 directions is to guide people who mean to do reverence to the flags and emblems. By complete contrast, the purpose of the s.7 prohibitions is to protect the flags and emblems from people who mean to desecrate them. And publicly and wilfully parading a defaced flag or emblem, having chosen the same for its defaced condition, is to defile the flag or emblem thus desecrating it. This appeal turns, therefore, on the constitutional issue. And I now deal with this issue.

Freedom of expression: substance and mode

Given the breadth to be ascribed to the word "speech" in the constitutional context, the freedom of speech and the freedom of expression amount to the same thing. I will use the word "expression". Articles 27 and 39 of our Constitution the Basic Law guarantee the freedom of expression in Hong Kong. Article 27 of the Basic Law provides that:

Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.

Article 39 of the Basic Law provides that the provisions of the International Covenant on Civil and Political Rights (the ICCPR) as applied to Hong Kong shall remain in force and shall be implemented through our laws. The Hong Kong Bill of Rights (the Bill) is the embodiment of the ICCPR as applied to Hong Kong. And art.16 of the Bill, which is identical to art.19 of the ICCPR, provides that:

- A (1) Everyone shall have the right to hold opinions without interference.
 (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- B (3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
- C (a) for respect of the rights or reputations of others; or
 (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

It is to be noted that art.16 of the Bill makes express provision for restrictions on the rights which it confers. But art.27 of the Basic Law makes no express provision for any restriction on any of the rights which it confers. So if there is any difference between the guarantee of freedom of speech contained in art.27 of the Basic Law and the guarantee of freedom of expression contained in art.16 of the Bill (as backed by art.39 of the Basic Law), I would treat the art.27 guarantee as even more powerful than the art.16 guarantee.

Testing the matter by reference to *ordre public*, the first thing to face is this. As Professor Yash Ghai has pointed out (in "*Human Rights in Hong Kong*", ed. Raymond Wacks (1992), Ch.11, "Freedom of Expression" at p.391 and again in "*The Hong Kong Bill of Rights: A Comparative Approach*" eds Johannes Chan and Yash Ghai (1993), Ch. 8, "Derogations and Limitations in the Hong Kong Bill of Rights" at p.192) the ambit of the French expression *ordre public* is unclear. I accept that *ordre public*, as a public welfare concept, is something more than the mere converse of public disorder. But how much more? Where a concept is unclear the courts must clarify it before using it as a test by which to judge what, if any, restriction may constitutionally be placed on a fundamental right or freedom. To this end, I treat *ordre public* as being no wider a basis for justifying a restriction on such a right or freedom than the basis to which I now turn.

If any restriction on an art.27 right or freedom is to be justified, it must, I think, be on the basis that it is reconcilable with that right or freedom. And no restriction on such a right or freedom can possibly begin to be regarded as reconcilable with that right or freedom unless the restriction is narrow and specific. That springs very clearly from the very nature of exceptions to rules when the rule guarantees a right or freedom and the exception places a restriction on that right or freedom. I will in due course expand upon all of this in the particular context of the actual issue in the present case.

Freedom of expression covers both substance (*what* is expressed) and mode (*how* it is expressed). Our national and regional flag and emblem protection laws, as I read them, affect only the latter. The significance of the absence of any restriction on the substance of expression is well illustrated — albeit in a

context different from the present one — by the Australian case of *Levy v Victoria* (1997) 189 CLR 579. That case concerned the validity of regulations which, for the purpose of promoting personal safety, imposed a licensing regime regulating entry into duck shooting areas.

Mr Levy had attempted to enter such an area to make a televised protest there against laws which permitted the shooting of game birds and against the illegal shooting of protected species. He, having no licence to enter the area, was physically prevented from entering it when he attempted to do so. Following this, he took out proceedings challenging the validity of the regulations. It was argued on his behalf that by preventing him from entering the area in question to make his protest there, the regulations prevented conduct protected by the implied freedom of communication flowing from the Constitution of the Commonwealth. The High Court of Australia rejected that argument and upheld the validity of the regulations. Chief Justice Brennan said (at p.595) that:

A law which prohibits non-verbal conduct for a legitimate purpose *other than the suppressing of its political message* is unaffected by the implied freedom if the prohibition is appropriate and adapted to the fulfilment of that purpose. (Emphasis added.)

We have been addressed on the relevant position in a number of overseas jurisdictions.

The American flag desecration cases

On the strength of the prohibition in the First Amendment to the Constitution of the United States of America against the making of laws abridging the freedom of speech, the United States Supreme Court has struck down both state and federal statutes criminalising desecration of the American flag and rendering such desecration punishable by a fine or imprisonment. Neither the decision in the state statute case of *Texas v Johnson* 491 US 397 (1989) nor the decision in the federal statute case of *United States v Eichman* 496 US 310 (1990) was unanimous. Each was by a bare majority of five to four. Moreover Kennedy J, when concurring in the state statute case, made it a point to say this (at pp.420–421):

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

This revelation of his distaste for the result does not weaken — rather does it strengthen — Kennedy J's concurrence. For it demonstrates how convinced he must have been that such result was unavoidable if freedom of speech was to

be maintained. But what emerges from this revelation by a member of the majority of his distaste for the result as well as from the minority judgments is that cases of this kind are what lawyers call "hard cases".

Other overseas nations

Turning to other overseas nations, it is to be observed that some of them criminalise flag desecration while some of them do not. And it is further to be observed that those of them which do have statute laws criminalising desecration of the national flag and rendering such desecration punishable by a fine or imprisonment include a number of signatories to the ICCPR, art.19(2) of which provides that everyone shall have the right to freedom of expression.

Of course merely having such a law on the statute book is not the same as having such a law which has had its constitutionality upheld by judicial decision following a constitutional challenge in the courts. Particularly to be contrasted with the two American decisions referred to earlier are, therefore, two European decisions upholding the constitutionality of laws which protect the national flag and render breaches punishable by a fine or imprisonment. These two European decisions are of the courts of Italy and Germany, both being signatories to the ICCPR. The Italian decision is the one given on 14 July 1988 by the Corte Suprema di Cassazione, Italy's Supreme Court of Cassation, in *Re Paris Renato*, Judgment No 1218, General Registry No 3355 of 1988. The German decision is the one given on 7 March 1990 by the Bundesverfassungsgericht, Germany's Federal Constitutional Court, in *81 Entscheidungen des Bundesverfassungsgericht 278 (FRG) (German Flag Desecration Case)*.

As a further illustration of the diversity to be found around the world in these matters, I would refer to the relevant position in another of the nations about which we have been supplied information. Norway has no law criminalising the desecration of its own flag. But it has a law punishing (by a fine or up to one year's imprisonment) public insult in Norway to the flag or national coat of arms of a foreign nation. I might just mention that Japan is like Norway in that Japan, too, protects foreign flags and emblems within its jurisdiction without similarly protecting its own flag or emblems.

Finally in this connection, I would observe that there appears to exist considerable differences between the actual terms of the flag and emblem protection laws of the various nations which have such laws. I will illustrate this by one comparison. We have been shown a letter dated 25 June 1999 which the Procurator-General of Portugal was so helpful as to write to the Department of Justice here. The letter cites art.332(1) of the Portuguese Penal Code, giving this English translation of it: "Anyone who by words, gesture, in writing or by any other means of public communication, desecrates the Republic, national flag or the national anthem the symbols or emblems of the Portuguese sovereignty, or in any other way fails to pay them their due respect, shall be punished with a prison sentence of up to 2 years or with a pecuniary penalty of up to 240 days."

It is of course no part of my function to engage in anything which even remotely resembles pronouncing upon the laws of other nations. But purely

for the purposes of respectful comparison, I would merely observe that, on its face, that provision of the Portuguese Penal Code appears to criminalise a considerable number of things which our own flag and emblem protection laws do not criminalise. A

Two coherent approaches

There are, as it seems to me, essentially two coherent approaches in this area of constitutional law. One approach would be to say that even though there are always far more effective ways of making a point than by desecrating the national or regional flag or emblem, such desecration, however boorish and offensive, should nevertheless be tolerated as a form of expression. The other approach would be to say that by reason of the reverence due to them for what they represent and because so protecting them would never prevent anyone from getting his or her point across in any one or more of a wide variety of ways, those flags and emblems should be protected from desecration. C D

While these two approaches lead to opposite results, they share certain similarities. Both accord respect to the national and regional flags and emblems. And both recognise that freedom of expression is not confined only to what is expressed but extends also to how it is expressed. E

The test: reconcilability

When a matter of the present kind comes before the courts, the question is not which approach the judges personally prefer. It is whether the approach chosen by the legislature is one permitted by the constitution. This does not involve deference to the legislature. It is simply a matter of maintaining the separation of powers. F

The legislature having chosen the approach which protects the national and regional flags and emblems from desecration — having so chosen by enacting laws which provide such protection — the question in the present case is whether those laws are constitutional. And the answer, as I see it, depends on whether such laws are reconcilable with the freedom of expression guaranteed by the constitution. The test is one of reconcilability. G

Conclusion

I wholeheartedly share the determination of the learned Judges of the Court of Appeal to uphold the freedom of expression. But I would allow this appeal because I feel unable to say that the laws under challenge are irreconcilable with that freedom. Two things may overlap at the edges but by their nature remain at core essentially different. Thus a symbol such as a flag, emblem or totem impartially representing the whole of a group, be it a small band or a large nation, is inherently and essentially different, both in substance and form, from a statement conveying a specific message whether bland or controversial. It is natural for a society to wish to protect its symbols. And given the difference J

between symbols and statements to which difference I have referred, I am of the view that it is possible — even if by no means easy — for a society to protect its flags and emblems while at the same time maintaining its freedom of expression.

This is possible if its flag and emblem protection laws are specific, do not affect the substance of expression, and touch upon the mode of expression only to the extent of keeping flags and emblems impartially beyond politics and strife. In my view, our laws protecting the national and regional flags and emblems from public and wilful desecration meet such criteria. They place no restriction at all on what people may express. Even in regard to how people may express themselves, the only restriction placed is against the desecration of objects which hardly anyone would dream of desecrating even if there was no law against it. No idea would be suppressed by the restriction. Neither political outspokenness nor any other form of outspokenness would be inhibited.

In the course of her powerful address, Counsel for the second respondent posed a rhetorical question. If these restrictions are permissible, where does it stop? It is a perfectly legitimate question. And the answer, as I see it, is that it stops where these restrictions are located. For they lie just within the outer limits of constitutionality. Beneath the national and regional flags and emblems, all persons in Hong Kong are — and can be confident that they will remain — equally free under our law to express their views on all matters whether political or non-political: saying what they like, how they like. E

Sir Anthony Mason NPJ:

I agree with the judgment of the Chief Justice.

Li CJ:

The Court unanimously allows the appeal. The convictions and the binding over ordered by the Magistrate are restored.