機密文件

立法會
Legislative Council

立法會 LS53/16-17 號文件

法律事務部就有關譴責鄭松泰議員的議案的
相關法律事宜
擬備的資料文件

目的

本文件載述相關的法律事宜，以協助調查委員會委員履行《議事規則》第 73A 條訂明的職能，研究譴責鄭松泰議員的議案("議案")及議案附表所載的詳情。

議案所述鄭議員的行為

2. 根據議案附表，被調查的行為是鄭議員在 2016 年 10 月 19 日的立法會會議上將擺放在民主建港協進聯盟議員桌上的中華人民共和國國旗("國旗")及中華人民共和國香港特別行政區區旗("區旗")展示品倒轉。

香港在規管使用及保護國旗及區旗方面的相關法例

相關法定框架

3. 根據《國旗及國徽條例》(1997 年第 116 號)("《國旗條例》")第 2 條，"國旗"的定義是指 1949 年 9 月 27 日中國人民政治協商會議第一屆全體會議決議通過的中華人民共和國國旗。

4. 第 5(1)及(2)條規定，供升掛的國旗須在香港特別行政區("香港特區")內由中央人民政府所指定的企業按照《國旗條例》附表 1 所列規格製造。

5. 根據《區旗及區徽條例》(1997 年第 117 號)(《區旗條例》)第 2 條，"區旗"的定義是指 1996 年 8 月 10 日香港特別行政區籌備委員會第四次全體會議通過的香港特區區旗。

6. 《區旗條例》第 5(1)條訂明，區旗必須按照《區旗條例》附表 l 所列規格製造。《區旗條例》附表 1 指明的規格，亦包括用作桌旗等用途的區旗旗面通用尺寸。

7. 《國旗條例》及《區旗條例》的第 4 條均訂明，不得展示或使用破損、污損、褪色或不合規格的國旗或區旗。本部察悉，相關法例並無就違反有關條文訂明任何制裁措施。

8. 《國旗條例》第 7 條訂明：

> *"任何人公開及故意以焚燒、毀損、塗劃、玷污、踐踏等方式侮辱國旗或國徽，即屬犯罪，一經定罪，可處第 5 級罰款及監禁 3 年。"。*[1]

9. 《區旗條例》第 7 條採用與《國旗條例》第 7 條所載述者相同的措辭，對區旗提供相同的保護。[2]

10. 該兩條條例的第 8 條均將免受侮辱的保護範圍，延伸至其相似程度足以使人相信它就是國旗或區旗的國旗或區旗複製本。本部察悉，該兩條條例均沒有界定"複製本"的定義。根據 *Shorter Oxford English Dictionary* (第 6 版)，"複製本"解作一件複製另一件書寫或印刷物品的內容的書寫或印刷物品(a piece of written or printed matter that reproduces the contents of another)；一份謄本或任何(被視作)為複製另一件東西(圖片、人物等)的外觀而製作的東西等(a transcript or anything (regarded as) made to reproduce the appearance of something else (a picture, personality, etc)。

<u>相關法庭案例</u>

11. *在香港特別行政區 訴 吳恭劭及另一人(HKSAR v Ng Kung Siu & Anor)*案(載於**附錄I**)中，終審法院曾研究《國旗條例》及《區旗條例》第 7 條。[3] 終審法院考慮的爭論點包括：(a)《國旗條例》及《區旗條例》第 7 條是否違反《基本法》；及(b)上述第 7 條中"玷污"的涵義。終審法院的看法是：

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1 第 5 級罰款現時的金額為 50,000 港元(《刑事訴訟程序條例》(第 221 章)附表 8)。

2 循公訴程序定罪的罰則與《國旗條例》第 7 條所訂者相同。干犯《區旗條例》第 7 條所訂罪行，一經循簡易程序定罪，最高可處第 3 級罰款(10,000 元)及監禁 1 年。

3 [2000] 1 HKC 117。

"貫徹'一國兩制'的方針極之重要，正如維護國家統一及領土完整亦是極之重要一樣。既然國旗及區旗具獨有的象徵意義，保護這兩面旗幟免受侮辱對達致上述目標也就起着重大作用。"。[4]

12. 至於如何"玷污"有關國旗才構成侮辱，終審法院裁定，"玷污"的一般涵義包括玷辱在內。終審法院認為，被告人在公開遊行中攜帶和揮舞該兩面已塗污的國旗及區旗，然後在遊行結束時把旗幟縛在欄杆上，這樣做明顯是要玷辱該兩面旗幟。在此基礎上，終審法院裁定這些作為構成了以玷污方式侮辱國旗及區旗。[5]

13. 原訟法庭在*香港特別行政區 訴 古思堯及馬雲祺(HKSAR v Koo Sze Yiu and Ma Wan Ki)*[6] 案(一宗有關焚燒區旗的案件)(載於**附錄II**)中依循終審法院就*吳恭劭* 案所作的裁決。原訟法庭裁定，"侮辱"一詞，並無特定或單向的涵義。按字面解釋，就算在國旗或區旗上加上讚美的字句，這個行為也會因構成"塗劃"該旗幟而犯法。因此，無論是《國旗條例》或《區旗條例》第 7 條，其目的都只在單純地維護國旗/區旗的尊嚴，以免它受到廣義的侮辱。[7] 就這宗案件，終審法院上訴委員會於 2014 年 10 月拒絕給予被告人向終審法院上訴的許可(FAMC 40/2014)。

14. 新西蘭的*Hopkinson v Police*案(載於**附錄III**)亦考慮了終審法院的裁決。[8] 案中參與示威的被告人，將一面倒轉的新西蘭國旗繫於柱桿上，然後向其淋潑火水及點火。其後，他被控干犯《1981 年國旗、國徽及名稱保護法》(Flags, Emblems, and Names Protection Act 1981)第 11(1)(b)條的罪行，即損毀新西蘭國旗意圖玷辱該國旗，並被裁定罪名成立。在上訴中，新西蘭高等法院經考慮其他司法管轄區的典據(包括終審法院對*吳恭劭*案所作的裁決)，採納"玷辱"的狹義定義，並裁定《國旗、國徽及名稱保護法》第 11(1)(b)條的"玷辱"(dishonour)一詞，應解釋為必須達到"詆毀"國旗的程度，才會與《人權法案》一致。基於此詮釋，法院裁定被告人的行為並不構成詆毀國旗，因此撤銷被告人的定罪。[9]

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4 *HKSAR v Ng Kung Siu* [2000] 1 HKC 117 at 141A to C。

5 同上，133I - 134B。

6 HCMA 482/2013。此案件的爭論點是焚燒區旗可否被視作玷污國旗。

7 同上，第 17 段。

8 [2004] 3 NZLR 704。

9 同上，第 717 頁第 81 段。

15. 根據本部的研究，依據《國旗條例》及《區旗條例》第 7 條施以刑事制裁的相關香港案例，均涉及對國旗或區旗造成實質損毀或污損，而該侮辱行為是公開及故意地作出的。

<u>其他司法管轄區對國旗的保護</u>

16. 在*吳恭劭及另一人*案中，終審法院研究了美國、意大利、德國、挪威、日本及葡萄牙的國旗保護法例。終審法院察悉，就其他海外國家而言，其中一些國家將侮辱國旗列為刑事罪行，而另外一些國家則沒有這樣做。[10]

17. 終審法院亦認為，即使多個有立法保護國旗及國徽的國家，其法例的實際條款亦存在相當大的差異。終審法院引述《葡萄牙刑法典》(Portuguese Penal Code)第 332(1)條的英文譯本作為例子，該條訂明："*任何人以語言、姿勢、文字或任何其他公開傳播方式，侮辱共和國、國旗、國歌、代表葡萄牙主權的象徵或徽號，或以任何其他方式不給予它們應有的尊重，均須處以不超過 2 年的監禁或不超過 240 天的金錢上的懲罰。*"。終審法院認為，表面看來，《葡萄牙刑法典》中這條條文似乎將很多在本港的旗幟和徽號保護法例中沒有列為刑事罪行的行為都列作刑事罪行。[11]

18. 本部亦曾嘗試研究其他司法管轄區如何保護國旗。本部的研究所得載於下文各段。

英國

19. 英國沒有制定有關保護及使用國旗或國徽的法例。

澳洲及加拿大

20. 澳洲的《1953 年國旗法》(The Flags Act 1953)只訂明國旗的格式。加拿大則鼓勵所有國民自豪地展示加拿大國旗。[12] 侮辱國旗在澳洲及加拿大並非罪行。

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10 [2000] 1 HKC 117 at 146B – C。

11 同上， 146H - I and 147A - B。

12 Section 2 of Statutes of Canada 2012, Chapter 12 An Act respecting the National Flag of Canada。

新西蘭

21. 《1981 年國旗、國徽及名稱保護法》("該法令")第 11 條訂明：

> *"(1) 任何人——*
>
> *(a) 沒有合法授權而在新西蘭國旗上放置任何字母、徽號或表述以修改該國旗；*
>
> *(b) 在任何公眾地方或公眾地方可見範圍內，意圖玷辱新西蘭國旗而以任何方式使用、展示、損毀或損壞該國旗，*
>
> *即屬犯了抵觸本法令的罪行。"*

22. 至於新西蘭法院如何詮釋及應用該法令第 11(1)(b)條，請委員參閱上文第 14 段提述的 ***Hopkinson v Police*** 一案。

作出立法會誓言

有關宣誓的條文

23. 作出誓言的規定源自《基本法》第一百零四條，該條訂明：

> *".....立法會議員.....在就職時必須依法宣誓擁護中華人民共和國香港特別行政區基本法，效忠中華人民共和國香港特別行政區。"*

24. 《宣誓及聲明條例》(第 11 章)第 19 條規定，立法會議員須於其任期開始後盡快作出誓言。議員須作出的誓言的格式載於第 11 章附表 2。

25. 中華人民共和國全國人民代表大會常務委員會於 2016 年 11 月 7 日行使《基本法》第一百五十八條第一款所賦予的權力，宣布其對《基本法》第一百零四條的含意所作的解釋("《解釋》")。根據《解釋》，宣誓是《基本法》第一百零四條所列公職人員就職的法定條件和必經程序。根據《基本法》第一百零四條作出的誓言是對中華人民共和國及香港特區作出的法律承諾，具有法

律約束力。宣誓必須符合法定的形式和內容要求，而宣誓人必須真誠、莊重地進行宣誓。[13]

相關法庭判決

26. 在*梁國雄訴立法會秘書(Leung Kwok Hung v Clerk to the Legislative Council)*案中，[14] 法庭裁定，立法會誓言構成一項鄭重聲明、一種承諾，使宣誓者受特定行為守則所約束。宣誓者如未能遵行此行為守則，可被開除議席。[15] 在關乎梁頌恆及游蕙禎("*梁、游*")所作宣誓的有效性的法律程序中，原訟法庭及上訴法庭進一步考慮了《基本法》第一百零四條及香港法例第 11 章對宣誓的規定。[16]

《基本法》第七十九條第(七)項中"行為不檢"和"違反誓言"的涵義

《基本法》第七十九條第(七)項

27. 《基本法》第七十九條第(七)項訂明：

> *"香港特別行政區立法會議員如有下列情況之一，由立法會主席宣告其喪失立法會議員的資格：……*
>
> *(七) 行為不檢或違反誓言而經立法會出席會議的議員三分之二通過譴責。"*

對解釋《基本法》適用的原則

28. 終審法院在*吳嘉玲 訴 入境事務處處長(NG Kar Ling v Director of Immigration)*[17]和*入境事務處處長 訴 莊豐源(Director of Immigration v Chong Fung Yuen)*[18]兩案中，訂明了對解釋《基本法》適用的原則，有關原則綜述如下：

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13 2016 年第 169 號法律公告(電子版香港法例(http://www.elegislation.gov.hk)第 A115 號非正式文件)。

14 HCAL 112/2004。

15 同上文第 5 段。

16 HCAL 185/2016 及 HCMP 2819/2016；以及 CACV 224/2016、CACV 225/2016、CACV 226/2016 及 CACV 227/2016(HCAL 185/2016 及 HCMP 2819/2016 的上訴案件)。

17 (1999) 2 HKCFAR 4。

18 (2001) 4 HKCFAR 211。

(a) 應採用依據立法目的處理的方法，而法院在解釋《基本法》時，其角色是詮釋字句，以確定這些字句所表達的立法原意，考慮時須參照其文意及目的。

(b) 為協助解釋，法院會考慮《基本法》的內容，包括《基本法》內除有關條款外的其他條款及序言。

(c) 有助於了解《基本法》的背景或目的的外來資料，一般均可用來協助解釋《基本法》。一般而言，與解釋《基本法》相關的外來資料是制定前資料。

(d) 然而，在全國人民代表大會常務委員會沒有作出具約束力的解釋的情況下，若法院在借助內在資料及適當的外來資料去確定文字的文意及目的，並參照該文意及目的後作出詮釋，斷定文字的含義清晰，則外來資料，不論其性質，均不能對解釋產生影響。

<u>《基本法》第七十九條第(七)項中"行為不檢"的涵義</u>

29. 本部察悉，《基本法》第七十九條第(七)項及《議事規則》均沒有界定"行為不檢"(misbehavior)或"作出不檢行為"(misbehave)的定義。就譴責議員而言，在本部的研究過程中，本部未有就"行為不檢"或"作出不檢行為"的涵義找到任何司法上的典據。根據 *Shorter Oxford English Dictionary*（第六版），"misbehave"的涵義包括"behaving badly"(行為不端)及"conducting oneself improperly"(舉止不當)。

30. 本部亦曾參考基本法起草委員會及基本法諮詢委員會已公開的紀錄，但找不到任何討論《基本法》第七十九條第(七)項中"行為不檢"一詞的涵義或適用範圍的紀錄。

31. 本部察悉，《基本法》第七十九條第(一)至(七)項載列取消議員資格的各種情況。《基本法》第七十九條第(一)至(六)項似乎明示議員被認為不能執行立法會議員的職務及不能履行立法會議員職能的各種情況。套用上文第 28 段所載適用於解釋《基本法》的原則，如按《基本法》第七十九條的文意解讀，《基本法》第七十九條第(七)項中的"行為不檢"似乎可以詮釋為具有影響議員執行立法會議員職務的能力的性質的不檢行為。

《基本法》第七十九條第(七)項中"違反誓言"的涵義

32. 《基本法》或《議事規則》均沒有界定"違反誓言"一語的定義。本部未有任何司法判決是關於何種行為會構成本文所指的違反誓言。上文第 26 段提及的宣誓個案及《解釋》，均關乎議員作出的誓言根據《基本法》第一百零四條及香港法例第 11 章，對就任立法會議員而言是否有效。這些個案並無考慮《基本法》第七十九條第(七)項中有關違反誓言的問題。

33. 根據《解釋》，《基本法》第一百零四條所訂的宣誓是該條所列公職人員對中華人民共和國及香港特區作出的法律承諾，具有法律約束力。[19] 因此，委員在考慮是否存在違反誓言的情況時，可考慮鄭議員的作為與他在作出立法會誓言時對中華人民共和國及香港特區所作出會擁護基本法及效忠中華人民共和國香港特區的承諾是否相符。

過往議事規則委員會及就譴責甘乃威議員的議案成立的調查委員會所作的考慮

34. 議事規則委員會曾於 1999 年考慮甚麼行為屬於《基本法》第七十九條第(七)項所指的"行為不檢"或"違反誓言"。議事規則委員會研究了海外立法機關的做法，並且察悉，該等海外立法機關全部均未能詳盡無遺地羅列議員的失當行為或可施加的處分類別。議院會按個別個案的嚴重程度作出判斷。議事規則委員會亦察悉，該等海外立法機關奉行的指導性原則，是議院應盡量避免行使其懲治管轄權，並且只會在信納確有必要為使議院及其議員獲得合理的保障時，該項管轄權方可行使。[20] 經商議後，議事規則委員會的結論認為，由當時的立法會決定何種行為會被視為"行為不檢"或"違反誓言"，致使有關議員須根據《基本法》第七十九條第(七)項被取消議員資格，是較為恰當的做法。[21]

35. 為考慮一項譴責甘乃威議員的議案而成立的調查委員會("前調查委員會")亦曾研究"行為不檢"的涵義。經商議後，前調查委員會的結論認為，制訂清晰的準則以供界定何謂"行為不檢"並不容易。前調查委員會進一步觀察到，雖然《基本法》第七十九條第(七)項並無明文訂明"行為不檢"只應涵蓋立法會議員履行其議員職

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19 《解釋》第三段。

20 *立法會議事規則委員會 1998 年 7 月至 1999 年 4 月的工作進度報告*第 12 頁第 2.47 段。

21 同上，第 13 頁第 2.49 段。

務時的行為，但有關機制不應適用於純粹屬議員個人或私人生活的行為，除非該等行為嚴重影響立法會的整體聲譽。[22]

議員根據《基本法》第七十七條及《立法會(權力及特權)條例》(第382章)享有的權力及特權

36. 《基本法》第七十七條訂明：

> *"香港特別行政區立法會議員在立法會的會議上發言，不受法律追究。"*

37. 香港法例第382章第3及4條的條文反映《基本法》第七十七條。第3條訂明：

> *"在立法會內及委員會會議程序中有言論及辯論的自由，而此種言論及辯論的自由，不得在任何法院或立法會外的任何地方受到質疑。"*

38. 香港法例第382章第4條進一步訂明：

> *"不得因任何議員曾在立法會或任何委員會席前發表言論，或在提交立法會或委員會的報告書中發表的言論，或因他曾以呈請書、條例草案、決議、動議或其他方式提出的事項而對他提起民事或刑事法律程序。"*

39. 在*梁*、*游*案中，原訟法庭闡明與立法會議員的豁免權有關的以下原則：[23]

(a) 《基本法》第七十七條中"發言"一詞，按照其普通字面涵義，是指一名立法會議員以議員的身份行使職權和履行職能時，在立法會會議上進行正式辯論的過程中所作的陳述；[24]

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[22] *立法會就譴責甘乃威議員的議案而根據《議事規則》第49B(2A)條成立的調查委員會報告*第5.7段。

[23] HCAL 185/2016及HCMP 2819/2016。

[24] 同上，第86段。

(b) 香港法例第 382 章第 3 及 4 條沒有再作補充，而該等條文必須與《基本法》第七十七條的憲制條文一併解讀；[25]及

(c) 香港法例第 382 章第 3 及 4 條的淺白措辭更清楚地說明，條文所提供的豁免權，只加於與立法會會議上所作辯論相關的言論及發言(口頭或書面)。[26]

40. 將上述原則套用於現時的個案，由於鄭議員的作為並無涉及在立法會進行辯論的過程中以口頭或書面作出陳述，因此本部認為《基本法》第七十七條及香港法例第 382 章所提供的保障並不適用。

調查委員會可考慮的事宜

41. 《議事規則》第 73A(2)條訂明，調查委員會負責確立根據《議事規則》第 49B(1A)條(取消議員的資格)動議的議案所述的事實，並就所確立的事實是否構成譴責議員的理據提出意見。

42. 委員在參考上文各段載列事項考慮該議案時，可就以下事宜進行商議及作出決定：

(a) 雖然有所涉的國旗及區旗展示品未必符合相關條例訂明的規格，但它們是否與國旗或區旗極為相似，以致令人相信有關的複製本是國旗或區旗；

(b) 相對於所涉的國旗及區旗展示品，鄭議員的作為的性質為何，以及他在作出該作為時的意圖；

(c) 鄭議員的作為與他在作出立法會誓言時對中華人民共和國及香港特區所作出會擁護基本法及效忠中華人民共和國香港特區的承諾之間的關係；

(d) 何種行為會被視為"行為不檢"或"違反誓言"，致使有關議員須根據《基本法》第七十九條第(七)項被取消議員資格——應否因應議員被指作出的不檢行為的嚴重程度而作出不同的考慮；及

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[25] 同上，第 88 段。

[26] 同上。

(e) 裁定議員被指稱行為不檢是否屬實所須符合的舉證準則為何。

結論

43. 本文件列出的各項事宜，或有助調查委員會就議案所述的事實是否確立，以及所確立的事實是否構成根據《基本法》第七十九條第(七)項譴責鄭議員的理據，作出獨立的決定。本部樂意就調查委員會認為相關的其他事宜提供意見。

立法會秘書處
法律事務部
2017 年 3 月 29 日

A **HKSAR v NG KUNG SIU & ANOR**

COURT OF FINAL APPEAL
FINAL APPEAL (CRIMINAL) NO 4 OF 1999
LI CJ, LITTON, CHING AND BOKHARY PJJ AND SIR ANTHONY MASON
20-22 OCTOBER, 15 DECEMBER 1999

B

Constitutional Law – Guarantee of fundamental rights – Freedom of expression – Criminalising desecration of national flag and regional flag – Restriction on freedom of expression – Whether justified as necessary for protection of public order (ordre public) – Basic Law of the Hong Kong Special Administrative Region (04/04/90) art 39 – International Covenant on
C **Civil and Political Rights 1966 art 19 – National Flag and National Emblem Ordinance (116 of 1997) s 7 – Regional Flag and Regional Emblem Ordinance (117 of 1997) s 7**

Criminal Law and Procedure – Desecration of national flag and regional flag – Desecration by defiling – Whether including wilful and public display of
D **defaced flags – National Flag and National Emblem Ordinance (116 of 1997) s 7 – Regional Flag and Regional Emblem Ordinance (117 of 1997) s 7**

Human Rights – Freedom of expression – Criminalising desecration of national flag and regional flag – Restriction on freedom of expression – Whether justified as necessary for protection of public order (ordre public)
E **– Basic Law of the Hong Kong Special Administrative Region (04/04/90) art 39 – International Covenant on Civil and Political Rights 1966 art 19 – National Flag and National Emblem Ordinance (116 of 1997) s 7 – Regional Flag and Regional Emblem Ordinance (117 of 1997) s 7**

憲法 – 基本權利的保證 – 發表自由 – 把侮辱國旗和區旗行為刑事化
F **– 限制發表自由 – 是否必要以保障公共秩序 – 《香港特別行政區基本法》(04/04/90) 第 39 條 – 《公民權利和政治權利國際公約》1966 第 19 條 – 《國旗及國徽條例》(1997 年第 116 號條例) 第 7 條 – 《區旗及區徽條例》(1997 年第 117 號條例) 第 7 條**

G **刑法與刑事訴訟程序 – 侮辱國旗和區旗 – 以玷污方式的侮辱 – 是否包括故意並公開展示被污損的旗 – 《國旗及國徽條例》(1997 年第 116 號條例) 第 7 條 – 《區旗及區徽條例》(1997 年第 117 號條例) 第 7 條**

H **人權 – 發表自由 – 把侮辱國旗和區旗行為刑事化 – 限制發表自由 – 是否必要以保障公共秩序 – 《香港特別行政區基本法》(04/04/90) 第 39 條 – 《公民權利和政治權利國際公約》1966 第 19 條 – 《國旗及國徽條例》(1997 年第 116 號條例) 第 7 條 – 《區旗及區徽條例》(1997 年第 117 號條例) 第 7 條**

I

On 1 January 1998, the respondents were seen carrying in their hands and waving in the air along the route of a public procession what appeared to be a

defaced national flag and a defaced regional flag. At the end of the procession, the two respondents tied the two flags to some railings outside the Central Government Offices. These two flags were then seized by the police. The flag of the People's Republic of China was found to have been defaced in the following manner: a circular portion was cut out at the centre; the large five-pointed yellow star had been daubed with black ink and punctured; and the Chinese character '恥' (shame) was written on the four smaller yellow stars in black ink and on the reverse side, a black cross had been daubed on the lowest of the four small stars. The flag of the HKSAR was principally defaced by a black cross which had been drawn across the bauhinia on both sides of the flag. One section of the flag had been torn off obliterating a portion of the bauhinia design. Three of the remaining four red five-pointed stars had black crosses daubed over them. The Chinese character '恥' (shame) was written on the flag in black ink; and a further Chinese character appeared on the flag but rendered illegible by the tear in the flag. The procession and the demonstration before it were peaceful. The two respondents were summonsed for the offence of desecrating the national flag by publicly and wilfully defiling it, contrary to s 7 of the National Flag and National Emblem Ordinance (116 of 1997). They were also summonsed for the offence of desecrating the regional flag by publicly and wilfully defiling it, contrary to s 7 of the Regional Flag and Regional Emblem Ordinance (117 of 1997). A magistrate convicted the respondents of the offences after trial and sentenced them to be bound over to keep the peace. Both respondents appealed against conviction and the Court of First Instance ordered that the appeals be reserved for hearing before the Court of Appeal, which allowed the appeals and held that the two provisions criminalising desecration of the flags were not consistent with art 19 of the International Covenant on Civil and Political Rights and therefore contravened art 39 of the Basic Law (see [1999] 2 HKC 10 for a report of the judgments below). The prosecution appealed to the Court of Final Appeal and submitted, together with its case, a 'Brandeis Brief'[1] containing materials such as speeches by leaders of the Central Authorities, civic education kits, articles from academic journals and correspondence with departments of justice of different countries as to the existence and content of flag desecration laws in those countries. Of the two respondents, the first respondent elected to represent himself in person after the leave hearing and the second respondent continued to be represented by counsel on legal aid. The second respondent submitted for the first time in his case that there was no evidence to support the convictions since the carrying or waving of defaced flags could not amount to desecration by defiling the flags. Rather, what the respondents did in public came within s 4 of the National Flag and National Emblem Ordinance and s 4 of the Regional Flag and Regional Emblem Ordinance, which provided that a damaged or defaced flag should not be displayed but did not create an offence.

Held, allowing the appeals, restoring the convictions and the orders for bind-over:

per Li CJ (Litton, Ching and Bokhary PJJ and Sir Anthony Mason agreeing):

1 See *Editorial note* at p 125 for definition of Brandeis Brief

A (1) Section 7 of the National Flag and National Emblem Ordinance (116 of 1997) and s 7 of the Regional Flag and Regional Emblem Ordinance (117 of 1997) were justified restrictions on the right to freedom of expression and therefore, did not contravene the Basic Law. These provisions were necessary for the protection of public order (ordre public). The legitimate societal interests in the protection of the national flag and the legitimate community interests in the B protection of the regional flag were interests which were within the concept of public order (ordre public). The two provisions amounted to a limited restriction of freedom of expression and were proportionate to the aims sought to be achieved and did not go beyond what was proportionate. *Ming Pao Newspapers Ltd v A-G of Hong Kong* [1996] AC 907 applied. *Tam Hing Yee v Wu Tai Wai* C [1992] 1 HKLR 185 and *Wong Yeung Ng v S-J* [1999] 2 HKC 24 considered (at 140B-D, 140G-141A).

(2) The ordinary meaning of 'defiling' plainly included 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. The act of publicly and wilfully parading a D defaced flag, having chosen the same for its defaced condition, was to defile the flag thus desecrating it (at 133I-134B).

(3) In considering the question of the necessity to criminalise desecration of the national flag and the regional flag, thereby placing a limited restriction on the guaranteed right to freedom of expression, the Court should give due weight to E the view of the HKSAR's legislature that the enactment of the National Flag and National Emblem Ordinance (116 of 1997), in terms that included s 7 thereof, was 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 of the National People's Congress. Similarly, the Court should accord due weight to the F view of the HKSAR's legislature that it was appropriate to enact the Regional Flag and Regional Emblem Ordinance (117 of 1997) (at 140F-G).

per Bokhary PJ:

(4) In determining whether legislation was constitutional, the Court had to consider whether the approach chosen by the legislature was one permitted by the G constitution. This did not involve deference to the legislature. The answer to this question depended on whether the legislation in question was reconcilable with the fundamental rights guaranteed by the constitution (at 147G-H).

(5) Section 7 of the National Flag and National Emblem Ordinance (116 of 1997) and s 7 of the Regional Flag and Regional Emblem Ordinance (117 of H 1997) were not irreconcilable with the freedom of expression guaranteed under the Basic Law. It was possible for a society to protect its flags and emblems while at the same time maintaining the freedom of expression provided that 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. Our laws protecting the national I and regional flags and emblems from public and wilful desecration met such criteria. However, the restrictions placed on freedom of expression by those two provisions lay just within the outer limits of constitutionality (at 148B-G).

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Hector v Attorney General of Antigua and Barbuda [1990] 2 AC 312 (PC)
Hertzberg v Finland (Comm No 61/1979 Selected Decisions Vol 1, p 24
HKSAR v Ma Wai Kwan David [1997] 2 HKC 315
Home Office v Harman [1983] 1 AC 280
Hull v M'Keena & Ors [1926] IR 402
James v United Kingdom (1986) 8 EHRR 123

A *La Compagnie Sucrière de Bel Ombre Ltée v Government of Mauritius* [1995] MR 223 (PC)
Lange v Australian Broadcasting Corp (1997) 145 ALR 96 (HCA)
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B *Melser v Police* [1967] NZLR 437 (CA)
Morgentaler et al v R (1988) 44 DLR (4th) 385
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C *Ng Ka Ling (an infant) & Ors v Director of Immigration* [1999] 1 HKC 291
Ngai Sau Ying v Henry Chue Kwok Keung (No 1) [1982] HKLR 253
Norton v Shelby County 118 US 425 (1886)
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Police v Beggs [1999] 3 NZLR 615 (FC)
R v Butler (1992) 89 DLR (4th) 449
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Constitution of the People's Republic of China 1982 art 136
Hong Kong Bill of Rights Ordinance (Cap 383) art 16
National Flag and National Emblem Ordinance (116 of 1997) ss 3(1), (2), 4, 5(1), (2), 6(1), (3), 7, 8, 9
Regional Flag and Regional Emblem Ordinance (117 of 1997) ss 3(1), (2), 4, 5(1), 6(1), (2), 7, Sch 3
Criminal Law of the People's Republic of China art 299
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Constitution of the Republic of South Africa Act 1993 Act 200 of 1993
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Cook Islands Ensign Act 1973 [Cook Islands] s 4
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Criminal Law of the People's Republic of China, App 1
Finnish Flag Act (Act 588 of 1995)
Flag and Emblem Law 1949 [Israel] art 5
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Flags, Emblems, and Name Protection Amendment Act 1998 [NZ] s 3
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Law of the People's Republic of China on the National Flag arts 6(2), 13
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[*Editorial note*: For a discussion of this judgment, see Margaret Ng, *Dangers of Saluting the Flag*, South China Morning Post, 24 December 1999.

'Brandeis Brief': Form of appellate brief in which economic and social F surveys and studies are included along with legal principles and citations and which takes its name from Louis D Brandeis, former Associate Justice of Supreme Court, who used such brief while practising law. (Black's *Law Dictionary* (6th Ed, 1990))]

Final Appeal

G This was a final appeal by the prosecution from the judgment of the Court of Appeal (Power VP, Mayo and Stuart-Moore JJA) dated 23 March 1999 allowing the appeal of the two respondents, Ng Kung Siu and Lee Kin Yun, against the convictions imposed by Tong Man Esq, a magistrate for one joint offence of desecration of the national flag of the People's Republic of China and for one joint offence of desecration of the regional flag of the HKSAR (see [1999] 2 H HKC 10 for a report of the judgments of the Magistrate and of the Court of Appeal below). The decision of the Court of Appeal is also reported at (1999) 6 BHRC 591. The facts appear sufficiently in the following judgment.

Gerard McCoy SC, Andrew Bruce SC and Kenneth Chow (Director of Public Prosecutions) for the appellant.

I *Ng Kung Siu, the first respondent, in person.*

Audrey Eu SC, PY Lo, Paul Harris and Lawrence Lau (Ho Tse Wai & Partners) for the second respondent.

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

A 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
B 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.

C *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
D 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.

E 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
F 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
G 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 organizations shall respect and care for the National Flag.

H 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
I 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.

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.

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.

The Basic Law

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

> 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.

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:

> 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.

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.

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. 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. Sections 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. Sections 6(1) and 6(3). The provision in issue in this appeal, s 7, provides:

> 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 [i.e. $50,000] and to imprisonment for 3 years.

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.

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.

THE REGIONAL FLAG

The Basic Law

Articles 10(1) and 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.
>
> 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 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 Sch 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 organization 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

A the latter. Section 3(2) and Sch 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 B 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 —
>
> C
>
> (a) on conviction on indictment to a fine at level 5 [i.e. $50,000] and to imprisonment for 3 years; and
>
> (b) on summary conviction to a fine at level 3 [i.e. $10,000] and to imprisonment for 1 year.

D 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

E 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 F 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 G recognisance of $2,000 for 12 months for each offence [1999] 2 HKC 10 at 13-16.

The facts

H 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 1st January I 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 VP, Mayo and Stuart-Moore JJA) allowed the appeals and quashed the respondents' convictions [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 (paragraph 8); that they continued to do so during the procession from Causeway Bay to Central (paragraph 10); and that at the end of the procession the two Defendants tied 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 2nd Respondent did in public falls exactly within the terms of section 4. Since section 4 does not criminalize such action, it follows that what he did in public cannot amount to an offence.

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 David & Anor* [1998] 1 HKC 1.

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.

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.

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. 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:

> 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.

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

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.
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 Pt II of that Ordinance is in identical terms to art 19 of the ICCPR.

A 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 B 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 C 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 D 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.

E *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 F 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 G 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- H 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 I 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 Attorney General of Hong Kong* [1996] AC 907 (PC) at 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

A 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)?

B 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.

C 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 190 and *Secretary for Justice v Oriental Press Group Ltd & Ors* [1998] 2 HKLRD D 123 at 161 (Chan 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 Secretary for Justice* [1999] 2 HKLRD 293 at 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' E 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.

F 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 *Secretary for Justice v Oriental Press Group Ltd* (at 669C-H):

> G ... the objective in art 16(3)(b) [of the Hong Kong Bill of Rights Ordinance which is equivalent to Article 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 H '*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:
>
> I *... ordre public includes the existence and the functioning of the state organization, 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 organization'. 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 (at 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 organization and a sense of its civilized values. (Kiss at 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.

A 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 B 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 C 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).

D 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 E 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 defined. Secondly, the concept includes what is F 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.

As to the time, place and circumstances with which we are concerned, G 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 H 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 I 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

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).

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* at 191, *Ming Pao Newspapers Ltd v Attorney General of Hong Kong* at 919G-H, *Wong Yeung Ng v Secretary for Justice* at 40E-F, 53C-D, 59B. This approach is sound.

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.

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.

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 Attorney General of Hong Kong* at 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

A proportionate to the aims sought to be achieved and does not go beyond what is proportionate.

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
B 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
C desecration is a justifiable restriction on the guaranteed right to the freedom of expression.

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
D 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.

E 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.

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

Order

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

G (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.

I would allow the appeal and would restore the convictions and the
H 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 Gerard McCoy SC, for the Government, and Ms Audrey Eu SC
I 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.

Litton PJ: I agree with the judgment of the Chief Justice.

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.

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.

The charges

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.

Two charges were brought against them. Each charge was against both of them jointly. The first 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.

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 recognisance of $2,000 to keep the peace for a period of 12 months. They

A 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.

B *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 C 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 D 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. E

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 F 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 G 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 H 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:

> (1) Everyone shall have the right to hold opinions without interference.
> (2) Everyone shall have the right to freedom of expression; this right shall I 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; 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

A 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
B 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
C 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. Brennan CJ said (at p 595) that:

> A law which prohibits non-verbal conduct for a legitimate purpose *other than*
> D *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. (Italics supplied.)

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

E

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
F 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 (1988) nor the decision in the federal statute case of *United States v Eichman* 496 US 310 (1989) was unanimous. Each was
G 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
> H 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
I 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 the *German Flag Desecration Case*, 81 Entscheidungen des Bundesverfassungsgerichts 278 (FRG).

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.

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.

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.

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.

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.

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 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.

Sir Anthony Mason: 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.

Reported by PY Lo

附錄 II

HCMA 482/2013

香港特別行政區

高等法院原訟法庭

刑事上訴司法管轄權

定罪及判刑上訴

案件編號：裁判法院上訴案件2013年第482號

(原東區裁判法院案件2013年第918號)

香港特別行政區

訴

第一上訴人	古思堯	(KOO SZE YIU)
第二上訴人	馬雲祺	(MA WAN KI)

主審法官： 高等法院原訟法庭法官彭偉昌

聆訊日期： 2014年3月6日

裁判日期： 2014年3月27日

判案書

1. 兩名上訴人（後稱“D1”和“D2”）以共犯身份經審訊後被裁判官杜浩成先生裁定一項「企圖侮辱區旗」罪成立，違反香港法例1997 年第117 號《區旗及區徽條例》第7條及香港法例第200 章《刑事罪行條例》第159G 條，分別處入獄4 個月緩刑2 年及社會服務230 小時。兩名上訴人不服，現就定罪與判刑同時提出上訴。

事實

2. 2012年4月1日，一次主題為「抗議中央干預特區行政長官選舉及爭取盡快落實民主普選」的示威遊行，在西區中央人民政府駐香港特別行政區聯絡辦公室外進行。從以獲認事實方式呈證的警察、媒體及互聯網錄像可見，D1和D2曾在人群中分別或一起以打火機或燃燒著的報紙，點向一面香港特別行政區區旗。在場的警員上前制止，卻被其他的示威者阻撓。最後，警方用滅火噴劑成功把火種撲滅。期間，燃燒中的報紙，有部分落在持區旗旗桿者手上。

原審情況

3. D1和D2不爭議案中的事實。他們不作供也沒有傳召證人。他們要求原審裁判官宣布《區旗及區徽條例》第7 條違反《基本法》第27[1]及39 條[2]，與及《香港人權法案》第16 條[3]。理由方面，它與本上訴的部分理據重疊，我會根據需要在下文作相應討論，在原審時則被裁判官援引終審法院在*HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442的判決全面駁回，裁定兩人罪成。

有關定罪的上訴

4. 上訴方的上訴理由有兩個。為有利討論，我會先處理理由 （2）。這個理由直指裁判官裁定簡稱《區旗條例》第7 條不違憲，是錯的。

上訴理由(2) – 第一部分

5. 上述這項投訴，其實也分為兩個層面。第一個層面在原審時未被提出，在上訴時才首次被依賴，內容與簡稱《人權法》第16 條整條的條文有關：

「 第十六條

意見和發表的自由

(一) 人人有保持意見不受干預之權利。

(二) 人人有發表自由之權利；此種權利包括以語言、文字或出版物、藝術或自己選擇之其他方式，不分國界，尋求、接受及傳播各種消息及思想之自由。

(三) 本條第(二)項所載權利之行使，附有特別責任及義務，故得予以某種限制，但此種限制以經法律規定，且為下列各項所必要者為限—

(甲) 尊重他人權利或名譽；或

(乙) 保障國家安全或公共秩序，或公共衛生或風化。

[比照《公民權利和政治權利國際公約》第十九條]」

6. 上訴方陳詞，指終審法院在*Ng Kung Siu*案裡，只著墨於第16(2) 條，與及第16(3) 條對第16(2) 條的限制，卻忽略了第16(1) 條所保障的，人人有保持意見不受干預（to hold opinions without interference）的權利。意思是，不論某人對區旗持有甚麼意見，那都是第16(1) 條所賦予的絕對權利，不受第16(3) 條所制約。《區旗條例》第7條既把侮辱區旗刑事化，就等同侵蝕甚或剝奪這個絕對權利，途徑是透過公權力規定甚麼才是區旗的正統象徵意義，並強迫市民在言行上遵從那個象徵意義。因此，《區旗條例》第7 條違反《人權法》，又違反《基本法》。

7. 下面是這個陳詞所賴以支持的理由。

8. 就《公民及政治權利國際公約》第19 條（《香港人權法案》第16 條的藍本），聯合國人權委員會在2011 年9 月12 日公佈的《一般評論第34 號》[4]有如下說明。它確立了保持意見的權利的絕對性：

"9. Paragraph 1 of Article 19 requires protection of the right to hold opinions without interference. This is a right to which the Covenant permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion. The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for

> reasons of the opinions they may hold, constitutes a violation of Article 19, paragraph 1.
>
> 10. Any form of effort to coerce the holding or not holding of any opinion is prohibited. Freedom to express one's opinion necessarily includes freedom not to express one's opinion."

9. 上訴方也援引美國最高法院在*Texas v Johnson* 491 US 397 (1989) 的判決。該案被告 J是一群示威者中的一員。他們聚集在共和黨全國大會會議場外抗議美國總統的施政。期間，有人從旗桿上撤下美國國旗，J在接過後澆上火水燃點焚燒，示威者跟著高喊要給「阿美利堅紅白藍三色」吐沫。結果，J被控侮辱國旗，在定罪後幾經交叉上訴至美國最高法院。後者最終裁定，涉案的州立法律，違反聯邦

憲法《第一修正案》下我簡稱為言論自由的權利[5]。原因是，這項法律針對燒旗背後的信息內容（content），而非單純針對這個信息的發表形式（mode），而國家本身又無權把它對國旗的看法用刑法來強加於人民：

> "[T]he state's asserted interest in preserving the flag as a symbol of nationhood and national unity does not justify the conviction since (a) the attempted restriction on expression is content-based … and (b) although the state has a legitimate interest in encouraging proper treatment of the flag, it may not foster its own view of the flag by prohibiting expressive conduct relating to it and by criminally punishing a person for burning the flag as a means of political protest." [6]

10. 國家沒有這個權，是因為《第一修正案》的關鍵在保障多元：

> "Recognizing that the right to differ is the centerpiece of our First Amendment freedoms … a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent." [7]

11. 繼*Texas v Johnson*之後，美國最高法院以同一理由裁定，國會因不滿該案判決而通過以保護國旗的聯邦法案違憲：*U*nited States v Eichman 496 US 310 (1990)。

12. 上訴方進一步指出，十年前，新西蘭高等法院在考慮過上述兩宗美國案例及*Ng Kung Siu*的判決後裁定，該國的國旗法違反言論自由：*Hopkinson v Police* [2004] 3 NZLR 704。

討論

13. 聯合國人權委員會的《一般評論》，無疑對詮釋《香港人權法案》有著最直接及饒有分量的幫助。這點有案例確認[8]。然而，簡稱《評論34 號》在上文的節錄，明顯在針對以思想入罪。例如，信仰甚麼／不信仰甚麼本身就是犯法，這樣的規定肯定與簡稱《公約》的第19 條第1 段相悖。相反，這個評論並未指出，《公約》第19 條第1 段（保持意見不受干預之權利）與《公約》第19 條第2 段（發表自由之權利）有甚麼必然關係。它並未指出，後者受到限制時會損及前者。所以，這個評論對上訴方沒有幫助。

14. 來自美國的法學方面，我注意到，《第一修正案》並未如《公約》那樣把保持意見與發表自由兩個權利區分[9]。不過，最高法院又似乎沒有把兩者等同起來。案例把燒旗的動作，與藉燒旗所表達的立場，相提並論，並不就等於把發表自由與保持意見的權利視作一體。有關的法律被指違憲，是因為它授權國家按自己定下的所謂正統觀念來懲處人民藉行為來表達對國旗的不同看法。有關的法律被指違憲，並不是因為它在任何情況下都要求人民對國旗肅然起敬。前者觸及的只是發表自由，後者觸及的才是保持意見的權利。

15. 另外，我注意到一些法律詮釋問題。在*Texas v Johnson*案的州立法律，把侮辱一詞定義為任何不當的物質對待，是行為人知道會令目睹或知情者認真反感的：

> "[The] state statute … defined desecration as the physical mistreatment of such objects in a way which the actor knows will seriously offend one or more persons likely to observe or discover the act." [10]

換言之，這個法律，並不是要維護國旗在任何情況下的完整無缺；它要保障的，是國旗免於受到令人認真反感的損害。這也是該項法律被視為針對信息內容（甚麼是人民對國旗應有的態度？）的原因：

> "[T]he state's asserted interest in preserving the flag … does not justify the conviction since (a) the attempted restriction on expression is content-based, and thus subject to the most exacting scrutiny, given that the flag-desecration statute is aimed not at protecting the physical integrity of the flag in all circumstances, but only against impairments that would cause serious offense to others, and is aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity ..." [11]

16. 這個情況與《區旗條例》第7條有分別：

> 「任何人公開及故意以焚燒、損毀、塗畫、玷污、踐踏等方式侮辱區旗或區徽，即屬犯罪 -
>
> (a) - 經循公訴程序定罪，可處第5級罰款及監禁3年；及
>
> (b) - 經簡易程序定罪，可處第3級罰款及監禁1年。」

17. 根據終審法院首席法官李國能在*Ng Kung Siu*的分析，侮辱一詞，並無特定或單向的涵義。按字面解釋，就算在國/區旗上加上讚美的字句，這個行為也會因構成「塗畫」而犯法。因此，無論是簡稱《國旗條例》或《區旗條例》的第7 條，其目的都只在單純地維護國/區旗的尊嚴，以免它受到廣義的侮辱：

> "… 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." [12]

18. 對此，包致金常任法官在他的獨立判詞有一致看法：

> "… 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 willful desecration meet such criteria." [13]

19. 至於國/區旗本身的尊嚴何來，根據李首席法官的解釋，就是它作為國家或特區的象徵了。國家和特區有合法利益要保護這些象徵，是無可爭議的：

> "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 alienable 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." [14]

事實是，美國最高法院也承認這些合法利益。該院只是認為，捍衛這些利益的某項法律過界，因而違憲。

20. 及此，我已粗略地指出了*Texas v Johnson*和*Ng Kung Siu*案之有所區別的理由。我並未忽略*US v Eichman* 所可能帶來的問題。正如上文指出，有關的聯邦法案，目的在繞過*Texas v Johnson*，所以沒有明文規定被禁的行為需令人心生反感，做法與《國旗條例》和《區旗條例》的第7 條相似，但美國最高法院卻仍然裁定它違憲。

21. 然而，該案的判詞摘要顯示[15]，上述的違憲判決，是基於對有關法案的解讀。最高法院認為，就算把行為會令人反感等規定省略，法案在本質上仍然是要針對信息的內容而非發表形式。簡而言之，它就是要禁止對國旗做出可表達不愛國的行為：

> "the Act, like the state statute in Texas v Johnson, improperly suppressed expression out of concern for its likely communicative impact, even though the Act contained no explicit content-based limitation on the scope of prohibited conduct, since (a) the Federal Government's stated desire to preserve the flag as a symbol of national ideals is implicated only when a person's treatment of the flag communicates a message that is inconsistent with those ideals, and (b) the statutory term describing the proscribed conduct … connoted disrespectful treatment of the flag and suggested a focus on acts likely to endanger the flag's symbolic value, whereas the disposal exemption *[pertaining to worn or soiled flags]* protected acts traditionally associated with patriotic respect …"

22. 由於這個原因，*US v Eichman*的判決，對香港仍然沒有很大的參考價值。終審法院指《國旗條例》和《區旗條例》第7 條沒有特定或單向涵義、只限制某一種發表形式，則對我有約束力：

> "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." [16]

23. 最後，*Hopkinson v Police*這宗新西蘭案例，應該說是中立的。它考慮了本港的*Ng Kung Siu*案，也考慮了上述兩宗美國案例。結果，承審的高等法院法官（France J）指出，在這個課題上，明顯有不同意見的空間。他指出，就算*Texas v Johnson* 的判決，也只是大比數判決[17]：

> "… it is obvious that there is room for differing views. The United States Supreme Court, for example, was divided on the issue and the dissenting judgments in *Texas v Johnson* and the Hong Kong decision show the arguments for the view that prohibition of such conduct is a justified limit." [18]

無疑，侮辱旗幟的課題，在人權需被確保的原則下，只能留給每個法域作自行判斷[19]。

24. 作為總結，我不認為上訴方的投訴成立。《評論34 號》只針對以思想入罪，美國最高法院的案例則與保持意見不受干預的權利無關。由於對法律條文的詮釋不同，美國案例對分析問題亦無甚幫助。

上訴理由(2) – 第二部分

25. 接著要討論的是D1和D2在原審時的辯護。它不為裁判官所接受，現在被重新提出。內容是，*Ng Kung Siu*的判詞有足夠的空間讓今天（即十五年後）的下級法院不依循該案的判決。此外，跟合法限制人權有關的法律，也在這個期間得到更透徹的討論，令人覺得有與該案商榷的餘地。

26. 以下是上訴方的具體陳詞。

27. 李首席法官在上述的判詞指出，隨著香港回歸，在一國兩制的原則下，成為與中華人民共和國不可分割的特別行政區，要保護國旗區旗的合法利益，定可歸於公共秩序（"*order public*"）的概念之內：

> "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 (*order public*)." [20]

28. 至於李法官何以要提到時間、地點和環境（time, place and circumstances），那就要回到上述節錄之前的一段文字。在省覽過有關的典據，包括學者Kiss的*Permissible Limitations on Rights*[21]之後，李法官接納，公共秩序實非一個精準的概念，它必須隨著時間、地點和環境的改變而有所不同：

> "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 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." [22]

29. 是故，名譽資深大律師陳文敏教授在*Basic Law and Constitutional Review: The First Decade*一文指出，這個說法可能意味著，侮辱國/區旗罪在特區成立之初才有理由存在，待特區成立久遠以後則未必：

> "This is a rather odd formulation, as it suggests that while the offence of desecration of national *[and regional]* flag*[s]* may be justified at the early days of the establishment of the HKSAR, it may not be justifiable long after the HKSAR has been established." [23]

30. 有此作依據，上訴方乃進一步陳詞，指自*Ng Kung Siu*一案以來，香港已在多方面出現重大變化 - 法治精神受到威脅；政府高級官員腐敗；公眾對落實一國兩制、高度自治、政制民主化和維護人權等事，有較大幅的信心下滑。由於這種種倒退，區旗對香港市民的象徵意義已大不如前；政府要保護區旗的合法利益，也漸失（甚或失去了）它的重要性。這樣被時間和環境改變了的公共秩序，應不再被視為可支持《區旗條例》第7 條無違憲的根據。

31. 另外，上訴方指出，終審法院在後來的一宗案件，*Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229，清楚列出了可合法限制權利的要件[24]。其後，在英國，上議院又在這方面作了補充：*Huang v Secretary of State for the Home Department* [2007] 2 AC 167[25]。上訴方指出，Kiss[26]和Nowak[27]兩位學者的意見一致，指公共秩序，必須適用於一個包括基本人權在內的法律框架；此外，公共秩序這個概念本身，亦要求行使公權力時尊重人權。

32. 上訴方再指出，上文提到的《評論34號》，為《公約》第19 條第3段，亦即《人權法》第16(3)條所允准的限制，定下了嚴格要求。同一文件指出，衡量公共秩序，是法院的責任；法院不應對立法機關的看法給予比重。上訴方聲稱，以上種種理由，皆令人質疑*Ng Kung Siu*案的正確性。上訴方聲稱，法院要給《區旗條例》第7 條濟助式的釋義，讓「提倡多黨民主和人權」，可被理解為侮辱區旗的合法辯解，第7 條才不致違反《基本法》和《人權法》。

討論

33. *Ng Kung Siu*案的判決，直接與《人權法》第16(2) 條和第16(3)條有關。終審法院在該案的判決理由，我尊重接受，亦受其約束。故此，我不認為有需要或空間詳細處理上訴方在這部分的陳詞。

34. 惟獨要一提的是，與公共秩序有關的所謂時間、地點和環境，在與案有關的課題裡，當指香港進入嶄新的憲制秩序而非其他。這點從李首席法官在上文（第27 段）所節錄的判詞清楚可見。在那段判詞當中，李法官並未觸及香港居民的民心和愛國情操等非憲制問題。他提到的，只是中華人民共和國對香港恢復行使主權，以一國兩制的原則設立香港特別行政區，香港是中華人民共和國不可分割的一部分。當然，他亦指出，《基本法》的前言提到，香港回歸，是中國人民（不單指香港居民）的歷史願景。我看不到，被這樣界定的公共秩序，在《基本法》繼續有效下，將如何能被可改變的時局影響。

35. 可以說，終審法院在較近期的一宗案件，*Democratic Republic of the Congo & Others v FG Hemisphere Associates LLC* (2011) 14 HKCFAR 95，也重新印證了這方面的立場：

> "319. The desire for national reunification and territorial integrity is an important theme underlying China's recovery of Hong Kong. This was recognized by this Court in the case concerning desecration of the national flag."

上訴理由(1)

36. 這個理由批評裁判官在斷案時錯誤地加插了他的個人見解，亦即把他心目中的，何謂區旗的正統象徵意義，強加於市民。

討論

37. 裁判官備受批評的那些話，出自他書面判詞的第50至59 段：

> 「50. 法庭認為，除了國內治安和秩序外，*order public*也包涵了滿足集體需要、國外或對外行為以及公眾福祉的考慮，因此，法庭必須進一步考慮區旗在回歸後的對內和對外意義。
>
> 51. 過去16年，特區的運動員在區旗帶領下，參加國際體育項目，取得驕人成績。特區的政治、經濟人員也在區旗帶領下，出席國際會議，努力為特區市民謀福祉。
>
> 52. 另外，特區市民過去16年的集體、共同努力，為公眾謀求福祉，獲國際社會肯定和認同。特區無可否認是個舉足輕重世界金融中心。世界經濟論壇2011年和2012 年度的金融發展報告 (Financial Development Report)，均把特區列為世界第一； 2013年度，全球競爭力指數中，特區排行全球第三。更重要的是，聯合國2013年度發表的人類發展指數，特區在全球186個國家/地區中，排名 13，新加坡排名 18，英國則為 26。2007年同一指數中，特區排名 24。
>
> 53. 法庭認為，區旗過往16年間獲得明顯的對外意義，象徵著無數香港人為公眾福祉的努力和貢獻。
>
> 54. 對內而言，過去16 年，特區的遊行集會數字，由1997 年每年1,190宗，以倍數逮升至去年的7,529 宗，當中不少涉及政治議題。
>
> 55. 遊行集會中出現不同、甚致敵對派系的情況不能忽視，侮辱區旗不一定受到所有參與遊行集會人士的認同。

56. 法庭認為，如果沒有保護區旗的法例，侮辱區旗的行為便有可能引致破壞社會安寧的衝突，而把侮辱區旗列為刑事行為，交由警方和法庭處理，則能有效減少該些衝突的風險。

57. 辯方認同，特區公職人員殉職，靈柩會蓋上區旗。不久前，特區的一位消防隊目和年青隊員，捨生救人。蓋著他們靈柩的區旗象徵著全港市民對他們的敬意，表達了區旗底下有英魂的訊息。

58. 法庭認為，區旗在16年間已獲得了濃厚的人民精神象徵意義。

59. 法庭裁定，上述時間和內外環境的改變，進一步支持了保護區旗法例的合憲性。」

38. 在此，我不打算討論裁判官的觀察的對錯，就正如我不會評論上訴方對時局的看法。這樣做著實不必，結果也會因人而異。正如我在上文（第34 段）指出，就公共秩序而言，與保護區旗唯一有關的考慮，就是相對於以往，香港已進入一個新的憲制秩序，而這個秩序又會因《基本法》而持續下去。因此，裁判官確實考慮過多，但也不致影響本案的判決。

針對判刑的上訴

原判理由

39. 裁判官基於李首席法官及包常任法官對《國旗條例》和《區旗條例》的分析（見上文第17及18兩段的節錄），認為條例的立法原意，在於保持旗幟中立，避免其牽涉於政治，以致能全面有效地保護國/區旗的尊嚴[28]。基於這個原因，他拒絕兩名上訴人以公民抗命（一種政治手段）作請求輕判的理由。

40. 裁判官認為，本案有三個加增罪行嚴重性的因素：一，事發時有多名示威者把D1、D2圍著，阻撓警員執法；二，上述的行為，令雙方一度發生推撞，沒有人因此而受傷是僥倖；三，過程中有火屑實際落於第三者手部，有人被灼傷的風險不再只是理論。

41. 結果，裁判官的判決如下：

「第一被告

81. 第一被告現年67歲，太太與14 歲的兒子在內地居住。

82. 過往10年，被告居住在一商業大廈單位，單位主要用作儲存示威用品之用，被告每月只須支付約 $200 元的電費，毋須支付租金。

83. 1989年起，被告放棄船隻技工的工作，積極參與社運，被告報稱，間中會任職裝修工人，每月可賺取 $5,000至 $10,000。

84. 案發時，第一被告有7次刑事定罪記錄（他第8 次定罪不在本案考慮範圍之內），合共13 項控罪，包括與本案相類似的罪行。

85. 以往法庭曾給予被告機會，以罰款形式處理他侮辱區旗的行為，而他卻有違反簽保守行為令以及緩刑令的記錄。

86. 考慮過本案案情，特別是加重罪行嚴重性的因素，以及第一被告的背景資料，法庭認為一個適當的量刑應在6 個月左右監禁的水平。

87. 第一被告干犯本案後，在2012年6月10日和2013 年1月1日再次干犯類似的控罪（見*香港特別行政區訴古思堯*HCMA 185/2013）。該案的判刑日期為

2013年2月7 日，第一被告判監，等候上訴，而上訴程序最終在2013年5 月13 日完結。

88. 本案案發日期為2012年4月1日。控方在本年3 月（即第一被告判監後）向他提出起訴。從被告的刑事記錄可以推算出，他就本案在6 月3 日應訊時，應剛剛服刑完畢不久。

89. 從上述情況看來，法庭無法排除以下的可能性，即在整體刑期原則的考慮下，如果第一被告2012 年4月1 日、6 月10 日以及2013 年1月1日的案件是一併審理的，本案刑期有可能部份與2012年6月10日和2013年1月1 日控罪的刑期同期執行。

90. 法庭理解，控方在本案中處理互聯網上得來的攝錄片段，有相當難度，但未能把三案一併處理絕非第一被告的過失引起的。

91. 在這情況下，法庭可考慮以緩刑方式處理 （見參考*HKSAR v Chiu Peng, Richard* [2002] 1 HKC 401）。

92. 基於上述的分析，考慮到第一被告已被拘留兩個星期，法庭認為，適當的刑期為監禁4 個月，緩刑兩年。

第二被告

93. 第二被告現年19歲，2011年中五畢業後，曾任職便利店職員半年，2012年4月開始，以月薪 $9,500在一政治組織任職助理。

94. 案發時，第二被告沒有刑事記錄，但2012 年9 月因一項非法集結罪罰款 $2,000。

95. 上文提及令案件嚴重的所有因素都適用於第二被告。

96. 法庭認為，19 歲並不算十分年輕，不應把第二被告看作15 歲或以下（tender age）稚童看待。

97. 第二被告沒有如第一被告的特殊情況。

98. 基於席前的資料，法庭以社會服務令方式處理第二被告的案件。

總結

99. 第一被告判監4個月；緩刑兩年。

100. 考慮到第二被告已拘留的時間，第二被告須完成230 小時的社會服務令。」

討論

42. 我認為，裁判官對終審法院的判詞有誤解。李、包兩位法官所言，旨在指出，《國旗條例》與《區旗條例》內容中立，所施加的限制只狹窄地落於發表形式而非信息內容上，所以不違憲。這個裁決，與科刑時應考慮甚麼，是兩回事。它不是否決公民抗命作輕判理由的理由。

43. *R v Jones (Margaret) & Others* [2007] 1 AC 136是上訴方援引的英國上議院案例。它道出了公民抗命在該國的歷史和價值。賀輔明勳爵（Lord Hoffmann）是這樣說的：

> "89. My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind."

然而，這段話，只是賀勳爵的判詞的一小部分，其餘的部分則頗嚴厲地批評了被告藉犯法而把法庭變作其政治平台的行為。事實上，賀勳爵指出，所謂公民抗命，也有其特徵，例如是行動節制、不造成過份的破壞或不便、當事人不在庭上抗辯以顯示自己對信念的真摯：

> "But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account."

44. 由此看來，為信念犯法的人，並不一定應該獲得輕判。這要視乎每宗案件的實況。若然犯案的情節和後果輕微，那自然應該從寬處理，否則則不然。但這其實又與一般的科刑原則無異 - 被告的動機、手段、後果、對社會的影響，全部都是要考慮的因素。因此，我認為，把公民抗命看作一個獨立的求情理由，意義不大。這是我對這個課題的結論。

45. 至於本案，它的情節孰輕孰重，我則有以下觀察：一，從拍得的錄像顯示，無論作火引的報紙，抑或被燒的區旗，應該都沒有澆上例如是火水等助燃劑，否則會頓時變作火球。二，案中沒有證據顯示有人真正受傷。三，案中沒有證據證明，阻撓警察的示威者，在行動上並不出於自發而是與D1、D2早有共識。當然，在人多擠迫之處（嘗試）把東西用火點著，絕對是危險的事；如果導致周邊的人群起哄，造成其他危險，就更加不妙。問題是，對於能準確釐定本案嚴重性而言，剛提到的三點，是不能忽視的。

46. 最後要討論的是個別上訴人。正如裁判官指出，D1在本案案發之前有七次共十三項定罪紀錄，據理解全部出於抗議示威遊行，其中一次與本案控罪相同，當時（2002 年）只以罰款了事。換言之，本案是D1在事隔十年後首次再度侮辱區旗。他違反簽保守行為和緩刑等命令則與侮辱旗幟罪無關。既然是這樣，再加上我不認同案情有如裁判官所形容般嚴重，4 個月的刑期（裁判官最初還以6 個月作起點）是明顯過重，應改為2個月。另外，由於本案本有可能與其後的燒旗案一併處理 - 如果不是蒐證需時的話（見裁判官判詞第87至91 段），所以緩刑的時段也不應長達2年，可減半至1 年。

47. D2案發時只有19歲，沒有前科。判刑前，他被裁判官收押以等候包括教導所、勞教中心、更新中心、社會服務及感化令等一系列符適報告，至一天後緊急從高等法院取得保釋。此外，230 小時社會服務，離開法定上限只有10 小時，與感化官原來建議的低時段（最多不超過80 小時）則相差幾近三倍。這是絕對過重，與上訴人的背景、案件性質和犯案情節完全不成比例。為使事情可告一段落，如今最妥善的做法，是把有關的命令改為110 小時，亦即D2已經完成的時數。

判決

48. 兩名上訴人針對定罪的上訴駁回，不服判刑的上訴得直。D1改判入獄2 個月，緩刑1 年。D2改判社會服務110 小時。

(彭偉昌)
高等法院原訟法庭法官

答辯人：由律政司副刑事檢控專員梁卓然及高級檢控官李希哲代表香港特別行政區。

第一、第二上訴人：由張柱才律師事務所轉聘李柱銘資深大律師及詹鎧鏘大律師代表。

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[1] 言論自由

[2] 《公民權利和政治權利國際公約》適用於香港的規定繼續有效

[3] 保持意見不受干預及發表自由的權利

[4] UN Human Rights Committee, "General Comment No 34, Article 19, Freedoms of Opinion and Expression", 12 September 2011, CCPR/C/GC/34.

[5] 《第一修正案》(The First Amendment)的原文為: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[6] 491US 397，Summary的末端。

[7] 491US 401，最高法院確認州上訴法院的觀察。

[8] *The Queen v Sin Yau Ming* [1992] 1 HKCLR 127; *Fok Lai Ying v Governor in Council & Others* [1997] HKLRD 810

[9] 見註釋5。

[10] 491 US 397，Summary。

[11] 見註釋6。這是同一段文字在前半部分的較完整版本。

[12] (1999) 2 HKCFAR 442，456頁G至H。

[13] 468頁A至C

[14] 447頁E至G。

[15] Summary, 496 US 310。

[16] 456頁F至G。要指出，終審法院並非不知悉上文提到的兩宗美國案例；常任法官包致金在他的獨立判詞有提及。

[17] 比數是五對四。認為有關法律不違憲的四位美國最高法院法官（包括首席法官）指出，法律只限制了J的發表形式，而且是眾多發表形式中的一種，與終審法院在*Ng Kung Siu*案所顯示的法理極其相近。此外，*US v Eichman* 的判決，其實也只是五對四的大比數判決。

[18] [2004] 3 NZLR 704，716頁，判詞第73段。

[19] 正如終審法院在*Ng Kung Siu*案一樣，新西蘭高等法院指出，民主國家中有不少都有保護國旗不受侮辱的法律。

[20] 460頁B至D。

[21] 收錄於Henkin (ed)，*The International Bill of Rights 1981*，301 頁。

[22] 459頁I至460頁A。

[23] (2007) 37 HKLJ 407，429頁底部。

[24] 判詞第36段。

[25] 判詞第19段。

[26] 見上文第27段。

[27] 著有*UN Covenant on Civil and Political Rights: CCPR Commentary*。

[28] 這是我對裁判官書面判詞第74至76段的理解。

有關向終審法院提出的相關上訴，請參閱FAMC40/2014。

Hopkinson v Police

High Court Wellington CRI 2004-485-23
18 May; 23 July 2004
France J

Crimes – Offences – Flag burning – Whether flag burning protest dishonoured the flag – Flags, Emblems, and Names Protection Act 1981, s 11(1)(b).

Constitutional law – New Zealand Bill of Rights Act 1990 – Relationship between freedom of expression and flag protection legislation – Meaning of "dishonour" – New Zealand Bill of Rights Act 1990, s 6.

The accused was protesting in Parliament grounds against Australian support of United States action in Iraq. At the time of the protest the Australian Prime Minister was visiting. As part of the protest the accused attached a New Zealand flag upside down to a pole, doused it in kerosene and lit it. The flag was consumed in a fireball. The singed pole was extinguished. No member of the public was harmed.

The accused was convicted of destroying the New Zealand flag with the intention of dishonouring it under s 11(1)(b) of the Flags, Emblems, and Names Protection Act 1981.

Held: 1 The conduct of the appellant fell within the natural meaning of "dishonour" under the Flags, Emblems, and Names Protection Act 1981. The prohibition of this conduct amounted to a prima facie breach of the right to freedom of expression. While the objective of preserving the flag as a symbol of national unity and preventing breaches of the peace were legitimate, s 11 of the Flags, Emblems, and Names Protection Act 1981 was not a proportional and rational way to protect that interest (see paras [39], [41], [50], [77]).

Texas v Johnson 491 US 397; 105 L Ed 2d 342 (1989) referred to.

HKSAR v Ng Kung-Siu (1999) 8 BHRC 244; 3 HKLRD 907 referred to.

Board of Education v Barnette 319 US 624; 87 L Ed 1628 (1943) referred to.

2 Given the fact that on its natural and ordinary meaning s 11 of the Flags, Emblems, and Names Protection Act 1981 was not a justified limit on freedom of speech, s 6 of the New Zealand Bill of Rights Act required the Court to determine whether s 11 could be read consistently with the rights protected. This was possible as "dishonour" in s 11(1)(b) could be read as requiring "vilification" of the flag. This interpretation was adopted. The conduct of the appellant did not amount to vilifying the flag (see para [81]).

Result: Appeal allowed.

Observation: The five-step approach outlined by the Court of Appeal in *Moonen* was not a prescriptive one and other approaches were available in Bill of Rights cases. In the present case it was appropriate to consider whether the

conduct of the appellant fell within the natural meaning of the statute, then to ask whether there is prima facie inconsistency with the New Zealand Bill of Rights Act and if so to determine whether the limit imposed is a justifiable one. If it is not then it must be determined whether the statute can be read consistently with the New Zealand Bill of Rights Act and if it cannot then the natural meaning must prevail on the basis that s 4 of the New Zealand Bill of Rights Act applies (see paras [27], [28]).

Moonen v Film and Literature Board of Review [2002] 2 NZLR 754 (CA) referred to.

Other cases mentioned in judgment

Lange v Atkinson and Australian Consolidated Press New Zealand Ltd [1997] 2 NZLR 22.

Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (CA).

US v Eichman 496 US 310; 110 L Ed 2d 287 (1990).

Application from conviction

This was an appeal by Paul Barry Hopkinson from conviction in the District Court for destroying the New Zealand flag with the intention of dishonouring it under s 11(1)(b) of the Flags, Emblems, and Names Protection Act 1981.

A Shaw for Hopkinson.

C Mander for the Crown.

Cur adv vult

FRANCE J.

Table of contents

Introduction

[1] After a defended hearing, Paul Hopkinson was convicted on 6 November 2003 of an offence against s 11(1)(b) of the Flags, Emblems, and Names Protection Act 1981 of destroying the New Zealand flag with the intention of dishonouring it. On 12 February 2004, Mr Hopkinson was convicted and fined $600 and ordered to pay Court costs of $130.

[2] The charge followed a protest in Parliament grounds at the New Zealand Government's hosting of the Australian Prime Minister against the background of Australia's support of the United States in its war against Iraq.

[3] The appellant appeals against conviction and sentence. The appeal raises questions about the effect of the New Zealand Bill of Rights Act 1990 and, in particular, the appellant's right to freedom of expression and of peaceful assembly under ss 14 and 16 of that Act, on the offence provision in s 11(1)(b) of the Flags, Emblems, and Names Protection Act.

Facts

[4] The facts are set out in the decision of the District Court delivered on 6 November 2003. The District Court Judge notes that on 10 March 2003 a crowd, estimated on various accounts at between 500 and 1000 people, marched through downtown Wellington and assembled in Parliament grounds to protest at the New Zealand Government hosting the Australian Prime Minister, Mr Howard, to lunch given Australia's support of America in the war against Iraq.

[5] Observing that there was general agreement on the facts, the Judge noted that the appellant was one of the organisers of the protest. His evidence was that he had several political points to make on the occasion of Mr Howard's visit including the New Zealand Government's involvement in pre-war sanctions against Iraq, and the government welcome to Mr Howard when he supported the American invasion of Iraq.

[6] The Judge notes that flag burning as a form of protest was discussed by the appellant with others. By arrangement he bought a New Zealand flag and took that with him. The flag was attached to a pole upside down as a sign of distress. The Judge noted that this is a legitimate distress signal in nautical circles but the appellant said he hung the flag in this way to demonstrate the flag was in distress because of what the Government was doing. Another protester, Mr McNeill, arrived by arrangement with a similar-sized Australian flag and another protester had a smaller New Zealand flag. The arrangements were made to burn the flags. Essentially, kerosene was poured on the flags to soak them and then the flags were lit. The appellant said the small flag was lit first. The appellant and Mr McNeill, side by side, held the poles out in front of them horizontally and with the tips together. Another protester, Mr Phillips, with a cigarette lighter supplied by Mr Hopkinson lit the flags. Immediately following ignition, Messrs Hopkinson and McNeill raised the flags vertically with their hands at the bottom of the poles at about chin height.

[7] The Judge notes that the result was "quite spectacular" with a brief fireball about 1 – 2m across followed by a brief column of flame about 2m high, with a tower of black smoke above. The flags were consumed almost immediately and the singed ends of the poles were extinguished on the grass.

[8] No member of the public was harmed.

Statutory scheme

(i) The New Zealand Bill of Rights Act 1990

[9] For present purposes, the relevant provisions are ss 4, 5, 6, 14 and 16 of the Bill of Rights. Sections 14 and 16 protect the substantive rights involved, that is, the right to freedom of expression (s 14) and the right to freedom of peaceful assembly (s 16).

[10] Section 4 of the Bill of Rights provides that the Court cannot hold any provision of an enactment to be impliedly repealed or revoked or to be in any way invalid or ineffective, or to decline to apply any provision of an enactment, "by reason only that the provision is inconsistent with any provision" of the Bill of Rights.

[11] Section 5 sets out the extent to which rights in the Bill of Rights may be limited, that is, only by such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[12] Section 6 directs an interpretation consistent with the Bill of Rights to be preferred and applies "wherever an enactment can be given a meaning that is consistent with the rights and freedoms" in the Bill of Rights.

(ii) The Flags, Emblems, and Names Protection Act 1981

[13] Section 11, the offence provision, provides first, in subs (1), that it is an offence to:

> (a) without lawful authority, alter[s] the New Zealand flag by the placement thereon of any letter, emblem, or representation.

[14] Secondly, in terms of s 11(1)(b), every person commits an offence who:

> in or within view of any public place, uses, displays, destroys, or damages the New Zealand flag in any manner with the intention of dishonouring it.

[15] For the purposes of s 11, the New Zealand flag means any flag of the design depicted in the Schedule to the Act or any other design that so closely resembles it as to be likely to cause any person to believe that it is the design depicted in the Schedule.

[16] Section 11(3) provides in any prosecution for an offence against this section the onus of proving that any alteration of the New Zealand flag was lawfully authorised shall be on the defendant.

[17] Prosecutions under s 11 require the consent of the Attorney-General (s 25).

Grounds of appeal

[18] The points on appeal state the following grounds:

(a) The entire structure of the District Court's analysis is wrong and led to major misdirections of law.

(b) The Judge misinterpreted the mental element of the offence, namely, the words "with the intention of dishonouring it".

(c) The findings of fact cannot justify the inference that "one of [the appellant's] intentions was to disrespect the New Zealand flag".

(d) The finding that the mental element of the offence was proved is unreasonable or cannot be supported having regard to the evidence.

(e) The Judge erred in ruling that "the prohibition on flag burning with the intention of dishonouring it is justifiable in a free and democratic society". In relation to this, the appellant via the points of appeal seeks a declaration or indication that s 11(1)(b) of the 1981 Act is inconsistent with the appellant's rights under ss 14 and 16 of the Bill of Rights, and does not constitute a justified limitation in terms of s 5 of that Act. A declaration or indication is also sought that the section breaches the appellant's rights under arts 19(2) and 21 of the International Covenant on Civil and Political Rights and is not justified under art 19(3) or art 21.

(f) As a tentative point, the appellant contends that the decision of the Attorney-General to consent to the laying of the information was unlawful and/or unreasonable. This matter was not pressed at the hearing of the appeal.

(g) The sentence is manifestly excessive.

Approach to Bill of Rights

(i) The appellant's submissions

[19] The appellant submits that the District Court Judge wrongly approached *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 and misinterpreted the mental element. The appellant argues that while the District Court Judge purported to apply *Moonen*, he did not do so essentially because he started with a consideration of s 11(1)(b) and not with a consideration of the rights involved. The overall submission is that the Judge has not adopted a rights-centred approach.

[20] In this context, the appellant emphasises the importance of freedom of expression and particularly that of political expression with reference, for example, to the following observation of Elias J (as she then was) in *Lange v Atkinson and Australian Consolidated Press New Zealand Ltd* [1997] 2 NZLR 22 at p 46:

> "In a system of representative democracy, the transcendent public interest in the development and encouragement of political discussion extends to every member of the community."

[21] The appellant submits that however offensive, shocking, obnoxious, upsetting and challenging the appellant's actions may appear in the eyes of some or even the majority of New Zealanders, his act of burning the flag was symbolic political speech in a free and democratic society fully protected by ss 14 and 16 of the Bill of Rights.

[22] The error in approach to s 6 of the Bill of Rights, the appellant says, is that the Judge has treated s 11(1)(b) as only having one meaning when, in fact, it is susceptible of a broad range of tenable meanings. Although not explicit, the appellant says that the District Court Judge appears to have adopted the meaning of "disrespecting" as equating with "dishonouring".

[23] The appellant submits that the Court should interpret "dishonouring" in its sense of "defiling" and imputing an active and lively sense of shaming and/or a deliberate act of callousness. Examples of such conduct might include intentionally urinating on the ashes of the flag or knowingly blowing one's nose on it.

(ii) Submissions for the respondent

[24] The submission for the respondent is that an analysis of the statutory scheme leads to the conclusion that there is only one tenable meaning of "dishonour", that is, being to deliberately treat it with "disrespect" or "to treat without honour or respect". Accordingly, it is submitted that the District Court Judge has correctly approached the Bill of Rights.

[25] By passing the Flags, Emblems, and Names Protection Act, it is submitted that Parliament expressly recognised the flag to be the symbol of the New Zealand Government and people. The respondent argues that the statute is legislative acknowledgment of the esteem and respect with which the flag is to be held. Its significance is as a symbol of statehood and the allegiance of New Zealand citizens to their country.

[26] The submission is that in passing s 11, the intention was to give a wide protection to the flag from persons who might otherwise abuse or vandalise it. Section 11(1)(b) created a new offence. Paragraph (a) of that subsection made it an offence to alter the flag by various ways. The precursor to para (a) was s 5(4) of the Shipping and Seamen Act 1952. It is submitted that it is apparent that in enacting s 11(1)(a) Parliament sought to widen that offence provision by replacing the term "defaces" with the word "alters".

(iii) Discussion

[27] To the extent to which there is criticism of the use of s 11(1)(b) as the starting point, I do not accept the appellant's submission. The Court of Appeal in *Moonen* made it clear that its five-step approach to interpretation in terms of s 6 of the Bill of Rights was not a prescriptive one. That was clear enough in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 but was further emphasised in *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754. The Court of Appeal in the later *Moonen* case resisted the invitation to revisit the five-step approach but emphasised the approach was not prescriptive: " 'May' means may. . . Other approaches are open" (para [15]). The issue is whether, whatever process was used, the Court interpreted the offence provision consistently with the Bill of Rights so as to give effect to the rights in question.

[28] The approach I take is to consider, first, whether the conduct of the appellant falls within the natural or applied meaning of s 11(1)(b), and in particular that of "dishonour". Then, to ask whether the prohibition of that conduct is prima facie inconsistent with the Bill of Rights. If it is, is it a justified limit? If not, the next step is to ask whether the section can be read consistently. If it can, it should be read in that way. If it cannot, then the natural or applied meaning has to be given effect to but on the basis that s 4 of the New Zealand Bill of Rights applies.

Does conduct fall within natural meaning?

[29] Under this head, it is appropriate to consider the appellant's arguments that the factual findings do not justify the inference that one of the appellant's intentions was to disrespect the flag, and the reasonableness of the finding as to the mental element (grounds (c) and (d) in the points on appeal, para [18] above). The appellant says that the Court below does not explicitly state from which findings of fact the Judge drew the inference that "one of [the appellant's] intentions was to disrespect the New Zealand flag" (para [24] of the District Court judgment).

[30] The appellant submits that none of the findings of fact whether taken singly or in combination entitled the Court to draw this inference. Or, it is said, the Court's conclusion was not a reasonable one.

[31] The appellant also observed that there are many ways of destroying the flag. Burning a flag is in fact the only honourable way of destroying it according to flag etiquette. In that regard, the appellant refers to the provisions of the US Flag Code (4 USCS § 8; August 12 1998, PL 105-225, § 2(a) 112 Stat 1497) as illustrative of internationally accepted practice in the destruction of flags.

[32] It is further submitted that to hold that the mere act of burning the flag can give rise to an intention of dishonouring it is to engage in a form of res ipsa loquitur reasoning that is inappropriate in the context of a criminal statute.

[33] The Crown submission is that the learned District Court Judge was entitled to make the finding that at least one of the appellant's intentions was to disrespect the flag. Alternatively, it is submitted that whether the wider concept of "disrespect" or concepts of "shaming", "impugning", or "vilifying" are applicable to the term as used in the section, the act of intentionally burning the flag provides a sufficient basis from which the requisite intention can be drawn.

[34] The submission is that it is beyond dispute that the appellant and his fellow protesters did not agree with the foreign policies of the respective countries. Both flags were soaked in kerosene, held aloft and incinerated. This took place in the grounds of Parliament. This was a deliberate act intended to be seen in direct opposition or contrast to the respect, esteem, and pride ordinarily to be shown towards a nation's flag.

[35] The District Court Judge used the *Concise Oxford Dictionary* (7th ed) definition of "dishonour" meaning "a state of shame or disgrace; discredit"; "something that causes dishonour"; and "to treat without honour or respect". Consideration of the meaning of the word "dishonour" arose in the context of determining whether or not the prosecution had established the requisite intention for the offence. In deciding that, the Court took into account the following uncontested circumstances:

> "• This was a political protest to coincide with the Australian Prime Minister's visit.
> • [The appellant] was one of the organisers.
> • The protest was a lengthy process. The protesters had assembled earlier and marched through downtown Wellington arriving at Parliament grounds about midday. The process actively proceeded until and after the departure of Mr Howard, about 2.40 pm. The [flag] burning occurred at about 1.13 pm.
> • Preparations by [the appellant] and others were made the day before to burn the New Zealand flag. The protest involved a large crowd; incessant chanting; the use of loudhailers; the banging of pots and the ringing of bells; speeches; pantomimes; a strong TV media presence; and a strong police presence" (para [21]).

[36] The Judge also took into account the appellant's evidence, namely:

> "• He is an active member of a number of political protest groups.
> • His political objective regarding this protest is already noted.
> • His attaching of the New Zealand flag upside down as a sign of distress, the distress here intended to be a political statement, that is, the flag was in distress because of what the New Zealand Government was doing. Under cross-examination he said it was not his intention to dishonour the flag. He burned it to show the Government was disrespecting it. It was a political action to make people think.
> • He accepted that the intensity of the fire was intended to, and did, catch people's attention and that the action drew attention to him. He also accepted that others, apart from the flag burning party would not have known what he intended." (para [22]).

[37] In general terms, the Judge found the appellant to be an honest and reliable witness but said he was left with "considerable disquiet" over the issue of what was really in his mind at the relevant time. In that regard the Judge found the appellant to be less than convincing. The Judge continued at para [23]:

> "I accept that his intentions may well have been as he claimed but find that they were not all of them. He knew that he should not burn the flag although unaware of the specific provisions of s 11. I record that I cannot escape the sense that he is now attempting to rationalise his way in a circuitous manner around what he now understands to be the mental element."

[38] The Judge's conclusion was as follows at para [24]:

> "[24] For those reasons, and against the background of the factual circumstances as I have found them to be, I reject his evidence that he did not intend to dishonour or disrespect the flag. I draw the inference that one of his intentions was to disrespect the New Zealand flag. That is to say, that by demonstrating such disrespect for the flag, he sought to add weight to the effects of the protest by deliberately undertaking an action which he knew would create attention."

[39] On this first step, I agree with the District Court Judge. The findings of fact were plainly open to the Judge. Viewing the circumstances in their totality there was more than just burning the flag. The appellant may well have had a higher purpose as he saw it but his means of achieving that purpose – his intention – was to dishonour the flag giving "dishonour" its natural meaning.

[40] I also agree with the Judge's approach to the transcript of conversation between a talkback radio host and the appellant on 11 March 2003 (the day after the protest). The appellant submits the Judge should have given the transcript more weight. As the respondent says, the Judge was correct in limiting the weight to be given to the transcript. It was not sworn evidence and contained editorial comment from the talkback host. Further, there are passages in the transcript which support the Judge's conclusion on intention. For example, when asked why he burnt the New Zealand flag, the appellant said "because I believe . . . it stands for imperialism". Further, that the flag does not "represent us".

Prima facie inconsistent?

[41] There cannot be any doubt that prohibition of the appellant's conduct is prima facie a breach of his right to freedom of expression. The scope of the right is broad and it is well established that it includes non-verbal conduct such as flag burning (see, for example, Rishworth et al, *The New Zealand Bill of Rights* (Oxford, 2003) pp 313 – 314).

[42] The next question is, therefore, whether prohibition of this conduct is a justified limit on the freedom of expression.

A justified limit?

[43] This question involves a consideration of the objective of s 11(1)(b) and whether or not the use of a criminal sanction is a rational means of achieving the objective bearing in mind the need to infringe on rights in as minimal a way as possible. The Court of Appeal in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 put the test as follows at para [18]:

> ". . . it is desirable first to identify the objective which the legislature was endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack

a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective. Of necessity value judgments will be involved. . . ."

[44] The appellant is critical of the District Court Judge's failure to embark on this sort of balancing exercise even though the Judge said s 11(1)(b) was a justified limit (ground (e) in the points on appeal). On the Judge's analysis, however, it was not necessary to bring s 5 to bear on the matter because he considered "dishonour" had just the one meaning and the appellant's conduct came within it. The Judge's comment about s 5 was just that, a comment.

(i) Legitimacy of objective

[45] As to the objective of s 11(1)(b), the 1981 Act has its genesis in regulations made under the Colonial Defence Act 1865. These regulations made provision for the recognised ensign of the colony. (See discussion in Carr (ed) *Flags of the World* (1956) at 103.) Since 1901, it has been an offence to deface the flag. The New Zealand Ensign Act 1901 established the blue ensign of the Royal Naval Reserve having on its fly the Southern Cross as the recognised flag of New Zealand for the specified purposes. In terms of s 4, it was an offence to deface the ensign "by placing any sign, representation, or letter thereon". The Shipping and Seamen Act 1908 repeated that offence provision and it was again continued in the Shipping and Seamen Act 1952. (W A Glue, *The New Zealand Ensign* (1965) at 10 discusses the early history of a national flag in New Zealand. Glue refers to the addition to the New Zealand Ensign Bill of a preamble in the course of the Bill's passage through the House. The Prime Minister, Glue notes, said the preamble was intended to make it "understandable for future generations" why it was deemed desirable to pass the legislation "at this stage of our history".)

[46] The 1981 Act states in its long title that it is an Act;

> **. . . to declare the New Zealand ensign to be the New Zealand flag and to make provision relating to its use and to the use of certain other flags, and to make better provision for the protection of certain names and emblems of Royal, national, international, commercial, or other significance.**

[47] To achieve that purpose, s 5 of the 1981 Act declares the New Zealand ensign as the New Zealand flag. Section 5(2) provides that the New Zealand flag shall be the symbol of the realm, government, and people of New Zealand. In terms of s 5(3) the New Zealand flag:

> (a) Shall be the national flag of New Zealand for general use on land within New Zealand and, where appropriate for international purposes, overseas.

[48] Then, as noted above, there are the offence provisions in s 11. Of those provisions, in the second reading debate on the Bill the responsible Minister stated:

> "Because of the flag's intrinsic importance to almost every New Zealander, the Government has included the offence provisions in clause 11. However no information on those offences can be laid without the consent of the Attorney-General" (441 *New Zealand Parliamentary Debates*, 1981 at p 3990).

[49] Against this legislative background, the objective of s 11(1)(b) must be to protect and preserve the flag as an emblem of national significance. The respondent submits that s 11 also seeks to protect those members of the public who may be offended by the physical use or actions towards the flag resulting from a person's intention to dishonour it. The legislative scheme suggests to me a focus more on preservation of the flag per se and, of course, in the present case there is no evidence of others being offended by what occurred. Both objectives, on the respondent's analysis, would meet the s 5 test.

[50] The appellant contends that the stated objective has little weight and is of relatively little importance in New Zealand's contemporary, multicultural and pluralistic society. I do not accept that submission. I believe the objective remains an important one. In *Texas v Johnson* 491 US 397 (1989) at p 414 the United States Supreme Court ruled that the Texas flag-burning legislation was unconstitutional, but did consider that the state's aims of preserving the flag as a symbol of national unity and preventing breaches of the peace were legitimate ones.

[51] There is also support for this conclusion in the fact that other democratic countries have found it necessary to legislate in this area. Attached as appendix A is material from the Australian parliamentary website on the legislative position in other jurisdictions.

(ii) Proportionality/rationality

[52] Noting that the onus of showing s 5 is met is on the respondent, the appellant submits there is no rational connection between s 11(1)(b) and the objective. Banning expressions against an institution in order to protect the institution (or symbol) is described by the appellant as an outdated and logically invalid concept. Even if there is a rational connection, a blanket ban is disproportionate.

[53] The respondent on the other hand, makes the following points in support of the submission the prohibition is a justified limit:

(a) Section 11 restricts only physical action in relation to the flag.
(b) A person can say what he or she likes about the flag as indeed the appellant here did.
(c) Successive Parliaments have not sought to amend the prohibition.
(d) The values of representative democracy and tolerance may apply equally to those who when using a symbol like the flag go too far and risk inciting violence and disorder in response.

[54] In terms of the proportionality/rationality aspects of s 5, the two conflicting approaches are reflected in the majority and minority approaches in the American jurisprudence and, as well, in the jurisprudence from Hong Kong. (See also the discussion of the German experience in P E Quint, "The Comparative Law of Flag Desecration: The United States and the Federal Republic of Germany" (1992) 15 Hastings Int'l & Comp L Rev 613. Counsel advised me there was no equivalent Canadian case and my own researches have not found one. That is consistent with the material in appendix A which says there is no Canadian legislation on the topic.)

[55] The United States Supreme Court by a majority (5:4) in *Texas v Johnson* concluded that the conviction of a protester for burning the American flag as part of a political demonstration violated the First Amendment protection of free speech.

[56] *Texas v Johnson* dealt with a provision in the Texas Penal Code which makes it an offence to "intentionally or knowingly desecrate" a state or national flag. "Desecrate" means:

> "s 42.09 . . (b) . . . deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his actions."

[57] In this particular case, Mr Johnson at the end of a demonstration unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protesters chanted "America, the red, white, and blue, we spit on you". After the demonstrators dispersed, a witness to the flag burning collected the flag remains and buried them. No one was physically injured or threatened with injury although several witnesses testified that they had been seriously offended by the flag burning.

[58] Brennan J delivered the opinion of the Court. The test Brennan J applied was whether the State of Texas had asserted an interest in support of Mr Johnson's conviction that was unrelated to the suppression of expression. The conclusion was that in that case Mr Johnson's political expression was restricted because of the content of the message that he conveyed and so the state's asserted interest in preserving the special symbolic character of the flag was to be subjected to the "most exacting scrutiny".

[59] Brennan J restated the "bedrock" principle underlying the First Amendment's protection of free speech, namely, that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. As noted above, the majority did not doubt the legitimate interests of the government in making efforts to preserve the flag. However, that was not to say that it may criminally punish a person for burning a flag as a means of political protest. Brennan J said that the way to preserve the flag's special role is not to punish those who feel differently about these matters but to persuade them that they are wrong.

[60] In a concurring decision, Kennedy J noted that the hard fact was that sometimes Courts must make decisions that Judges do not like but make them because they are right in a sense that the law and the constitution as the Judge sees them, compel the result.

[61] Chief Justice Rehnquist, with whom White and O'Connor JJ joined, dissented. The Chief Justice emphasised the unique position of the American flag as a symbol of the American nation. He saw that uniqueness as justifying a governmental prohibition against flag burning in the way that Mr Johnson had done.

[62] The Chief Justice then reviewed the history of the flag and its symbolism. He concluded that the American flag throughout more than 200 years of history has come to be the "visible symbol" embodying the American nation. The flag was not simply another idea or point of view competing for recognition in the marketplace of ideas. The Chief Justice also placed some emphasis on the fact that to deny Mr Johnson this form of speech was to deny him one of many means of "symbolic speech". Flag burning, he said is "the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others".

[63] Accordingly, in enacting this statute, the government was seen as simply recognising as a fact the profound regard for the American flag created by its history.

[64] Stevens J in dissent also referred to the flag as a symbol of more than nationhood and national unity but also signifying the "ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas".

[65] The trivial burden the statute imposed on free speech by requiring that an available, alternative mode of expression including uttering words critical of the flag was available was relevant. (For an illustration of the numerous articles on *Texas v Johnson* see D R Fine, "Symbolic expression and the Rehnquist Court: The Lessons of the Peculiar Passions of Flag Burning" (1991) 22 U Tol L Rev 777; G R Schermerhorn, "When the Smoke clears: Government Regulation of the Expressive Use of National Symbols as addressed in *Texas v Johnson*: An Alternative Method of Analysis would be nice" (1990) 67 University of Detroit Law Review 581; and Tribe, *American Constitutional Law* (2nd ed) ch 12.)

[66] The United States Supreme Court took the same approach in *US v Eichman* 496 US 310 (1990). There, by a majority, the Court ruled unconstitutional the Flag Protection Act 1989 enacted after *Texas v Johnson* which imposes criminal penalties against anyone who knowingly "mutilates, defaces, physically defiles, burns, maintains upon the floor or ground, or tramples" upon a flag of the United States.

[67] In *HKSAR v Ng Kung-Siu* (1999) 8 BHRC 244, the Court of Final Appeal in Hong Kong upheld an equivalent provision in the National Flag and National Emblem Ordinance and in the Regional Flag Ordinance.

[68] The provision in issue in the National Flag Ordinance made it an offence to desecrate the national flag by "publicly and wilfully burning, mutilating, scrawling on, defiling or trampling upon it". The Regional Flag Ordinance is in similar terms.

[69] In that case there was a public demonstration. The national and regional 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.

[70] On the regional flag, one section had been torn off obliterating a portion of part of the 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.

[71] It was accepted in that case that flag desecration is a form of non-verbal speech or expression. The restriction on flag desecration was therefore a breach of expression although the Chief Justice observed it was a limited restriction on that right. The Court, like the United States Supreme Court, accepted that there were legitimate societal and community interests in protecting the flags. In the circumstances, where Hong Kong has a new constitutional order, the Court considered it was necessary to protect the societal interests by means of a criminal sanction. In reaching that conclusion, the Court analysed the concept of public order which is an exception to free speech in the International Covenant on Civil and Political Rights. The Chief Justice continued:

"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. . . . The relevant concept is wider than the common law notion of law and order."

[72] Further, the Chief Justice at p 257 considered:

"First, the concept [of public order] is an imprecise and elusive one. Its boundaries cannot be precisely 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 the function of time, place and circumstances. . . .

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 HKSAR 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 collectivity as a whole."

[73] On this part of the s 5 test it is obvious that there is room for differing views. The United States Supreme Court, for example, was divided on the issue and the dissenting judgments in *Texas v Johnson* and the Hong Kong decision show the arguments for the view that prohibition of such conduct is a justified limit. As the Court of Appeal observed in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at para [18]:

". . . Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise."

[74] In exercising that judgment, it is pertinent that the limitation is a confined one. As the respondent put it, other forms of speech relating to the flag are not affected. As illustrated by the other parts of the protest of which the appellant was a participant, political views were expressed.

[75] On the other hand, the ban in relation to destruction is a blanket one. The matter also needs to be considered against my perception that New Zealand has reached a level of maturity in which staunch criticism is regarded as acceptable. There may well be strong reactions to such criticism but there is an acceptance of the ability to make it.

[76] Obviously, the flag is important. However, even in the United States where the flag is such a dominant symbol, the majority concluded its protection did not warrant the interference of the criminal law. Freedom of expression comes at a cost in the sense that one must accept the ability to say and act in a way that annoys or upsets. Further, as Jackson J stated in *Board of Education v Barnette* 319 US 624 (1943) at p 642:

". . . freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."

[77] Freedom of expression is not without some limits. But in the end I have concluded that the rational connection part of the s 5 test is not met here so that the prohibition on this appellant's conduct was not a justified limit on his free speech.

Ability to read consistently?

[78] The District Court concluded that s 6 did not assist the appellant who was aggrieved at the government and "deliberately sought to startle in order to draw attention to his cause." (para [28]). The Judge saw the matter as one of striking the balance and concluded as follows at para [30]:

> "[30] Adopting the approach suggested in *Moonen* (before) at p 16 paras 17 and 18, I hold that the mental element in s 11(1)(b) requiring proof is susceptible of only one interpretation, and is unaffected, here, by the (commonplace) fact that the [appellant] also had other intentions. Given the New Zealand flag is New Zealand's national symbol, and it is flown and used by all manner of New Zealanders and others in all kinds of circumstances, if the legislature had intended there should be deemed to be no intention to dishonour or to disrespect where the act of flag burning constituted symbolic political speech, then it would have said so in plain terms. If the Act creates a limit on the right to free expression at all, then it must be of minimal effect given that this is, apparently, the first prosecution of its kind in over twenty years since the Act came into effect. In my assessment the prohibition on flag burning with the intention of dishonouring it is justifiable in a free and democratic society."

[79] As noted above, the appellant submits that the application of s 6 of the Bill of Rights necessitated the Court adopting a definition of "dishonour" as equating with "defiling". The appellant as an example, refers to *Black's Law Dictionary* (5th ed, 1979) p 421 which defines "dishonour" as follows:

> "Dishonour . . . as respects the flag, to deface or defile, imputing a lively sense of shaming or an equivalent acquiescent callousness. *State v Schleuter*, 127 NJL 496, 23 A 2d 249, 251."

[80] The respondent's submission is that the Judge was correct that "dishonour" in the 1981 Act had the one meaning, that is, to treat without honour or disrespect. The appellant's suggested meanings are, the respondent says, examples or instances of a form of dishonour or disrespect and not a true alternative to or substitute for "dishonour".

[81] Looking at the statutory scheme as a whole, there is some support for the respondent's view that there is just the one tenable meaning, namely, that adopted by the District Court Judge. However, the better view is that the statute does allow of the narrower meaning of "vilify". If that meaning is adopted, as s 6 of the Bill of Rights demands that it must, I consider s 11(1)(b) can be read consistently with the Bill of Rights. However, I do not accept the respondent's submission that the appellant's conduct would fall foul of this narrower definition of "dishonour", that is, one limited to dishonour in the sense of vilifying. That would have required some additional action on the appellant's part beyond a symbolic burning of the flag. My decision is of course confined to this particular appellant's conduct. What other conduct may come within this narrower interpretation of "dishonour" is a matter for a different case.

[82] On this basis, that is, that the prohibition on the appellant's conduct is not a justified limit on the right to freedom of expression and does not come within the proper Bill of Rights consistent interpretation of s 11(1)(b), the appellant's conviction cannot stand.

Declaration of inconsistency

[83] It is not necessary therefore to consider the appellant's argument for a declaration of inconsistency. I note this issue was not raised in the notice of appeal. If it was to be seriously considered, it should have been expressly addressed in the notice and the notice of appeal should have been served on the Solicitor-General.

Appeal against sentence

[84] In the circumstances, I do not need to consider the appeal against sentence.

Result

[85] The appellant's appeal against conviction is accordingly allowed. The conviction is quashed.

Appendix A

Overseas flag desecration laws

(Taken from http://www.aph.gov.au/library/pubs/bd/2003-04/04bd042.htm#Appendix)

Austria

Penal code prohibits those who in a malicious manner and at a public occasion or a function open to the public, insults, brings into contempt or belittles the flag displayed for official purposes or the national or state anthems of the Austrian Republic or its sStates. The penalty is imprisonment of up to six months or a fine of up to 360 times the fixed daily rate.

Canada

Canada currently has no legislation but there have been attempts (in 2001 and 2002) by private members to introduce flag burning legislation.

China

Under the criminal code the penalty for insulting the national flag is up to three years' imprisonment. An extract from an unofficial translation of the code reads:

> Chinese Criminal Code. Article 299. Whoever purposely insults the national flag, national emblem of the PRC in a public place with such methods as burning, destroying, scribbling, soiling, and trampling is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control or deprived of political rights.

Hong Kong

Hong Kong's National Flag and National Emblem Ordinance, ch 2401, s 7 states:

> Protection of national flag and emblem
>
> A person who desecrates the national flag or national emblem 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 and to imprisonment for 3 years.

France
The website includes an excerpt from the *London Times*, which states that France passed a law in 2003 which makes it an offence to insult the national flag or anthem. The penalty is a fine or up to six months' imprisonment.

Germany
Section 90(a) of the Criminal Code (Strafgesetzbuch, StGB) states as follows:

> **90. Disparagement of the State and its Symbol** – (1) Whoever publicly, in a meeting or through the dissemination of writings (Section 11, subsection (3)):
>
> 1. insults or maliciously maligns the Federal Republic of Germany or one of its Lands or its constitutional order; or
> 2. disparages the colors, flag, coat of arms or the anthem of the Federal Republic of Germany or one of its Lands,
>
> shall be punished with imprisonment for not more than three years or a fine.
>
> (2) Whoever removes, destroys, damages, renders unusable or unrecognizable, or commits insulting mischief upon a publicly displayed flag of the Federal Republic of Germany or one of its Lands or a national emblem installed by a public authority of the Federal Republic of Germany or one of its Lands shall be similarly punished. An attempt shall be punishable.
>
> (3) The punishment shall be imprisonment for not more than five years or a fine if the perpetrator by the act intentionally gives support to efforts against the continued existence of the Federal Republic of Germany or against its constitutional principles.

India
Section 2 of the Prevention of Insults to National Honour Act of 1971 provides for a maximum jail term of three years and a fine:

> **2 Insults to Indian National Flag and Constitution of India.** – Whoever in any public place or in any other place within public view burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon or otherwise brings into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag or the Constitution of India or any part thereof, shall be punished with imprisonment for a term which may extend, to three years, or with fine, or with both.

Italy
The Italian penal code makes it an offence for anyone to publicly insult or vilify the national flag or other emblem of the state. This is punishable by imprisonment from one to three years.

Japan
There is no law against damaging the Japanese flag, however there are laws that prevent the burning of foreign flags as this may be offensive to the foreign country.

Portugal
The Portuguese penal code makes it an offence for:

> 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.

Norway

There is no law relating to the desecration of Norway's own flag but there is a law protecting the flag or national coat of arms of a foreign country.

Turkey

The website states that information from guides, written for travellers to Turkey, state that it is against the law to insult the Turkish nation in any way. This includes defacing or destroying Turkish currency or the national flag and insulting the founder, Atatürk, or the president of the Republic of Turkey.

Appeal allowed.

Solicitors for Hopkinson: *Sladden Cochrane & Co* (Wellington).
Solicitors for the Crown: *Crown Solicitor* (Wellington).

Reported by: Duncan Webb, *Barrister*