

CONFIDENTIAL

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Legislative Council

LC Paper No. LS53/16-17

**Information paper prepared by Legal Service Division on
relevant legal issues relating to the motion
to censure Dr Hon CHENG Chung-tai**

Purpose

This paper sets out the relevant legal issues to assist members of the Investigation Committee in the consideration of the motion to censure Dr Hon CHENG Chung-tai ("Motion") and the particulars stated in the Schedule to the Motion in the performance of its function under Rule 73A of the Rules of Procedure ("RoP").

Dr CHENG's conduct as stated in the Motion

2. According to the Schedule to the Motion, the conduct under investigation is Dr CHENG's inverting the mock-ups of the national flag of the People's Republic of China ("national flag") and the regional flag of the Hong Kong Special Administrative Region ("regional flag") placed on the desks of Members of the Democratic Alliance for the Betterment and Progress of Hong Kong at the Council meeting of 19 October 2016.

Relevant laws on the regulation of the use and protection of the national and regional flags in Hong Kong

Relevant statutory framework

3. Under section 2 of the National Flag and National Emblem Ordinance (116 of 1997) ("the National Flag Ordinance"), "national flag" is defined as the national flag of the People's Republic of China ("PRC") adopted by resolution of the First Plenary Session of the Chinese People's Political Consultative Conference on 27 September 1949.

4. Section 5(1) and (2) requires the national flag for flying to be manufactured in the Hong Kong Special Administrative Region ("HKSAR") by enterprises designated by the Central People's Government and in accordance with the specifications set out in Schedule 1 to the National Flag Ordinance.

5. Under section 2 of the Regional Flag and Regional Emblem Ordinance (117 of 1997) ("the Regional Flag Ordinance"), "regional flag" is defined as the regional flag of HKSAR endorsed at the Fourth Plenum of the Preparatory Committee of the Hong Kong Special Administrative Region on 10 August 1996.

6. Section 5(1) of the Regional Flag Ordinance provides that the regional flag must be manufactured in accordance with the specifications set out in Schedule 1 to the Regional Flag Ordinance. Among others, Schedule 1 to the Regional Flag Ordinance also specifies the standard size of the regional flag which is used for purposes such as a desk flag.

7. Section 4 of both the National Flag Ordinance and the Regional Flag Ordinance provide that a national flag or a regional flag which is damaged, defiled, faded or substandard must not be displayed or used. It is noted that no sanction is provided under the relevant Ordinances for contravention of this provision.

8. Section 7 of the National Flag Ordinance provides that:

*"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."*¹

9. Section 7 of the Regional Flag Ordinance offers the same protection to the regional flag by adopting the same wording as that stated in section 7 of the National Flag Ordinance.²

10. Section 8 of both Ordinances extend the protection from desecration to a copy of the national flag or the regional flag that so closely resembles the national flag or the regional flag as to lead to the belief that the

¹ A level 5 fine stands current at HK\$50,000 (Schedule 8 to the Criminal Procedure Ordinance (Cap. 221)).

² The level of penalty on conviction on indictment is the same as that for section 7 of the National Flag Ordinance. On summary conviction of an offence under section 7 of the Regional Flag Ordinance, the maximum penalty is a fine at level 3 (\$10,000) and one year's imprisonment.

copy in question is the national flag or the regional flag. It is noted that no definition of "copy" is provided in the said Ordinances. According to the *Shorter Oxford English Dictionary* (Sixth edition), "copy", among others, means a piece of written or printed matter that reproduces the contents of another; a transcript or anything (regarded as) made to reproduce the appearance of something else (a picture, personality, etc).

Relevant court cases

11. Section 7 of the National Flag Ordinance and the Regional Flag Ordinance were considered by the Court of Final Appeal ("CFA") in *HKSAR v Ng Kung Siu & Anor* (at **Appendix I**).³ Among the issues considered by CFA were (a) whether section 7 of the National Flag Ordinance and the Regional Flag Ordinance contravened the Basic Law and (b) the meaning of "defiling" in the said section 7. CFA observed that:

*"The implementation of the principle of "one country, two system" is a matter of fundamental importance, as is the reinforcement of national unity and territorial integrity. Protection of the national flag and the regional flag from desecration, having regard to their unique symbolism, will play an important part in the attainment of these goals."*⁴

12. As to what amounts to desecration of the flag concerned by defiling it, CFA held that the ordinary meaning of "defiling" includes dishonouring. CFA considered that by carrying and waving the defaced national and regional flags during the public procession and then tying them to some railings at the end of the procession, the Defendants were clearly dishonouring the flags. On this basis, CFA held that these acts amounted to desecration of the flags by defiling them.⁵

13. CFA's decision in *Ng Kung Siu* was followed by the Court of First Instance ("CFI") in *HKSAR v Koo Sze Yiu and Ma Wan Ki*⁶ (a case concerning the burning of a regional flag) (at **Appendix II**). CFI held that the word "desecrate" does not bear any specific or one-way meaning. Adopting a literal interpretation, even the act of putting words of praise on the national or the regional flag would be an offence for it would constitute "scrawling on" the flag. Therefore, the purpose of section 7 of the National Flag Ordinance and the Regional Flag Ordinance is simply to preserve the dignity of the

³ [2000] 1 HKC 117.

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

⁵ *Ibid.*, at 133I–134B.

⁶ HCMA 482/2013. The issue in this case is whether burning a regional flag can be regarded as defiling the national flag.

national/regional flag against desecration in the broad sense of the word.⁷ In respect of this case, the Appeal Committee of CFA refused to grant leave to the Defendants to appeal to CFA in October 2014 (FAMC 40/2014).

14. CFA's decision was also considered in a New Zealand case in *Hopkinson v Police* (at **Appendix III**).⁸ In that case, the Defendant who participated in a protest attached a New Zealand flag upside down to a pole, doused it in kerosene and lit it. He was then charged and convicted of destroying the New Zealand flag with the intention of dishonouring it under section 11(1)(b) of the Flags, Emblems, and Names Protection Act 1981. On appeal, the High Court of New Zealand, having considered authorities in other jurisdictions, including CFA's decision in *Ng Kung Siu*, adopted a narrow definition of "dishonour" and held that the word "dishonour" in section 11(1)(b) of the Flags, Emblems, and Names Protection Act should be read as requiring "vilification" of the flag in order for it to be consistent with the Bill of Rights. With this interpretation, the Court held that the Defendant's conduct did not amount to vilifying the flag, and on this basis, the Defendant's conviction was quashed.⁹

15. According to our research, the relevant Hong Kong cases where criminal sanction was imposed pursuant to section 7 of the National Flag Ordinance and the Regional Flag Ordinance involved physical damage to or defacing of the national flag or the regional flag and the act of desecration was committed publicly and wilfully.

Protection of national flag in other jurisdictions

16. In *Ng Kung Siu & Anor*, CFA examined the national flag protection laws of the United States of America, Italy, Germany, Norway, Japan and Portugal. CFA noted that in other overseas nations, some of them criminalised flag desecration while some of them did not.¹⁰

17. CFA also observed that there were considerable differences between the actual terms of the flag and emblem protection laws of the various nations which have such laws. By way of example, CFA quoted the English translation of art 332(1) of the Portuguese Penal Code: "*Anyone who by words, gesture, in writing or by any other means of public communication, desecrates*

⁷ Ibid, paragraph 17.

⁸ [2004] 3 NZLR 704.

⁹ Ibid, paragraph 81 at page 717.

¹⁰ [2000] 1 HKC 117 at 146B-C.

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." CFA observed that on its face, that provision of the Portuguese Penal Code appeared to criminalise a considerable number of things which our own flag and emblem protection laws did not criminalise.¹¹

18. We have also attempted to study how national flag is protected in other jurisdictions. Our findings are set out in the following paragraphs.

United Kingdom ("UK")

19. There is no legislation in relation to the protection and use of national flag or national emblem in UK.

Australia and Canada

20. The Flags Act 1953 of Australia only prescribes the formats of its national flag. In Canada, all Canadians are encouraged to proudly display the National Flag of Canada.¹² Desecration of national flags is not an offence in Australia and Canada.

New Zealand

21. Section 11 of the Flags, Emblems, and Names Protection Act 1981 ("Act") prescribes that:

"(1) Every person commits an offence against this Act who,--:

- (a) Without lawful authority, alters the New Zealand Flag by the placement thereon of any letter, emblem, or representation;*
- (b) 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."*

22. As to how the New Zealand courts have construed and applied section 11(1)(b) of the Act, members may refer to the case of *Hopkinson v Police* mentioned in paragraph 14 above.

¹¹ Ibid, at 146H-I and 147A-B.

¹² Section 2 of Statutes of Canada 2012, Chapter 12 (An Act respecting the National Flag of Canada).

The taking of the Legislative Council Oath

Relevant provisions on oath taking

23. The requirement to take the oath originates from Article 104 of the Basic Law ("BL 104"), which provides that:

"when assuming office ... members ... of the Legislative Council ... must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China."

24. Section 19 of the Oaths and Declarations Ordinance (Cap. 11) requires a Legislative Council ("LegCo") member to take the oath as soon as possible after the commencement of his term of office. The form of oath required to be taken by Members is set out in Schedule 2 to Cap. 11.

25. On 7 November 2016, the Standing Committee of the National People's Congress of PRC in the exercise of its power under Article 158(1) of the Basic Law pronounced an interpretation ("the Interpretation") of the meaning of BL 104. According to the Interpretation, oath taking is the legal prerequisite and required procedure for public officers specified in BL 104 to assume office. The oath taken under BL 104 is a legal pledge made to PRC and HKSAR and is legally binding. The oath taking must comply with the legal requirements in respect of its form and content and that an oath taker must take the oath sincerely and solemnly.¹³

Relevant court decisions

26. In *Leung Kwok Hung v Clerk to the Legislative Council*,¹⁴ the Court held that the LegCo Oath constitutes a solemn declaration, a form of promise, which binds the maker to a particular code of conduct. A failure to adhere to that code of conduct may render the maker liable to expulsion from office.¹⁵ The requirements of oath taking under BL 104 and Cap. 11 were further considered by CFI and the Court of Appeal in the legal proceedings

¹³ L.N. 169 of 2016 (unofficial Instrument no. A115 in Hong Kong e-Legislation (<http://www.elegislation.gov.hk>)).

¹⁴ HCAL 112/2004.

¹⁵ *Ibid*, paragraph 5.

concerning the validity of the oaths taken by Sixtus Leung Chung Hang and Yau Wai Ching ("*Leung and Yau*").¹⁶

Meaning of "misbehaviour" and "breach of oath" under Article 79(7) of the Basic Law ("BL 79(7)")

BL 79(7)

27. BL 79(7) provides that:

"The President of the Legislative Council of the Hong Kong Special Administrative Region shall declare that a member of the Council is no longer qualified for the office under any of the following circumstances:

(7) *When he or she is censured for misbehaviour or breach of oath by a vote of two-thirds of members of the Legislative Council present."*

Principles applicable to interpretation of the Basic Law

28. The principles applicable to interpretation of the Basic Law, as laid down by CFA in *NG Kar Ling v Director of Immigration*¹⁷ and *Director of Immigration v Chong Fung Yuen*,¹⁸ are summarised below:

- (a) A purposive approach should be applied and that in interpreting the Basic Law, the courts' role is to construe the language in order to ascertain the legislative intent as expressed in the language which is to be considered in the light of its context and purpose.
- (b) To assist in interpretation, the courts consider what is within the Basic Law, including provisions other than the provisions in questions and the Preamble.
- (c) Extrinsic materials which throw light on the context or purpose of the Basic Law may generally be used as an aid to the interpretation of the Basic Law. The extrinsic materials relevant to the

¹⁶ HCAL 185/2016 and HCMP 2819/2016; and CACV 224/2016, CACV 225/2016, CACV 226/2016 and CACV 227/2016 (on appeal from HCAL 185/2016 and HCMP 2819/2016).

¹⁷ (1999) 2 HKCFAR 4.

¹⁸ (2001) 4 HKCFAR 211.

interpretation of the Basic Law are, generally speaking, pre-enactment materials.

- (d) However, in the absence of a binding interpretation by the Standing Committee of the National People's Congress, extrinsic materials, whatever their nature, cannot affect interpretation where the courts conclude that the meaning of the language, when construed in the light of its context and purpose ascertained with the benefit of internal aids and appropriate extrinsic materials, is clear.

Meaning of "misbehaviour" under BL 79(7)

29. It is noted that no definition of "misbehaviour" or "misbehave" is provided in BL 79(7) nor in RoP. In the course of our research, we have not identified any judicial authorities on the meaning of "misbehaviour" or "misbehave" in the context of censuring a Member. According to the *Shorter Oxford English Dictionary* (Sixth edition), "misbehave", among others, means behaving badly and conducting oneself improperly.

30. We have also referred to the available records of the Basic Law Drafting Committee and the Basic Law Consultative Committee, but cannot find any record of discussion on the meaning or scope of "misbehaviour" referred to in BL 79(7).

31. It is noted that BL 79(1) to (7) set out the various scenarios for disqualification of Members. Those set out in BL 79(1) to (6) seem to be manifestation of the various circumstances under which a Member is considered to be incapable of carrying out the duties and discharging the functions of the office of a LegCo Member. Applying the principles of interpreting the Basic Law set out in paragraph 28 above, it seems that one possible interpretation of "misbehaviour" in BL 79(7), when read in the context of BL 79, is that it relates to misbehaviour of a nature which affects the Member's ability to carry out his duties as a LegCo Member.

Meaning of "breach of oath" under BL 79(7)

32. The phrase "breach of oath" is not defined in the Basic Law or RoP. We have not identified any judicial decisions on the types of conduct that would amount to breach of oath in the present context. The cases on oath taking mentioned in paragraph 26 above and the Interpretation concern whether the oaths taken by Members are valid under BL 104 and Cap. 11 for the purpose of assuming office of LegCo Members. The issue of breach of oath under BL 79(7) was not considered in these cases.

33. According to the Interpretation, the taking of the oath stipulated by BL 104 is a legal pledge made by the specified public officers to PRC and HKSAR, and is legally binding.¹⁹ As such, in considering whether there is a breach of oath, members may consider whether or not the act of Dr CHENG is consistent with his pledge made under the LegCo Oath to PRC and HKSAR that he would uphold the Basic Law and swear allegiance to HKSAR of PRC.

Previous consideration by the Committee on Rules of Procedure and the Investigation Committee in respect of the motion to censure Hon KAM Nai-wai

34. What behaviour should be regarded as falling within the meaning of "misbehaviour" or "breach of oath" under BL 79(7) was considered by the Committee on Rules of Procedure ("CRoP") in 1999. CRoP studied the practice of overseas legislature and noted that in none of the overseas legislatures had it been possible to draw up an exhaustive list of misconduct, or the types of sanction which might be imposed. Each case was judged by the House according to the degree of seriousness involved. It is also noted that these overseas legislatures upheld the guiding principle that the House should exercise its penal jurisdiction as sparingly as possible and only when satisfied that it was essential to do so in order to provide reasonable protection for the House and its Members.²⁰ After deliberation, CRoP concluded that it would be more appropriate for the Council of the day to make a decision on the kind of behaviours which would be regarded as "misbehaviour" or "breach of oath" leading to the disqualification of a Member from office under BL 79(7).²¹

35. The meaning of "misbehaviour" was also considered by the Investigation Committee established to consider a motion to censure a Member Hon KAM Nai-wai ("the former IC"). After deliberation, the former IC concluded that it was by no means easy to formulate clear and explicit criteria for defining "misbehaviour". It further observed that while BL 79(7) has not explicitly stipulated that "misbehaviour" should cover only the conduct of Members in the discharge of their duties as Members, the mechanism in question should not be applicable to conduct purely related to a Member's personal or private life, unless such conduct seriously affect the reputation of LegCo as a whole.²²

¹⁹ The Interpretation, paragraph 3.

²⁰ *Progress Report for the period July 1998 to April 1999 of the Committee on Rules of Procedure of the Legislative Council* at page 17, paragraph 2.47.

²¹ *Ibid*, at page 18, paragraph 2.49.

²² *Report of the Legislative Council Investigation Committee established under Rule 49B(2A) of the Rules of Procedure in respect of the Motion to censure Honourable KAM Nai-wai*, paragraph 5.7.

Members' powers and privileges under Article 77 of the Basic Law and the Legislative Council (Powers and Privileges) Ordinance (Cap. 382)

36. Article 77 of the Basic Law ("BL 77") provides that:

"Members of the Legislative Council of the Hong Kong Special Administrative Region shall be immune from legal action in respect of their statements at meetings of the Council."

37. BL 77 is reflected in sections 3 and 4 of Cap. 382. Section 3 provides that:

"There shall be freedom of speech and debate in Council or proceedings before a committee and such freedom of speech and debate shall not be liable to be questioned in any court outside the Council."

38. Section 4 of Cap. 382 further provides that:

"No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Court or a committee, or by reason of any matter brought by him therein by petition, Bill, resolution, motion or otherwise."

39. In the case of *Leung and Yau*, the following principles relating to LegCo Members' immunities were set out by CFI:²³

- (a) the plain and ordinary meaning of the word "statement" used in BL 77 is to mean statements made by a LegCo member in the course of official debates on the floor of LegCo when exercising his powers and discharging his functions as a LegCo member;²⁴
- (b) sections 3 and 4 of Cap. 382 do not add anything further and must be read consistently with the constitutional provisions of BL 77;²⁵ and
- (c) the plain words of sections 3 and 4 of Cap. 382 make it even clear that the immunity provided attaches only to words and speeches (spoken or written) in relation to debates in LegCo meetings.²⁶

²³ HCAL 185/2016 and HCMP 2819/2016.

²⁴ Ibid, at paragraph 86.

²⁵ Ibid, at paragraph 88.

²⁶ Ibid.

40. Applying the above principles to the present case, since Dr CHENG's act did not involve making statements, spoken or written, in the course of LegCo debates, we do not consider that the protection provided in BL 77 and Cap. 382 would apply.

Matters that may be taken into consideration by Investigation Committee

41. Rule 73A(2) of RoP states that the Investigation Committee shall be responsible for establishing the facts stated in the motion moved under Rule 49B(1A) of RoP (Disqualification of Member from office), and giving its views on whether or not the facts as established constitute grounds for the censure.

42. In considering the Motion, with reference to the issues set out in the above paragraphs, members may wish to deliberate and make decisions on the following matters:

- (a) while the mock-ups of the national flag and regional flag concerned may not conform to the specifications set out in the relevant Ordinances, whether they so closely resemble the national flag or regional flag as to lead to the belief that the copy in question is the national flag or regional flag;
- (b) the nature of Dr CHENG's act vis-a-vis the mock-ups of the national flag and regional flag concerned and his intention at the time of the act;
- (c) the relationship between Dr CHENG's act and his pledge made under the LegCo Oath to PRC and HKSAR that he would uphold the Basic Law and swear allegiance to HKSAR of PRC;
- (d) the types of behaviours which would be considered to be "misbehaviour" or "breach of oath" leading to the disqualification of a Member from office under BL 79(7) – whether different considerations should apply with regard to the level of gravity of a Member's alleged misbehaviour; and
- (e) the standard of proof required for determining whether the alleged misbehaviour is substantiated.

Conclusion

43. This paper has identified issues which may assist IC in coming to an independent decision on whether the facts stated in the Motion are established and whether or not the facts as established constitute sufficient grounds for the censure of Dr CHENG under BL 79(7). We are prepared to advise on any other issues that the Investigation Committee considers are also relevant.

Prepared by

Legal Service Division
Legislative Council Secretariat
29 March 2017

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 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

C

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

D

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) – 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

E

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 – 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

F

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

G

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 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* [1992] 1 HKLR 185 and *Wong Yeung Ng v S-J* [1999] 2 HKC 24 considered (at 140B-D, 140G-141A).

B
C
D (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 defaced flag, having chosen the same for its defaced condition, was to defile the flag thus desecrating it (at 133I-134B).

E
F (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 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 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:

G (4) In determining whether legislation was constitutional, the Court had to consider whether the approach chosen by the legislature was one permitted by the 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).

H
I (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 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 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).

Cases referred to

- German Flag Desecration Case, The* (1990) 81 Entscheidungen des Bundesverfassungsgerichts 278 (Constitutional Court of Germany)
- HKSAR v Ng Kung Siu & Anor* [1999] 2 HKC 10 (MC), (CA), [1999] 1 HKLRD 783 (CA)
- Levy v Victoria* (1997) 189 CLR 579 (HCA)
- Ming Pao Newspapers Ltd v Attorney General of Hong Kong* [1996] AC 907 (PC)
- Paris Renato, Re* (Corte Suprema di Cassazione, Judgment No 1218, General Registry No 3355 of 1988, unreported) (Court of Cassation of Italy)
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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.

- F 'Brandeis Brief': Form of appellate brief in which economic and social 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 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.
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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

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- 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 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 effective as of 1 October 1990. Article 1 states that this Law is enacted in accordance with the Constitution 'with a view to defending the dignity of the National Flag, enhancing citizens' consciousness of the State and promoting the spirit of patriotism'. Article 2 prescribes that the national flag shall be a flag with five stars and that it shall be made according to the specified Directions. Article 3 provides:

The National Flag of the People's Republic of China is the symbol and hallmark of the People's Republic of China.

All citizens and 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 private funeral activities. Article 19 provides:

- I 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.

A *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:

F 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.

G 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:

- H (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.
- I (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

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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.

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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:

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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'.

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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:

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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.

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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 Executive. Contravention is a criminal offence. Section 6(1) and 6(2).

B 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 —

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- (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 defiling the same.

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The convictions

- G On 18 May 1998, both respondents were convicted of the two offences. Each respondent was bound over to keep the peace on his own recognisance of \$2,000 for 12 months for each offence [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):

- I This case arises from a public demonstration in Hong Kong on 1st January 1998, organised by the Hong Kong Alliance in Support of the Patriotic Democratic Movement in China. The demonstration consisted of a public meeting and a public procession from Victoria Park to the Central Government

Offices of the Hong Kong Government at Lower Albert Road. The public meeting and the public procession were both lawful and orderly.

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

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

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

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

Court of Appeal

The respondents appealed against conviction to Beeson J in the Court of First Instance. On 8 December 1998 on the parties' joint application, she reserved the appeals to the Court of Appeal. On 23 March 1999, that Court (Power 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.

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A *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.

B *The new point*

C 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:

D 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.

E 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.

F 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.

G 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.

H 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.

I 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
C magistrate and the Court of Appeal have referred to the freedom of expression rather than the freedom of speech. I shall do likewise. But my judgment would apply equally if the restriction is considered in relation to the freedom of speech.

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

E *The extent of restriction*

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

H As has been observed, flag desecration is symbolic expression or non-verbal expression. A person desecrating a national flag as a means of expression would usually be expressing a message of protest. But the message he seeks to convey may not be clear. The message may be one of hatred or opposition directed to the nation. Or it may be one of protest against the ruling government. Or the person concerned may be protesting
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 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' 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 '*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.

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

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

- 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 by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society'.

- E 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.

- F 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

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

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

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

D 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.

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

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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.

H I would allow the appeal and would restore the convictions and the binding over ordered by the magistrate.

I 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 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

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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 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.

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

D And I now deal with this issue.

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Freedom of expression: substance and mode

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

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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.

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

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- (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.

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

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

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

I This revelation of his distaste for the result does not weaken — rather does it strengthen — Kennedy J's concurrence. For it demonstrates how convinced he must have been that such result was unavoidable if freedom of speech was to be maintained. But what emerges from this revelation by a member of the majority of his distaste for the result as well as from the

minority judgments is that cases of this kind are what lawyers call 'hard cases'.

Other overseas nations

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

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

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- A 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.'

B 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.

C *Two coherent approaches*

D 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.

E 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.

F *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.

G This does not involve deference to the legislature. It is simply a matter of maintaining the separation of powers.

H 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.

I *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

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Appendix II

[English Translation - 英譯本]

HCMA 482/2013

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO. 482 OF 2013
(ON APPEAL FROM ESCC NO. 918 OF 2013)

BETWEEN

HKSAR

and

KOO SZE YIU (古思堯)

1st Appellant

MA WAN KI (馬雲祺)

2nd Appellant

Before: Hon Derek Pang J in Court

Date of Hearing: 6 March 2014

Date of Judgment: 27 March 2014

JUDGMENT

1. The two appellants (“D1” and “D2”) were jointly charged with the offence of “attempting to desecrate the regional flag”, contrary to section 7 of the Regional Flag and Regional Emblem Ordinance (No. 117 of 1997) (“Regional Flag Ordinance”) and section 159G of the Crimes Ordinance, Cap 200 of the Laws of Hong Kong. They were convicted as charged after trial before Magistrate Mr Joseph To and were sentenced respectively to 4 months’ imprisonment suspended for 2 years and 230 hours’ community service. D1 and D2 now appeal the convictions and sentences.

Facts

2. On 1 April 2012, a demonstration and procession with the theme of “protesting against the Central Government for interfering with the election of the Chief Executive, and fighting for the early implementation of democratic universal suffrage” took place outside the Liaison Office of the Central People’s Government in the Hong Kong Special Administrative Region in the Western District. It can be seen from the video clips from the police, the mass media and the internet, all of which had been produced by way of admitted facts, that D1 and D2, who were in a crowd of people, individually or jointly set fire to a flag of the Hong Kong Special Administrative Region with a lighter or burning newspaper. Police officers at the scene attempted to approach D1 and D2 to stop their act but were obstructed by other demonstrators. Eventually, the police managed to put out the fire by using fire extinguishing sprays. During the incident, part of the burning newspaper landed on the hand/arm of the flag bearer.

The trial

3. D1 and D2 did not dispute the facts of the case. They neither testified nor called any witness. They asked the Magistrate to declare that section 7 of the Regional Flag Ordinance was inconsistent with articles 27[1] and 39[2] of the Basic Law and article 16[3] of the Hong Kong Bill of Rights. Some of the arguments advanced by D1 and D2 at trial overlap some of the grounds of the present appeal, and later in this judgment I shall deal with them as necessary. Referring to the Court of Final Appeal judgment in *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442, the Magistrate ruled against D1 and D2 on all of their arguments and convicted them of the offence as charged.

The appeal against convictions

4. Two grounds of appeal have been advanced on behalf of the appellants. To facilitate discussion, I will first deal with ground (2), which contends that the Magistrate erred in holding that section 7 of the Regional Flag Ordinance was not unconstitutional.

Ground of appeal (2) — Part one

5. The above complaint in fact comprises two aspects. The first aspect, which was not put forward at trial and was relied on for the first time on appeal, relates to the entire article 16 of the Hong Kong Bill of Rights (“Bill of Rights”):

“Article 16

Freedom of opinion and expression

(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; or

(b) for the protection of national security or of public order (ordre public), or of public health or morals.

[cf. ICCPR Art. 19]”

6. It is submitted on behalf of the appellants that in *Ng Kung Siu* the Court of Final Appeal focused only on article 16(2) and the restrictions imposed by article 16(3) on article 16(2) and overlooked what article 16(1) seeks to protect, namely, the right to hold opinions without interference. In other words, whatever view a person may hold towards the Regional flag, it is an absolute right conferred on that person by article 16(1) and not to be restricted by article 16(3). The criminalization of the desecration of the regional flag under section 7 of the Regional Flag Ordinance is (it is submitted) tantamount to undermining or depriving a person of this absolute right by means of regulating with public powers the orthodox symbolic meaning of the regional flag and compelling members of the public to observe that symbolic meaning in what they say and do. Therefore, section 7 of the Regional Flag Ordinance has (it is submitted) contravened both the Bill of Rights and the Basic Law.

7. The grounds relied on to support this argument are as follows.

8. In respect of article 19 of ICCPR (the blueprint for article 16 of the Hong Kong Bill of Rights), the Human Rights Committee of the United Nations provided the following explanatory statement in General Comment No 34^[4] which was published on 12 September 2011 (“General Comment 34”). It establishes the absolute nature of the right to hold opinions:

“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. The appellants also rely on the decision of the Supreme Court of the USA in *Texas v Johnson* 491 US 397 (1989). J, the defendant in that case was a member of a group of demonstrators who assembled outside the venue of a Republican National Convention to protest against the policies of the US President. During that time, someone removed the USA flag from the flag pole; J took it, poured kerosene on it and set it on fire. The demonstrators then shouted "America, the red, white, and blue, we spit on you". As a result, J was charged with and convicted of desecrating the national flag. After a number of cross-appeals, the matter finally reached the Supreme Court of the United States. The Court held that the law of the state in question was inconsistent with what I refer to as the right to freedom of speech for short, as guaranteed by the First Amendment to the US Constitution[5], the reason being that this law was directed at the content of the message behind the burning of the flag and not merely at the mode by which the message was expressed, and furthermore, the nation was not entitled to foist its view of the flag on its subjects through the penal code:

"[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. The nation was not so entitled because the crux of the First Amendment was the protection of diversity:

"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. Dissatisfied with the judgment in *Texas v Johnson*, the Congress passed a Federal law protecting the national flag, but in a subsequent case Supreme Court of the United States held, for the same reasons, that the Federal law was unconstitutional: *United States v Eichman* 496 US 310 (1990).

12. The appellants further point out that, ten years ago, having considered the above two US cases and the judgment in *Ng Kung Siu*, the High Court of New Zealand ruled that the Flags Act of New Zealand was inconsistent with the freedom of speech: *Hopkinson v Police* [2004] 3 NZLR 704.

Discussion

13. As far as the interpretation of the Hong Kong Bill of Rights is concerned, there is no doubt that the General Comments issued by the UN Human Rights Committee provide assistance which is most direct and which carries considerable weight. This has been confirmed by decided cases[8]. Nevertheless, the passage in General Comment 34 quoted above is obviously directed at the criminalization of the holding of an opinion. For example, it would certainly be contrary to article 19.1 of ICCPR to provide that it was unlawful for a person to hold/not to hold a religious belief. On the other hand, the Comment does not point out what necessary relationship there is between article 19.1 (the right to hold opinions without interference) and article 19.2 (the right to freedom of expression) of ICCPR. Nor does it state that a restriction on the latter would jeopardize the former. Therefore, this Comment does not assist the appellants.

14. As far as American jurisprudence is concerned, I notice that, unlike ICCPR, the First Amendment draws no distinction between the right to hold opinions and the right to freedom of expression[9]. However, it appears that the Supreme Court of the United States did not equate the two. The fact that the act of burning the flag and the position expressed through the burning of the flag have been viewed in the same light in the case law does not mean that the freedom of expression and the right to hold opinions are to be regarded as one and the same. The relevant law was considered unconstitutional because it authorized the State to provide for its own definition of the so-called orthodox concept and to punish those of its subjects who by conduct expressed different views on the national flag. The relevant law was considered unconstitutional not because it required its subjects to feel deep veneration for the flag in all circumstances. The former touched only on the freedom of expression, while it is the latter that touched on the right to hold opinions.

15. I also notice some issues regarding statutory interpretation. In *Texas v Johnson*, the relevant state law defined “desecration” as any physical mistreatment which the actor knew would seriously offend those who observed or discovered the act:

“[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]

In other words, this law did not seek to protect the physical integrity of the national flag in all circumstances; what the law did was protect the national flag from impairments which would cause serious offence to others. This was also the reason why the law in question was regarded as content-based (what was the proper attitude that people should have towards the national flag?):

“[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. This is distinguishable from section 7 of the Regional Flag Ordinance, which provides as follows:

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

(a) on conviction on indictment to a fine at level 5 and to imprisonment for 3 years; and

(b) on summary conviction to a fine at level 3 and to imprisonment for 1 year.”

17. According to the analysis made by Li CJ in *Ng Kung Siu*, the word “desecrate” does not bear any specific or one-way meaning. On a literal interpretation, even the act of putting words of praise on the national/Regional flag would be an offence for it would constitute “scrawling on” the flag. Therefore, be it section 7 of the National Flag Ordinance (for short) or section 7 of the Regional Flag Ordinance, its purpose is simply to preserve the dignity of the national/regional flag against desecration in the broad sense of the word:

“... 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 lawseeking 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. Consistent with this, Bokhary PJ expressed the following views in his judgment:

“... 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. As to the origin of the dignity of the national/regional flag, Li CJ explained that the flag commands respect as it is the symbol of the Nation or the Special Administrative Region, and it is beyond dispute that both the Nation and the Special Administrative Region have a legitimate interest in protecting these symbols:

“The society in the People’s Republic of China, the country as a whole, including the Hong Kong Special Administrative Region, has a legitimate interest in protecting their national flag, the unique symbol of the Nation. Similarly, the community in the Hong Kong Special Administrative Region has a legitimate interest in protecting the regional flag, the unique symbol of the Region as an inalienable part of the People’s Republic of China under the principle of ‘one country, two systems’. The existence of these legitimate interests has not been challenged in argument before us.”[14]

As a matter of fact, even the Supreme Court of the United States recognized such legitimate interests; it was only that a certain legal provision which purported to defend these interests had, in the Supreme Court’s view, overstepped the line and was therefore unconstitutional.

20. I have thus far outlined the reasons for distinguishing between *Texas v Johnson* and *Ng Kung Siu*. I have not overlooked the problem that *US v Eichman* may give rise to. As pointed out above, the relevant Federal Act was designed to circumvent *Texas v Johnson* and therefore, taking an approach similar to that of section 7 of the National Flag Ordinance and the Regional Flag Ordinance, did not expressly provide that the prohibited act had to offend anyone. Still, the Act was held by the Supreme Court of the United States to be unconstitutional.

21. However, the summary of the judgment of that case^[15] indicates that the above decision on unconstitutionality was based on the interpretation of the relevant Act by the Supreme Court. The Supreme Court was of the view that, even with the removal of the requirement that the conduct in question would cause offence to anyone, the Act was in substance still directed at the content of the message rather than the mode of expressing it. Simply put, the Act sought to prohibit any act done to the national flag which might express unpatriotic sentiments:

“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. For this reason, the decision in *US v Eichman* does not have much referential value in Hong Kong. On the other hand, I am bound by the view expressed by the Court of Final Appeal that section 7 of the National Flag Ordinance and section 7 of the Regional Flag Ordinance do not bear any specific or one-way meaning but only seek to prohibit a certain mode of expression:

“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. Finally, in *Hopkinson v Police*, a New Zealand case which should be described as neutral, the presiding High Court Judge France J considered the Hong Kong case of *Ng Kung Siu* and the aforementioned two US cases and concluded by pointing out that on this subject-matter there obviously was room for divergent views and that even the judgment in *Texas v Johnson* was only a majority judgment^[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]

No doubt, as far as the issue of flag desecration is concerned, subject to the principle that human rights shall be protected, individual jurisdictions can only be left to make their own judgments. ^[19]

24. In summary, I do not think the appellants' complaint is made out. General Comment 34 deals only with the criminalization of the holding of opinions, and the US Supreme Court cases have nothing to do with the right to hold opinions without interference. As they involve a different interpretation of the legal provisions, the US cases are of limited assistance in the analysis of the issue before me.

Ground of appeal (2) — Part two

25. I now turn to the defence which D1 and D2 raised at trial. It was not accepted by the Magistrate and is now raised again. The defence is that that there is sufficient room in the judgment of *Ng Kung Siu* to allow the lower courts of today (that is, 15 years later) not to follow the decision of that case. It is further argued that that decision is open to question as there have been more thorough discussions on the laws relating to legitimate restrictions on human rights since the time of that decision.

26. The specific submissions made on behalf of the appellants are set out below.

27. Li CJ pointed out in the aforesaid judgment that with the reunification of Hong Kong with the PRC, and under the principle of “one country, two systems”, Hong Kong had become a Special Administrative Region and an inalienable part of the PRC, and accordingly, the legitimate interests in protecting the national and regional flags were within the concept of public order (*ordre public*):

“As to the time, place and circumstances with which we are concerned, Hong Kong has a new constitutional order. On 1 July 1997, the People’s Republic of China resumed the exercise of sovereignty over Hong Kong being an inalienable part of the People’s Republic of China and established the Hong Kong Special Administrative Region under the principle of ‘one country, two systems’. The resumption of the exercise of sovereignty is recited in the Preamble of the Basic Law, as ‘fulfilling the long-cherished common aspiration of the Chinese people for the recovery of Hong Kong’. In these circumstances, the legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag are interests which are within the concept of public order (*ordre public*).”[20]

28. As to why Li CJ had to mention time, place and circumstances, one has to read the passage immediately preceding the above extract. There, having referred to the relevant authorities, including “Permissible Limitations on Rights”[21] by Professor Kiss, Li CJ accepted that public order was an imprecise concept which varied with time, place and circumstances:

“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. Therefore, in his article “Basic Law and Constitutional Review: The First Decade”, Professor Johannes Chan Man-mun, SC (Hons) pointed out that the above view might suggest that the offence of desecrating the national/regional flag was only justified in the early stage of the establishment of the Special Administrative Region and might not be justifiable long after its establishment:

“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. On that basis, the appellants further submit that since *Ng Kung Siu*, Hong Kong has undergone significant changes in various aspects — the rule of law is under threat, senior government officials are corrupt, public confidence in such matters as the implementation of “one country, two systems”, high autonomy, democratization of the political system and protection of human rights has suffered a considerable setback. As a result of these regressions, the regional flag has lost much of its symbolic meaning in the eyes of Hong Kong people, and the importance of the government’s legitimate interests in protecting the regional flag has gradually diminished (if not completely gone). Such public order, which has changed with time and circumstances, should no longer be regarded as capable of supporting the argument that section 7 of the Regional Flag Ordinance is not unconstitutional.

31. The appellants also submit that in a subsequent case *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229, the Court of Final Appeal clearly set out the essential conditions to be satisfied before a right could be lawfully restricted[24]. Subsequent thereto, the UK House of Lords made some additional observations in this respect: *Huang v Secretary of State for the Home Department* [2007] 2 AC 167[25]. The appellants submit that Professor Kiss[26] and Professor Nowak[27] have expressed mutually consistent views, namely that public order must operate in a legal framework which has incorporated fundamental human rights; further, the concept of public order *per se* requires respect for human rights in the exercise of public powers.

32. The appellants further submit that General Comment 34 referred to above has laid down stringent requirements on the restrictions permitted by article 19.3 of ICCPR, i.e. article 16(3) of the Bill of Rights. The same document also points out that it was the court’s duty to evaluate public order and that the court should not attach any weight to the views of the legislature. It is submitted that the above matters cast doubt on the correctness of the decision in *Ng Kung Siu*, and that the court should give a remedial interpretation to section 7 of the Flag Ordinance by reading into it a lawful excuse for desecrating the regional flag, namely “promotion of multi-party democracy and human rights”, so that the section does not contravene the Basic Law and the Bill of Rights.

Discussion

33. The decision in *Ng Kung Siu* is directly relevant to articles 16(2) and 16(3) of the Bill of Rights. I accept with respect and am bound by the reasons for judgment of the Court of Final Appeal in that case. Therefore, I find neither necessity nor room for a detailed consideration of this part of the appellants' submissions.

34. It only remains for me to mention that, in the context of the relevant issue, the so-called time, place and circumstances in relation to public order should refer to the new constitutional order that governs Hong Kong and not anything else. This can clearly be seen from the passage, quoted in paragraph 27 above, from the judgment given by Li CJ. In that part of the judgment, Li CJ made no reference to non-constitutional matters such as the prevalent feelings and patriotic sentiments of the Hong Kong residents. He only mentioned that the PRC resumed the exercise of sovereignty over Hong Kong and established the Hong Kong Special Administrative Region under the principle of "one country, two systems", and that Hong Kong was an inalienable part of the PRC. Of course, he also pointed out that according to the Preamble of the Basic Law, the resumption of the exercise of sovereignty was the common historical aspiration of the Chinese people, not just Hong Kong residents. As long as the Basic Law continues to take effect, I cannot see how public order, so defined, can be affected by possible changes in social circumstances.

35. This position can be said to have been affirmed in a more recent Court of Final Appeal case of *Democratic Republic of the Congo & Others v FG Hemisphere Associates LLC* (2011) 14 HKCFAR 95:

"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."

Ground of appeal (1)

36. This ground complains that the Magistrate erred in adding his personal views to his decision. In other words, he foisted his own views of the orthodox symbolic meaning of the regional flag on members of the public.

Discussion

37. The Magistrate's remarks which form the subject of the appellants' criticism are set out in paragraphs 50 to 59 of his Statement of Findings:

"50. It is the view of the court that, apart from domestic law and order, *ordre public* also covers considerations of satisfying collective needs, foreign or external conduct and public well-being. Therefore, the court must further consider the internal and external meaning of the regional flag following the handover of Hong Kong.

51. Over the past 16 years, under the regional flag, athletes of the Special Administrative Region have participated in international sporting events and achieved remarkable successes. Also under the regional flag, political and economic officials of the Special Administrative Region have attended international conferences, striving to promote the well-being of the people of the Region.

52. Furthermore, the efforts made jointly and collectively by people of the Special Administrative Region during the past 16 years for the sake of public well-being are recognized and endorsed by the international community. There is no denying that the Special Administrative Region is a major international financial hub. The Financial Development Report of the World Economic Forum in both 2011 and 2012 ranked the Special Administrative Region the world's first. The Region was ranked third in the global competitiveness index in 2013. More importantly, the Region was ranked No.13 among the 186 countries/territories around the world in the Human Development Index published by the United Nations in 2013, with Singapore ranked No.18 and the UK No.26. The Region was ranked No.24 in the same Index in 2007.

53. The court is of the view that, over the past 16 years, the regional flag has acquired obvious significance externally. It symbolizes the efforts and contributions that countless Hong Kong people have made towards the well-being of the public.

54. Internally, over the past 16 years the number of processions and assemblies had risen exponentially from 1,190 in 1997 to 7,529 last year, many of which involved political issues.

55. One cannot ignore the presence of different or even rival camps in processions and assemblies. Desecrating the regional flag is not necessarily agreeable to all those who take part in processions and assemblies.

56. The court is of the view that, in the absence of legislation to protect the regional flag, the act of desecrating the flag may result in conflicts in breach of peace. The criminalization of the desecration of the flag, so that such cases will be dealt with by the police and the court, can effectively reduce the risk of such conflicts.

57. The defence recognizes that when public officers of the Special Administrative Region died in the course of performing their duties, their coffins would be draped with the regional flag. Recently, a senior fireman and a young team member sacrificed their lives to save others. The regional flags were draped over their coffins, symbolizing the respect all Hong Kong people had for them and conveying the message that there were brave souls under the flags.

58. The court is of the view that the regional flag has over the past 16 years acquired a strong symbolic meaning representing the spirit of the people.

59. The court finds that the abovementioned changes in time and internal and external circumstances lend further support to the constitutionality of the legislation which protects the regional flag."

38. In this judgment, I do not propose to comment on the validity or otherwise of the Magistrate's observations, just as I will not comment on the appellants' views of the current social or political situation. There is indeed no need to do so, being an exercise in which different people will come up with different conclusions. As I have pointed out in paragraph 34 above, as far as public order is concerned, the only consideration relevant to the protection of the regional flag is the fact that, in contrast to the past, Hong Kong is now governed by a new constitutional order which will be sustained by virtue of the Basic Law. Therefore, although the Magistrate had indeed taken too much into consideration, it was not such as to affect the decision in the present case.

The appeal against sentences

Reasons for sentence

39. Based on the analyses given by Li CJ and Bokhary PJ of the National Flag Ordinance and the Regional Flag Ordinance (see the passages quoted in paragraphs 17 and 18 above), the Magistrate was of the view that the legislative intent of the Ordinances was to protect the neutrality of the flags so that they would not be embroiled in politics, so as to fully and effectively protect the dignity of the national/regional flag.[28] For this reason, he rejected the plea for mitigation put forward by the two appellants on the ground of civil disobedience (a political means).

40. The Magistrate considered that there were three aggravating factors in the present case: (1) at the time of the incident, D1 and D2 were surrounded by a number of demonstrators, thereby obstructing the police in the execution of their duties; (2) as a result of the aforesaid conduct, there was at one stage pushing and shoving between the parties, and fortunately no one was injured as a result; (3) sparks had actually landed on the hand/arm of a third party in the course of the incident, and the risk of someone getting burnt was no longer theoretical.

41. In the result, the Magistrate delivered the following judgment on sentence:

“The first defendant

81. The first defendant is now 67 years of age. His wife and 14-year-old son are residing on the Mainland.

82. The defendant has been residing in a unit in a commercial building for the last 10 years. The unit is mainly used for storing items to be used in demonstrations. The defendant is only required to pay electricity charges of approximately \$200 each month and is not required to pay any rent.

83. The defendant gave up his job of a vessel technician in 1989 and since then has actively taken part in social movements. He says he works as a decoration worker intermittently, earning \$5,000 to \$10,000 per month.

84. At the time of the offence, the first defendant had 7 conviction records (the 8th conviction against him does not fall to be considered for present purposes) in respect of a total of 13 offences, including offences similar to the present one.

85. The courts had previously given the defendant chances by imposing a fine for his act of desecrating the flag. However, he has records of breaching orders for binding over to be of good behaviour and orders for suspended sentences.

86. In light of the facts of the case, in particular the aggravating factors and the background of the first defendant, the court is of the view that the appropriate sentence should be imprisonment for approximately 6 months.

87. Having committed the offence being subject of the present case, the first defendant committed similar offences on 10 June 2012 and 1 January 2013 (See *HKSAR v Koo Sze Yiu* HCMA 185/2013). In that case, the first defendant was sentenced on 7 February 2013 to imprisonment pending appeal, and the appeal procedure came to a conclusion on 13 May 2013.

88. The present offence was committed on 1 April 2012. The prosecution preferred the charge against him in March of this year (i.e. after the first defendant had been sentenced to imprisonment). It can be deduced from the defendant's criminal record that when he attended court in respect of the present case on 3 June, it was shortly after he completed serving his prison sentence.

89. In view of the above, the court cannot rule out the possibility that, had the offences on 1 April 2012, 10 June 2012 and 1 January 2013 been dealt with together, part of the sentence for the present offence might, having regard to the totality principle, have been ordered to run concurrently with those for the 10 June 2012 and 1 January 2013 offences.

90. The court appreciates that in the present case the prosecution had met with considerable difficulty dealing with the video clips obtained from the internet. That said, the fact that the three cases against the first defendant were not dealt with together was in no way caused by any fault on his part.

91. This being the case, the court can consider disposing of the case by way of suspended sentence (see *HKSAR v Chiu Peng, Richard* [2002] 1 HKC 401).

92. On the above analysis, and in view of the fact that the first defendant has already been detained for two weeks, the court is of the view that the appropriate sentence is 4 months' imprisonment, suspended for two years.

The second defendant

93. The second defendant is now 19 years old. He worked at a convenience store for six months in 2011 after completing Form 5 education. From April 2012 on, he worked as an assistant in a political organization, earning a monthly salary of \$9,500.

94. As at the time of the offence, the second defendant had no criminal record, although he was fined \$2,000 in September 2012 for one count of unlawful assembly.

95. All aggravating factors referred to above also apply to the second defendant.

96. The court takes the view that the age of 19 is not so young as to justify treating the second defendant as a person of a tender age of 15 or below.

97. Unlike the first defendant, no special circumstances exist in relation to the second defendant.

98. On the basis of the information before me, this court will dispose of the case against the second defendant by way of a community service order.

Conclusion

99. The first defendant is sentenced to 4 months' imprisonment, to be suspended for two years.

100. Taking into account the time already spent by the second defendant in custody, the second defendant is ordered to complete 230 hours of community service."

Discussion

42. With respect, the Magistrate had in my view misunderstood the Court of Final Appeal judgment. By their remarks, Li CJ and Bokhary PJ intended to point out that the provisions of the National Flag Ordinance and the Regional Flag Ordinance were neutral and imposed a narrow restriction which affected only the mode of expressing a message and not the content of the message and were therefore not unconstitutional. This decision has nothing to do with sentencing considerations. Nor does it provide a reason for rejecting civil disobedience as a mitigating factor.

43. The UK House of Lords case of *R v Jones (Margaret) & Others* [2007] 1 AC 136, which is cited by the appellants, sets out the history and value of civil disobedience in the UK. Lord Hoffmann had this to say:

"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."

Nonetheless, the above passage is only a small part of Lord Hoffmann's judgment. In the rest of the judgment, he rather severely criticized the defendants for turning a court of law into their political platform by breaking the law. In fact, Lord Hoffmann pointed out that the so-called "civil disobedience" possesses certain characteristics, for example, the actions are restrained without causing excessive damage or inconvenience, and the protesters demonstrate the sincerity of their beliefs by not putting up a defence in court:

"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. This shows that those who have broken the law in pursuit of their beliefs are not necessarily to be given lenient sentences. It all depends on the circumstances of each case. If the facts of the case and the consequences of the offence are not serious, the defendant should naturally be given clemency; otherwise no leniency should be given. However, this is in fact no different from the ordinary sentencing principles — the defendant's motive, *modus operandi*, consequences, and impact on the society are all factors to be considered. Therefore, in my view, little purpose will be served by treating civil disobedience as a distinct mitigating factor. This is my conclusion on this subject.

45. As to the gravity of the circumstances of the present case, I make the following observations: (1) The video clips show that no accelerant such as kerosene had been poured on either the newspaper that was used as fire starter or the regional flag that was burnt; otherwise, the fire would have flared up at once. (2) There is no evidence that anyone had actually been injured. (3) There is no evidence that the demonstrators who obstructed the police were not acting spontaneously but in concert with D1 and D2. Of course, it is absolutely dangerous to (try to) set fire to something in a crowded place; worse still if this causes the crowds to kick up a commotion, thereby bringing about other dangers. The point is, for the purpose of accurately determining the gravity of the present case, the abovementioned three features cannot be overlooked.

46. The final matter for discussion is the sentence for each of the two appellants. As the Magistrate pointed out, prior to the present case D1 had a previous record of 7 convictions in respect of 13 offences, all of which, in my understanding, arose from protests, demonstrations and processions. One of these convictions was for the same offence as that in the present case. It took place in 2002 and the case was disposed of simply by way of a fine. In other words, it was after 10 years that D1 again committed the present offence of desecrating the regional flag, and his previous breaches of bind-over orders and suspended sentences had nothing to do with flag desecration. This being the case, coupled with my view that the facts of the case are not as serious as the Magistrate described it, the sentence of 4 months' imprisonment (the Magistrate even adopted 6 months as the starting point) is manifestly excessive and should be varied to 2 months. Furthermore, but for the time needed to collect evidence, the present case could have been heard together with the subsequent flag-burning case (see paragraphs 87 to 91 of the Magistrate's Statement of Findings). Therefore, the sentence should not be suspended for as long as 2 years; the period of suspension can be halved, i.e. reduced to one year.

47. D2 was aged only 19 at the time of the offence and had a clear record. Before passing sentence, the Magistrate remanded him in custody pending a series of suitability reports including training centre, detention centre, rehabilitation centre, community service and probation reports. He was only released on the following day upon being granted bail by the High Court on an urgent basis. Furthermore, the 230-hour community service is only 10 hours short of the statutory maximum and almost triple the low number of hours (80 hours at most) originally recommended by the probation officer. This is absolutely excessive and wholly disproportionate to the appellant's background, the nature of the offence and the facts of the case. To bring the matter to an end, the best approach now is to vary the length of community service order to 110 hours, which is the number of hours D2 has already served.

Decision

48. The appellants' appeals against convictions are dismissed. Their appeals against sentences are allowed. The sentence for D1 is varied to 2 months' imprisonment, suspended for one year. The sentence for D2 is varied to 110 hours of community service.

(Derek Pang)

Judge of the Court of First Instance

Mr. David Leung, Deputy Director of Public Prosecutions and Mr Andrew Li, Senior Public Prosecutor of the Department of Justice, for the Respondent/HKSAR.

Mr. Martin Lee, SC and Mr Carter Chim, instructed by Messrs. Cheung & Co., JCC Solicitors, for the 1st and 2nd Appellants.

Translated by the Judgment Translation Unit of the Judiciary and vetted by Mr. Edmund Cham, Solicitor

[1] Freedom of speech.

[2] The provisions of The International Covenant on Civil and Political Rights (“ICCPR”) as applied to Hong Kong shall remain in force.

[3] The right to hold opinions without interference and the right to freedom of expression.

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

[5] The original text of The First Amendment is: “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] 491 US 397, end of the Summary.

[7] 491 US 401, the Supreme Court confirmed the observation of the state appellate court.

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

[9] See footnote 5.

[10] 491 US 397, Summary.

[11] See footnote 6. This is a complete version of the first half of the same passage.

[12] (1999) 2 HKCFAR 442 at 456G-H.

[13] *Ibid*, at 468A-C.

[14] *Ibid*, at 447E-G.

[15] Summary, 496 US 310.

[16] *Ibid*, at 456F-G. It should be noted that the Court of Final Appeal was not unaware of the two US cases mentioned above. They were mentioned by Bokhary PJ in his judgment.

[17] A 5:4 majority. The four US Supreme Court Judges (including the Chief Justice) who did not consider the relevant law unconstitutional pointed out that the law only restricted J's mode of expression, which was one of many modes of expression. The reasoning is extremely similar to that given by the Court of Final Appeal in *Ng Kung Siu*. Furthermore, as a matter of fact, the judgment in *US v Eichman* was also only a 5:4 majority judgment.

[18] [2004] 3 NZLR 704 at 716, paragraph 73 of the judgment.

[19] The New Zealand High Court pointed out, as did the Court of Final Appeal in *Ng Kung Siu*, that quite a number of democratic countries have laws in place to protect the national flag from being desecrated.

[20] *Ibid*, at 460B-D.

[21] See Henkin (ed), *The International Bill of Rights 1981*, p.301.

[22] *Ibid*, at 459I to 460A.

[23] (2007) 37 HKLJ 407, bottom of page 429.

[24] Paragraph 36 of the judgment.

[25] Paragraph 19 of the judgment.

[26] See paragraph 27 above.

[27] Author of the *UN Covenant on Civil and Political Rights: CCPR Commentary*.

[28] This is my understanding of paragraphs 74 to 76 of the Magistrate's Statement of Findings.

Hopkinson v Police

5

High Court Wellington
18 May; 23 July 2004
France J

CRI 2004-485-23 10

Crimes – Offences – Flag burning – Whether flag burning protest dishonoured the flag – Flags, Emblems, and Names Protection Act 1981, s 11(1)(b). 15

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. 20

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. 25

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]). 30

Texas v Johnson 491 US 397; 105 L Ed 2d 342 (1989) referred to. 35

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]). 45

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.

10 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).

15 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.

20 *C Mander* for the Crown.

Cur adv vult

FRANCE J.

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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. 5

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. 10 15

[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. 20

[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. 25 30 35

[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. 40

[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). 45

[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. 5

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. 10

[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: 15

“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.” 20

[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. 25

[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”. 30

[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. 35

(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. 40

[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. 45

[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. 5

[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. 10

[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: 15

- This was a political protest to coincide with the Australian Prime Minister's visit. 20
- [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. 25
- 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]). 30

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

- He is an active member of a number of political protest groups. 35
- 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. 40
- 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]). 45

[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]: 50

5 "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]:

10 "[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."

15 [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.

20 [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
25 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".

30 *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).

35 [42] The next question is, therefore, whether prohibition of this conduct is a justified limit on the freedom of expression.

A justified limit?

40 [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]:

45 "... 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.” 5

[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. 10

[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”. 15 20

[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. 25

[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. 30

[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. 35

[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”. 40 45

[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. 50

[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".

5 [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
10 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.)

15 [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
20 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.

25 [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
30 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.

35 [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
40 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
45 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
50 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.

5 *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]:

10 "[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.
15 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
20 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
25 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:

30 "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
35 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
40 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 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
45 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.

5 *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)):

- 10 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,
- 15 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.

20

 (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.

25

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. –

30 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

35 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.

40 *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

45 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. 5

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. 10

Appeal allowed.

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

Solicitors for the Crown: *Crown Solicitor* (Wellington).

Reported by: Duncan Webb, Barrister 15