

# One Court, Two Rulings? Freedom Of Expression In Post-1997 Hong Kong

*This paper examines the two most controversial decisions on freedom of expression made by the Court of Final Appeal, the highest court in Hong Kong in the post-handover period. The first was a defamation case - Cheng Albert and Another v Tse Wai Chun Paul. The second - HKSAR v Ng Kung Siu and Another - was the criminal sanction of flag desecration. The outcomes of these two landmark cases were completely different. One has promoted freedom of expression, while the other has restricted it. Both cases have considerable potential to impact on how much and what kind of freedom of expression Hong Kong people may enjoy post-1997 under the promise of 'one country, two systems'. The decisions also shed light on a very important question – how well can the Court of Final Appeal protect and promote freedom of expression in Hong Kong?*

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The Court of Final Appeal of Hong Kong (CFA), the highest court established in Hong Kong after the 1997 handover, has made two landmark but controversial decisions on freedom of expression. The decision in Cheng Albert and Another v Tse Wai Chun Paul (Cheng v Tse) has made it much more difficult for a plaintiff to succeed in a defamation action. It has the effect of promoting freedom of expression. The other decision, in HKSAR v Ng Kung Siu and Another (HKSAR v Ng), endorsed the criminalisation of flag desecration introduced at the time of the handover. This effectively restricts the scope for freedom of expression. These two divergent rulings vividly demonstrate that the newly founded highest court, through its interpretation of the common law and constitutional scrutiny of statutes, has exerted substantial influence on the extent and substance of freedom of expression in post-1997 Hong Kong. Indeed, the youthful CFA has proved crucial in the protection of fundamental rights and freedoms of Hong Kong people, but at the same time its decisions have resulted in considerable controversy.

## The Post 1997 Arrangements

On 1 July 1997, Hong Kong was made a 'Special Administrative Region' (HKSAR) of the People's Republic of China (PRC or China). Socialist China pledged to allow Hong Kong a high degree of autonomy and to keep the territory's capitalistic system unchanged for a period of 50 years. These promises, embedded in the policy of 'Hong Kong people ruling Hong Kong' and the principle of 'one country, two systems', have been guaranteed by the HKSAR's mini-constitution – the Basic Law.

Article 27 of the Basic Law provides that Hong Kong residents shall have freedom of speech, of the press and of publication. Moreover, Article 39 stipulates that the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong shall remain in force and shall be implemented through the laws of HKSAR. Article 19 of the ICCPR guarantees freedom of expression. Such freedom of expression is not absolute, but any restrictions have to satisfy conditions laid down in Article 19(3). First, they have to be prescribed by law. Second, they should fall within one of the following grounds: respect of the rights or reputations of others; the protection of national security or of public order ; or protection of public health or morals. Third, the restrictive measures must be necessary and proportionate to the aims sought to be achieved.

The Basic Law also stipulates in Article 19 that Hong Kong shall be vested with independent judicial power, including that of final adjudication. The CFA serving as the HKSAR's highest court puts an end to the colonial practice of going to the Privy Council in England for final appeals. Article 82 of the Basic Law provides that judges from other common law jurisdictions may as required be invited to sit on the CFA. This has been implemented by the Court of Final Appeal Ordinance. Five judges are required for each panel hearing an appeal, consisting of the Chief Justice, three other permanent Hong Kong judges and a non-permanent Hong Kong judge or a judge from another common law jurisdiction selected by the Chief Justice and invited by the Court.

Cheng v Tse was a defamation case. Albert Cheng and Lam Yuk Wah were co-hosts of a Commercial Radio phone-in programme. The two co-hosts and their radio station were sued by a solicitor, Paul Tse, for remarks made during their programme on 1 August 1996. The remarks were about the aftermath of a rescue campaign of two Hong Kong residents jailed by the Philippines government for alleged drug trafficking. Cheng and Tse had been at loggerheads over the different positions they had taken in their respective attempts to assist the rescue campaign. All three

## Cheng vs Tse

defendants pleaded fair comment on a matter of public interest as a defence. In reply, Tse pleaded that the defendants had made the statements maliciously, which would negate the defence.

At the trial, the jury held in favour of the radio station but against Cheng and Lam. The two appealed on the ground that the judge had misdirected the jury on the issues relating to malice. In particular, their counsel argued that the judge was wrong to apply to the defence of fair comment the test on the issue of malice applicable to the defence of qualified privilege.

The Court of Appeal (CA) dismissed the appeal, ruling that the test for malice was the same for both qualified privilege and fair comment. In doing so, the CA relied on views in a leading textbook on defamation (*Gatley on Libel and Slander* 1998: par 16.2). The CA held that proof of malice would defeat both defences of qualified privilege and fair comment because if a person acted with malice – i.e. making use of a privileged occasion or purporting to exercise his freedom of speech in expressing an opinion for his own purposes or to further his own motive – he/she would be regarded in law as abusing his freedom of speech. The CA decision noted that there was ample evidence from which the jury could draw the conclusion that Tse had succeeded in proving malice on the part of Cheng and Lam.

Cheng and Lam further appealed to the CFA, renewing their challenge to the correctness and adequacy of the judge's summing up on the issue of malice. Only Lord Nicholls of Birkenhead, sitting on the CFA as a judge from other common law jurisdictions, gave a reasoned judgment on the defence of fair comment and the related issue of malice. All the other four judges concurred.

## Defence Of Fair Comment

Lord Nicholls noted that the title of the defence of “fair comment” was misleading. He considered “comment”, or “honest comment”, would be a more satisfactory name. Lord Nicholls then identified well-established, non-controversial ingredients of the defence. First, the comment must be on a matter of public interest. Second, the comment must be recognisable as comment, not an imputation of fact. Third, the comment must be based on facts that are true or protected by privilege. Fourth, the comment must indicate, explicitly or implicitly, what are the facts on which the comment is being made. Fifth, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views. These are the outer, objective limits of the defence of fair comment. To rely on the defence, defendants have to prove that their comment falls within these limits.

## The Issue Of Malice

The plaintiff may still defeat the defence of fair comment by proving that the defendant was “actuated by malice” when he/she made a statement. The question raised by this appeal concerned the meaning of malice in the context of the defence of fair comment. More specifically, whether the purpose or motive – spite and ill will in particular – for which a defendant stated an honestly held opinion might deprive him of the protection of the defence of fair comment.

The CFA’s ruling took the Hong Kong legal profession by surprise. It held that a comment that falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed. Lord Nicholls further expounded:

“Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not of itself defeat the defence. However, proof of such motivation may be evidence, sometimes compelling evidence, from which lack of genuine belief in the view expressed may be inferred.”

The CFA quashed the jury’s verdicts regarding Cheng and Lam and ordered a new trial. In his judgment, Lord Nicholls attached much importance to the purpose of the defence of fair comment, which is to facilitate freedom of expression by commenting on matters of public interest. The defence of fair comment envisages, according to Lord Nicholl, that everyone is at liberty to conduct social and political campaigns by expressing his own views. Commentators of all shades of opinions may therefore have ulterior motives and are entitled to “have their own agenda”. The defence should therefore not be restricted to comments made for particular reasons or particular purposes, some being regarded as proper, others not. He stressed:

“Nor is it for the courts to choose between ‘public’ and ‘private’ purposes, or between purposes they regard as morally or socially or politically desirable and those they regard as undesirable. That would be a highly dangerous course. That way lies censorship. That would defeat the purpose for which the law accords the defence of freedom to make comments on matter of public interest. The objective safeguards, coupled with the need to have a genuine belief in what is said, are adequate to keep the ambit of permissible comment within reasonable bounds.”

Nicholls explained he did not think the law should attempt to ring-fence comments made with the sole or dominant motive of causing injury out of spite. “The spiteful publication of a defamatory statement of fact attracts no remedy if the statement is proved to be true. Why should the position be different for the

spiteful publication of a defamatory, genuinely held comment based on true fact?"

In Lord Nicholls' opinion, books such as *Gatley on Libel and Slander* (1998: par 16.2), *Carter-Ruck on Libel and Slander* (1997: 116), *Winfield and Jolowicz on Tort* (1998: 427) and *Halsbury's Laws of England* (1973: par 149) had erred in their interpretation of the issue of malice. Since there has been no direct authority over the last 150 years, he noted, most textbooks tended to rely on the speech of Lord Diplock in *Horrocks v Lowe* – a leading authority on the issue of malice in relation to the defence of qualified privilege – in their analyses of the issue of malice in relation to the defence of fair comment. These textbooks came to the conclusion that the defence of an honest defendant might be vitiated by the motive with which the words were published.

Although the defence of fair comment had grown from the defence of qualified privilege in the latter half of the nineteenth century, Lord Nicholls regarded the approach of these textbooks as problematic. He pointed to the fact that the purposes for which the law had accorded the defence of qualified privilege and the defence of fair comment were not the same. The defence of qualified privilege is there to protect persons having a duty to perform or an interest to protect in providing the information from defamation actions. If a person's dominant motive is not to perform his duty or protect this interest, he is outside the ambit of the defence. The rationale of the defence of fair comment is different. The basis of the defence is the high importance of protecting and promoting the freedom of comment by everyone at all times on matters of public interest, irrespective of their particular motives. Lord Nicholls maintained the textbooks had erred because of their failure to appreciate the differences.

In essence, the issue of malice in relation to the defence of fair comment deals only with the dishonesty of the defendant – i.e. whether the defendant did not genuinely hold the view he expressed or was recklessly indifferent to the truth or falsity of his comments – and not with the motive or purpose for which he expressed his views. To avoid confusion, Lord Nicholls advised judges in the future to shun the word "malice" altogether: "Juries can be instructed, regarding fair comment, that the defence is defeated by proof that the defendant did not genuinely believe the opinion he expressed."

The CFA ruling in *Cheng v Tse* has been a landmark decision for Hong Kong's defamation law. By holding that the defence of fair comment cannot be defeated by the defendant's motive or purpose behind the defamatory statement and by holding the defence can only be defeated by proof that the defendant did not genuinely believe the opinion he expressed, the CFA decision in

## Impact On Freedom Of Expression

Cheng v Tse has the effect of promoting freedom of expression, and political speeches in particular. Opinion makers, especially those active in politics, can feel freer in expressing their views and opinions. They are effectively less restricted than before, when motives were supposedly crucial in the defence of fair comment.

More importantly, the CFA decision in Cheng v Tse has alleviated, to some extent, the inhibiting effect of Hong Kong's defamation law. This is of high importance when judged against two trends – lack of statutory reform of defamation law, and an increase in the number of defamation actions.

Traditionally, Hong Kong's defamation law has been based primarily on English law. Defamation law protects the reputations of individuals and corporations. The law is overwhelmingly favourable to claimants. Both in England and in Hong Kong, defamation law has been widely criticised for its chilling effect on media freedom (see Robertson 1992; Barendt et al. 1997; Cottrell 1999). To begin with, for a plaintiff to initiate defamation action, all he or she needs is to prove the statement is defamatory, published to a third party and referring to the plaintiff. There is no need for the plaintiff to prove intention to defame or that he has suffered any actual damage. Moreover, the defamatory statement is presumed to be false. The defendant is liable for defamation if he cannot prove otherwise. Second, the net has been cast very wide. Anyone involved in the publication of the statement may be liable. Third, defamation litigation is a complex and lengthy process. The main defences available are few and difficult to rely upon.

In England, efforts have been made in recent years to simplify defamation litigation. New measures in the Defamation Act 1996 included the introduction of a summary procedure for disposal of claims, reduction of the limitation period for bringing a libel action from three years to one year, with judicial discretion to extend it, the revision of the offer to amend defence to encourage the defendant to offer correction and apology, and the expansion of the range of people not liable for defamation. However, there has been no similar development in Hong Kong. Hong Kong's current Defamation Ordinance is still largely based on the UK's Defamation Act 1952. The Law Reform Commission of Hong Kong, since its formation in 1980, has never looked specifically at defamation law.

Meanwhile, there has been a surge of defamation cases in Hong Kong in the last decade. Two major factors have contributed to the phenomenon. First is the rise of talk shows, tabloid newspapers and magazines, many of which have a practice of carrying revealing, embarrassing or controversial stories. Second, media organizations themselves had initiated a number of

defamation cases against other media organizations.

Against such a background, judicially engineered reform is of particular importance in reducing the chilling effect of defamation law. Nonetheless, before the 1997 handover, no defamation actions from Hong Kong had ever reached the Privy Council in London. In fact, not many defamation actions reached the CA level in Hong Kong. Things appear to be different since the CFA came into being. In the three defamation cases that have reached the CFA so far, the Court sided with defendants and overturned decisions of the CA. The CFA repeatedly emphasized the importance of a generous approach in dealing with defamation cases. In *Eastern Express Publisher Ltd v Mo Man Ching and Another*, the Court held that when the defence of fair comment is relied upon, a degree of rhetoric could be allowed in the allegedly defamatory statement. The CA should not take the words in the statement too literally and come to the conclusion that there was no substructure of fact to justify the opinion. Giving the judgment, Sir Anthony Mason remarked that “in a society in which there is a constitutional guarantee of freedom of expression, no narrow approach should be taken to the scope of fair comment on a matter of public interest as a defence to an action of defamation”.

Chief Justice Li in *Cheng v Tse* reiterated these remarks: The CFA’s ruling in *Cheng v Tse* represented a big step forward in the judicial development of defamation law. Yet, it is too early to assess the effect, if any, of the CFA decision in *Cheng v Tse* and the generous approach adopted in defamation cases. It will be interesting to see if this has a significant impact on the number of defamation actions brought.

Not all reaction to the CFA ruling in *Cheng v Tse* was favourable. The pro-Beijing camp harshly criticised the decision on several grounds (Ma 2000: A11). First, it was said that the ruling would encourage commentators and politicians to attack their enemies in an irresponsible manner, abusing freedom of expression. Second, it was said the ruling was made by a “parachute judge”, i.e. Lord Nicholls, who did not know Hong Kong and made decisions unbeneficial to Hong Kong society. The critics went so far as to argue that “this misconception that all House of Lords judges make good Hong Kong judges needs to be banished” (Ma 2000: A11). Third, the CFA was accused of engaging in “judicial activism” through some of its rulings, including that of *Cheng v Tse* (Siu 2000: 16).

The criticisms of a “parachute judge” went too far. Even the Secretary for Justice, Elsie Leung, who is known for her close connections to the pro-Beijing camp, had to openly refute the argument, stressing that the judgment was a unanimous one and that Hong Kong benefited much from having judges from other

common law jurisdictions sitting on the CFA (Hong Kong iMail 2000: A07).

Yet the “parachute judge” argument did point to an issue of importance: would any Hong Kong permanent judges dare to make the same ruling in *Cheng v Tse*, which provided an answer to a legal issue not tackled for the past 150 years and maintained the leading textbooks had erred? Indeed, the CFA judgment in *Cheng v Tse* had to be made by a judge of very high seniority and standing like Lord Nicholls, who had earlier delivered in the House of Lords an important judgment on the defence of qualified privilege in *Reynolds v Times Newspaper Ltd*. In the colonial era, Hong Kong judges mainly applied precedents or followed leading textbooks if no appropriate case law was available. It may take some time for permanent judges of the CFA to build up their own authority before they can come up with rulings similar to that made by Lord Nicholls in *Cheng v Tse*, which had the effect of promoting freedom of expression in Hong Kong. Yet discussions in the latter part of this paper will show that in the foreseeable future there seems little prospect for ‘judicial activism’, a concept much attacked by the pro-Beijing camp.

*HKSAR v Ng* was Hong Kong’s first flag desecration case. Criminal sanctions for flag desecration only came into being in Hong Kong upon the return of sovereignty to China. No similar laws had existed before.

In 1990, China promulgated the Law on the National Flag. Article 1 stipulates the objectives of “defending the dignity of the National Flag, enhancing citizens’ consciousness of the State and promoting the spirit of patriotism”. Article 19 provides criminal sanction for desecration of the national flag.

The application of China’s national laws in the HKSAR is governed by Article 18(2) of the Basic Law. National laws applicable are confined to those listed in Annex III of the Basic Law and shall be applied locally by way of promulgation or legislation by the HKSAR. On 1 July 1997, the Law on the National Flag was added to the list of laws in Annex III. Accordingly, the legislature in Hong Kong enacted the National Flag and National Emblem Ordinance (the National Flag Ordinance). Section 7 of the Ordinance criminalised desecration of the national flag. Meanwhile, Regional Flag and Regional Emblem Ordinance (The Regional Flag Ordinance) was also enacted, governing the use and protection of the HKSAR flag. Section 7 of the ordinance provides criminal sanction for desecrating the regional flag.

## **HKSAR vs Ng**

## **Facts of the Case**

Two young men, Ng Kung Siu and Lee Kin Yun, were seen carrying the national and regional flags, damaged and defaced, during a protest on New Year's Day, 1998. They were subsequently charged according to Section 7 of the National Flag Ordinance and Section 7 of the Regional Flag Ordinance. The defence submitted both before the magistrate and the CA that these two provisions were inconsistent with Article 19 of the ICCPR, and therefore contravened Article 39 of the Basic Law.

## **Decisions of the Lower Courts**

At the trial, the magistrate held that the two provisions had restricted the right to freedom of expression guaranteed by Article 19 of the ICCPR, but were justified under Article 19(3) – being necessary for the protection of public order. The magistrate maintained that any responsible government should not overlook the real possibility of social disorder caused by the desecration of the national flag in public.

The magistrate resorted to the principle of 'one country, two systems', and found that the regional flag should enjoy no less protection than that of the national flag. As a result, the two defendants were convicted of both offences and ordered to be bound over to keep the peace for a period of 12 months.

On appeal, the CA quashed the convictions of Ng and Lee. The CA held that the two provisions were inconsistent with Article 19 of the ICCPR and, as such, contravened Article 39 of the Basic Law. The CA said there was no evidence and no basis for the magistrate to rule that the two provisions were justified as being necessary for the protection of public order under Article 19(3).

The CA maintained that the magistrate had failed to give due weight to the fact that the law, e.g. the Public Order Ordinance already catered for a variety of situations arising out of abuse of the flag which might lead to charges ranging from riot and unlawful assembly to breach of the peace.

In examining whether the two provisions were necessary, the CA also paid regard to the unlikelihood of serious civil disturbance arising from flag desecration and further said that the enactment of the two provisions was not necessary for the normal operation of the HKSAR.

## The CFA Ruling

The prosecution appealed to the CFA. The appeals were allowed and the convictions and orders for binding over by the magistrate were restored. The question before the CFA was whether criminalisation of flag desecration, which had restricted freedom of expression, was permissible under Article 19(3) of the ICCPR and therefore did not contravene the Basic Law.

Chief Justice Li maintained that the national flag and regional flag were of intrinsic importance. He cited the raising of the flags at the beginning of the handover ceremony and the speech of the President of the PRC on that occasion. The Chief Justice said:

“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 question before the Court, said the Chief Justice, was whether these legitimate interests justified the restriction on freedom of expression by the criminalisation of desecration of national and regional flags. In answering the question, he first held that the restriction on freedom of expression, i.e. criminalisation of flag desecration, fell within the permissible objective of protecting public order. Yet he ruled that both the magistrate and the CA had been incorrect in limiting the concept of public order to the common law notion of law and order.

The Chief Justice stressed that public order mentioned in the ICCPR was a much wider concept, including what was necessary for the protection of the general welfare or for the interests of the collectivity as a whole. This might vary over time, place and circumstances. With regard to Hong Kong’s new constitutional order, he held that the protection of the national flag and regional flag had formed part of the general welfare and the interests of the collectivity as a whole and therefore had fallen within the concept of public order.

In considering whether the restriction was necessary, he said the CFA should also give due weight to the view of the HKSAR’s legislature that the enactment of the National Flag Ordinance and the criminalisation of desecration of national flag was appropriate for the discharge of the Region’s obligation stipulated by Article 18(2) of the Basic Law. “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.”

The CFA judges also believed that criminalisation of flag desecration was regarded as necessary for the protection of public order in other democratic societies, because a number of ICCPR signatories had enacted such legislation.

The CFA concluded that the restriction was justifiable, because it had only limited effect on freedom of expression and was proportionate to the objective sought:

“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.”

## Impact On Freedom Of Expression

In his judgment, the Chief Justice maintained that the prohibition of flag desecration was a limited restriction on the freedom of expression. He argued that it banned only one mode of expression, i.e. flag desecration, and did not interfere with the person’s freedom to express the same message by other modes.

Justice Bokhary was the only other CFA judge who gave a reasoned judgment. He said that it was possible for a society to protect its flags and emblems while at the same time maintaining its freedom of expression so long as the legislation was specific enough to ban the mode of expression only to the extent of keeping flags and emblems impartially beyond politics and strife and did not affect the substance of expression. He maintained that “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 or any other form of outspokenness would be inhibited”.

Towards the end of his judgment, Justice Bokhary attempted to reassure the general public by answering a question posed by a defence counsel, who had asked: “If these restrictions are permissible, where does it stop?”

Justice Bokhary said: “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.”

In his judgment, the Chief Justice has also highlighted the importance of freedom of expression in the HKSAR: “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.”

In essence, both judges tried to assure the general public that the inhibiting effect on freedom of expression arising from criminalisation of flag desecration was limited and that the Court attached great importance to freedom of expression. Yet an examination of similar decisions elsewhere and other related issues on the home front would reveal otherwise.

The arguments of the CFA on the necessity of criminalisation of flag desecrations resembled the minority views of the Supreme Court of the United States. The US is the only common law country where a fierce debate on the issue of flag desecration has gone on for many years. The Supreme Court had to decide whether laws punishing flag burning violated the US Constitution in the two consecutive years of 1989 and 1990, first in *Texas v Johnson* on a state law and then in *US v Eichman* on a federal law. On both occasions, the Court was bitterly divided. A narrow majority of five to four ruled that the prohibition of flag burning was inconsistent with the right to freedom of speech guaranteed by the First Amendment to the American Constitution.

In *Texas v Johnson*, Chief Justice Rehnquist along with the two other dissenting judges maintained that the American flag occupied a unique position as the symbol of their nation, and every true American had a deep affection for it. He further noted that the right of free speech was not absolute at all times and under all circumstances. As with “fighting words”, flag burning was no essential part of any exposition of ideas for the purposes of the First Amendment. It was of such slight social value that any benefit that might be derived from it was clearly outweighed by the public interest in avoiding a probable breach of the peace.

Furthermore, the resulting restriction on freedom of speech was a very limited one. The law punished the protester, Johnson, for burning the flag in public, not for the idea that he sought to convey. He was free to make any verbal denunciation of the flag or to burn the flag in private. Chief Justice Rehnquist held that

uncritical extension by the Court of constitutional protection to the public burning of flags risked the frustration of the very purpose for which organised governments were instituted.

On the other hand, Justice Brennan, in delivering the opinions of the majority, pointed out that while the government had an interest in encouraging proper treatment of the flag, this did not mean that it might criminally punish a person for burning it as a means of political protest. He refuted the argument that only a mode of expression, burning of the flag, had been banned. The restriction on Johnson's expression was content-based. He was prosecuted for his expression of dissatisfaction with the policies of his country, expression situated at the core of the First Amendment values.

Justice Brennan stressed: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. We have not recognized an exception to this principle even where our flag has been involved." He explained that it was not the State's ends, but its means, to which the Court objected. Justice Brennan asserted that national unity, as an end that officials might foster by persuasion and example, was not in question. "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents."

It is submitted that the majority opinion in *Texas v Johnson* has offered a much more thoughtful and insightful interpretation of the constitutional protection of freedom of expression and its relation to a democracy. Yet nowhere in the CFA judgment of *HKSAR v Ng* can these views be found. More worrying is a conservative political overtone attached to the ruling.

First, Chief Justice Rehnquist in *Texas v Johnson* in his argument for the unique importance of the American flag had been charged with the high emotion of an ordinary citizen. Quite differently, Chief Justice Li in *HKSAR v Ng* argued for the uniqueness of the national and regional flags in a cold and detached manner, and more from the perspective of the State. It seems that the emphasis was more on the superior status of state organs and high-ranking officials, and the submissive and obedient role of ordinary citizens. In essence, the judgment sounds more familiar as a policy speech delivered by a PRC official than as a judgment of a court of justice in Hong Kong.

Second, it is debatable for Justice Bokhary to maintain that flags and emblems had to be kept impartially beyond politics and strife, and that hardly anyone would dream of flag desecration even if there was no law against it. In *Texas v Johnson*, Justice Brennan clearly pointed out that the burning of flag in public was

protected by the First Amendment because it was a form of political protest expressing dissatisfaction with government policies. Indeed, during the hearing of *U.S. v Eichman*, Justice Kennedy pointed out flag desecration had become an internationally recognized form of political protest (Overbeck 2001:71). Furthermore, the national flag and the national emblem of the PRC have never been apolitical and above party interest. The big star at the centre of the national flag represents the leadership of the Chinese Communist Party (CCP) (He 1995:8; Yao 1999). The kind of unity expressed by the national flag and emblem is unity under the CCP. This was exactly why the two protesters, Ng and Lee, had desecrated the flags – to express their disagreement with the authoritarian rule of the CCP in China and the lack of democracy in Hong Kong.

Third, the assurance of Justice Bokhary of no further restrictions on freedom of expression seems a personal one. The rest of the CFA judges sitting, including the Chief Justice, were silent on this point and did not endorse his views.

Indeed, the CFA judgment in *HKSAR v Ng* has made Hong Kong people come to terms with a reality of the post-1997 style of freedom of expression – flag desecration has become a taboo attracting criminal sanction.

It should, however, be acknowledged that the CFA was in a very difficult position when considering the final appeal of *HKSAR v Ng* in October 1999. As noted earlier, Article 18(2) requires Hong Kong to implement national laws listed in Annex III of the Basic Law. The Law on the National Flag was one of these laws. The CFA would have created a constitutional controversy if it had chosen to declare that the criminalisation of national flag desecration, based on Article 18(2), was in conflict with Article 39 of the Basic Law, which provides for the continued application of the ICCPR in Hong Kong.

Indeed, during the hearing of the final appeal of *HKSAR v Ng*, the prosecution made it plain that the Secretary for Justice would go to Beijing to ask the Standing Committee of the National People's Congress (NPC) for an interpretation of the Basic Law, if the CFA was to rule on any dispute relating to the application of national laws in Hong Kong, an issue which the Court eventually did not take up (Wong 1999: A25). Just four months earlier, in June 1999, the Standing Committee of the NPC interpreted for the first time the Basic Law at the request of the Hong Kong government, which had the effect of overruling the CFA's decision in *Ng Ka Ling and Others v Director of Immigration*. The incident led to big controversies and created serious doubts on very important constitutional issues such as the judicial independence of Hong Kong and where the power of final adjudication was

vested – in the CFA or in Beijing. Any further interpretation of the Basic Law by Beijing in so short a time period would have totally undermined the authority of the CFA.

## Conclusion

The above discussions have illustrated that the CFA as the newly established highest court in Hong Kong has proven crucial in deciding the extent and the kind of freedom of expression that Hong Kong people may enjoy post-1997. There are still too few cases available to predict with confidence whether freedom of expression will be promoted or restricted in the long run. Yet the picture may not be that encouraging despite freedom of expression being promoted in the CFA ruling of *Cheng v Tse*. The impact of the interpretation of the Basic Law by the Standing Committee of NPC in Beijing in June 1999 has been immense. It opens up the possibility of further interference with CFA rulings. Cases that involve the interests of the central government in Beijing, like that involving desecration of the national flag, are most likely to attract interference from Beijing. It is far from clear what effect this would have on the CFA in its decisions on such cases. The exact outcome will not only be dependent on the debate between 'judicial activism' and 'judicial restraint', but will hinge upon the status of the CFA itself and whether China's promise of judicial independence will be fulfilled.

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