

A SUMMARY OF THE RULINGS OF HKSAR v NG KUNG SIU & ANOTHER (1999) 2 HKCFAR 442 (DECEMBER 1999)

C F A

The CFA held that both ss 7 were consistent with the freedom of expression guaranteed under Art 19 of the ICCPR (ie Art 16 of BoR) as applied under BL 39.

It also held that the restriction imposed by both ss 7 was limited in that it only banned one mode of expressing whatever message the person concerned might wish to express and was proportionate to the legitimate interests in protecting the national and regional flags as the unique symbols of the nation and the SAR within the concept of public order/*ordre public*.

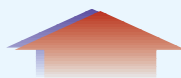


The HKSARG appealed to the CFA

Date of
Judgment
15 December 1999

C A

The CA held that ss 7 of both flag ordinances contravened the freedom of expression guaranteed under Art 19 of the ICCPR and hence BL 39.



Ng & Another appealed to the CA

Date of
Judgment
23 March 1999

MAGISTRATE'S COURT

Ng Kung Siu and another ("Ng & another") were convicted for desecrating the national and regional flags. The Magistrate held that ss 7 of both flag ordinances, while they restricted the right to freedom of expression guaranteed by Art 19 of the ICCPR, were justified under para 3 of the same article as necessary for the protection of public order and were therefore valid.

Date of
Judgment
18 May 1998





Brandeis Brief

The Brandeis Brief was first adopted in an American case *Muller v Oregon* (1908) 208 US 412, in which Louis D Brandeis, counsel for the state of Oregon, filed a brief in the US Supreme Court which included social-science data drawn from books, articles and reports in support of the constitutionality of a state law prescribing a ten-hour workday for women in laundries and factories on the ground that the law was related to worker health and safety. The brief covered sociological, economic and physiological data on the effect of long working hours on the health of women. The data had not been proved in the conventional way, and yet it was accepted by the Supreme Court which acknowledged that it had considered the brief as a matter of “judicial cognizance” in reaching its decision. A Brandeis Brief is particularly useful in constitutional cases because it can expose the court to a broad range of social-science knowledge without the limitation imposed by ordinary evidential rules and the parties incurring substantial costs associated with a trial involving a lengthy parade of expert witnesses.

The tool was first introduced to Hong Kong in the Flag Case, where the issues of freedom of expression and protection of national and regional flags arose. In that case, the CFA affirmed 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.”(see (1999) 2 HKCFAR 442 at 455 H - I)

The key issue in the Flag Case was whether the statutory provisions criminalizing desecration of the national and regional flags was a constitutional restriction of the freedom of expression. Both parties submitted a huge bundle of materials containing a vast amount of social-science data covering areas such as the symbolic meaning of the national flag to the Mainland and relevant legislation in other jurisdictions. Though not referring exactly to the concept of the Brandeis Brief, the CFA acknowledged the “invaluable assistance” given to the Court by the “materials produced by the respective teams”(see (1999) 2 HKCFAR 442 at 462 A - C).

The Brandeis Brief in the Flag Case was a reflection of the principal focus of the government’s strategy before the CFA. This strategy was values-driven: what is necessary and what meets the balance is very much a matter of the values of our community. The Brandeis Brief helped support the argument that the restriction under both flag ordinances on the guaranteed right to freedom of expression was both necessary and was proportionate to the aims sought to be achieved and permitted under the ICCPR. There was a legitimate interest in protecting the national flag as a unique symbol of the Nation and the regional flag as a unique symbol of the HKSAR, and that interest fell within the concept of public order/*ordre public*.

Annex III to the Basic Law:

National Laws to be Applied in the Hong Kong Special Administrative Region

The following national laws shall be applied locally with effect from 1 July 1997 by way of promulgation or legislation by the Hong Kong Special Administrative Region:

1. Resolution on the Capital, Calendar, National Anthem and National Flag of the People’s Republic of China.
2. Resolution on the National Day of the People’s Republic of China.
3. Declaration of the Government of the People’s Republic of China on the Territorial Sea.
4. Nationality Law of the People’s Republic of China.
5. Regulations of the People’s Republic of China Concerning Diplomatic Privileges and Immunities.
6. Law of the People’s Republic of China on the National Flag.
7. Regulations of the People’s Republic of China concerning Consular Privileges and Immunities.
8. Law of the People’s Republic of China on the National Emblem.
9. Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone.
10. Law of the People’s Republic of China on the Garrisoning of the Hong Kong Special Administrative Region.
11. Law of the People’s Republic of China on the Exclusive Economic Zone and the Continental Shelf.*

* Added to Annex III on 4 November 1998 and applied in the HKSAR with effect from 24 December 1998.

基本法簡訊

Basic Law Bulletin

{Abbreviations}

BL	Basic Law / Basic Law Article
BoR	Hong Kong Bill of Rights
CA	Court of Appeal
CE	Chief Executive
CE in C	Chief Executive in Council
CFA	Court of Final Appeal
CFI	Court of First Instance
CPG	Central People's Government
ExCo	Executive Council
HKSAR	Hong Kong Special Administrative Region
HKSARG	Government of the HKSAR
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LegCo	Legislative Council
NPC	National People's Congress
NPCSC	Standing Committee of the NPC
PRC	People's Republic of China
The Interpretation	The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China

《縮寫》

人大常委	全國人民代表大會常務委員會
人權法	香港人權法案
全國人大	全國人民代表大會
香港特區	香港特別行政區
人大常委解釋	全國人民代表大會常務委員會關於《中華人民共和國香港特別行政區基本法》第二十二條第四款和第二十四條第二款第(三)項的解釋

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