

Reconciling Freedom of Expression and Flag Desecration: a Comparative Study[†]

Kabir Duggal and Shreyas Sridhar[‡]*

“If we don't believe in freedom of expression for people we despise, we don't believe in it at all.”

- Noam Chomsky¹

I. Introduction

The freedom of expression is a basic right recognised in most legal frameworks, whether domestic, regional or international. The scope of the term is, by its very nature, undefined. As a consequence, it is a continuously evolving right and needs to remain so to match ever-changing socio-legal norms.

With most nations witnessing an ever-increasing grant of freedoms to individuals and groups alike, public opinion has assumed a significant role in determining the policies of Government. With more and more groups involving themselves in the policy making process, there has arisen a divide between those individuals and groups which have direct access to the Government and those who do not. This in turn compels the have-nots to use demonstrative means to voice their opinion.

Of the various forms of expressing political dissent, flag desecration and, in particular, flag desecration has posed serious questions concerning the ambit of the freedom of expression. A National Flag is, by its very nature, symbolic. Any form of disrespect, regardless of the motive or intent, is therefore bound to raise the issue of whether or not such an action falls within the scope of the freedom of expression. Internationally, different nations construe the right of expression differently and it is therefore impossible to define the boundaries in a strait-jacket formula.²

The desecration of any symbol could occur either for the purpose of making a political statement or merely for personal reasons (with no real political consequence). This article restricts itself to exploring the relationship of the former and the freedom of expression.³

[†] The article reflects the position of law as on February 10, 2006.

^{*} The Co- author is a lawyer registered as an Advocate with the Bar Council of Maharashtra and Goa, India, since July 2003. He is currently working with the UNICEF Child Protection Unit, Maharashtra State office, India. He is also an honorary lecturer at the Government Law College, Mumbai and lecturer at the Jitendra Chauhan College of Law, Mumbai.

[‡] The Co-author is a student of the Government Law College, Mumbai and is currently studying in the Fourth year of the Five Year Law course.

¹ *Avram Noam Chomsky* is the Institute Professor Emeritus of linguistics at the Massachusetts Institute of Technology, credited with the creation of 'Generative Grammar', considered by many to be the most significant contribution to the field of theoretical linguistics of the 20th century.

² A recent example is the controversy that arose regarding certain derogatory cartoons of the Prophet Mohammed. Whereas several nations, both Islamic and non-Islamic have called upon Denmark to take action against the cartoonist, saying that the freedom of expression cannot be extended this far, Denmark has condemned the drawings yet refusing to take any action stating that it does not believe in censorship of any kind.

³ Desecration for personal reasons has little value to this discussion as the underlying motive leading to the act of desecration includes individual prejudices, biases and perception. For example, in the case of *People v. Cowgill*,

Part II of this article deals with the freedom of expression and its evolution, and Part III explores the political significance of flag desecration. Part IV studies the legality of flag desecration across several sampled countries and attempts to examine the rationale behind the position in each. Finally, Annexure 'A' provides the reader with a quick reference of the legal provisions dealing with the freedom of expression and flags in a number of other nations.

II. The Concept Of 'Freedom Of Expression' As A Right

"Freedom of expression is the matrix, the indispensable condition, of nearly every other form of freedom." - Benjamin Cardozo⁴

This section seeks to discuss the scope and ambit of the 'freedom of expression'. For the purposes of this Article, the right to expression shall be construed as a *genus*, having *species* like the right to speech, opinion, freedom of press, freedom against censorship etc. Further, the scope of the freedom of expression includes both pure speech as well as symbolic speech.⁵ Symbolic speech is understood as a non-verbal expression, whose main purpose is to communicate ideas.⁶

A. Origin and Development

Man's struggle for his right to the 'freedom of expression' is as old as civilization itself. Through history, there have always been restrictions imposed on the right based on the prevailing beliefs of the time. One of the earliest recorded instances of the clash between the right to expression and political power was the case of the Greek philosopher Socrates. Socrates was tried and subsequently executed on the grounds that his methods and teachings were having a 'corrupting influence on the morals of the youth of Athens.'⁷

before the US Supreme Court, the act of wearing the Flag as a vest was not held to warrant protection under the freedom of expression, 396 U.S. 371 (1970).

⁴ Benjamin Nathan Cardozo (May 24, 1870 – July 9, 1938) was a distinguished American jurist.

⁵ Black's Law Dictionary, '(pure speech is) Words or conduct limited in form to what is necessary to convey the idea. This type of speech is given the greatest Constitutional protection.' 'Symbolic speech is conduct that expresses opinions or thoughts, such as a hunger strike or the wearing of a black armband. Symbolic speech does not enjoy the same Constitutional protection that pure speech does.' Black's Law Dictionary, Eighth edition, Thomson West, p. 1436.

⁶ -, 'Freedom of Expression, The First Amendment', Freedom of Expression ACLU Briefing Paper Number 10, Leticia Law Library, please visit: <http://www.lectlaw.com/files/con01.htm> (Last visited: December 25, 2005). "Symbolic speech, however, can more accurately be called symbolic behavior, chiefly because an individual uses conduct rather than words to convey a message or idea", Dyer James, 'Texas v. Johnson: Symbolic Speech and Flag Desecration Under the First Amendment', Spring 1991, 25 New Eng.L. Rev. 895, p. 895. See also Loewy Arnold H, 'The Flag-Burning Case: Freedom of Speech When We Need It Most', November 1989, 68 N.C.L. Rev. 165.

⁷ In his trial, Socrates placed an eloquent defense to promote the cause of freedom of expression: "If you offered to let me off this time on condition that I am not any longer to speak my mind in this search for wisdom, and that if I am caught doing this again I shall die, I should say to you, 'Men of Athens, I shall obey the God rather than you. While I have life and strength I shall never cease to follow philosophy and to exhort and persuade any one of you whom I happen to meet. For this, be assured the God commands' And, Athenians, I should go on to say, either acquit me or not; but understand that I shall never act differently, *even if I have to die for it many times.*"(Emphasis supplied)

In Europe, the Middle Ages and the Age of Renaissance saw the opinions of the Church⁸ governing the restrictions on the freedom of expression and speech. A notable case was that of Galileo Galilei, who was convicted of heresy for expressing ideas opposed to then prevalent religious beliefs.⁹

The Age of Enlightenment marked a paradigm shift in the evolution of the right of expression. In 1766, Sweden was the first country to introduce a law guaranteeing freedom of press and abolishing censorship. Denmark and Norway followed suit in 1770.¹⁰ The real impetus to begin a systematic jurisprudence on the freedom of expression began with the First Amendment of the Constitution of the United States (1791).¹¹

The French Revolution furthered this cause in Europe.¹² In 1789, the French National Assembly stated: “The free communication of thought and opinion is *one of the most precious rights of man*; every citizen may therefore speak, write and print freely.”¹³ (Emphasis supplied) The process of development continued throughout Europe, however the real impetus began after the Second World War. This is discussed in the next sub section.

B. The Right of Expression in International Law

After the Second World War, the need was felt to formally recognize certain basic human rights at the international level. The birth of the United Nations provided a platform for facilitating such Declarations and Conventions. The Universal Declaration of Human Rights of 1948 (UDHR) was the first codification by the international community as a whole of the freedom of expression.

Article 19 of the UDHR states,

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

It is interesting to note that this clause does not deal with the modes to ‘express’ oneself. Thus, a *prima facie* reading of this clause does not reveal whether ‘actions’ (such as flag desecration) would fall under the ambit of the term ‘opinion and expression’.

Several other instruments, both regional as well as international, guarantee the freedom of expression. Article 19 of the International Covenant on Civil and Political Rights (ICCPR),¹⁴ Article 9(2) of the African (Banjul) Charter on Human and Peoples’ Rights,¹⁵

⁸ The Bible, King James Version, Book of Leviticus, Passage 24:16, “And he that blasphemeth the name of the LORD, he shall surely be put to death, and all the congregation shall certainly stone him: as well the stranger, as he that is born in the land, when he blasphemeth the name of the Lord, shall be put to death.”

⁹ The thinker, philosopher and astronomer was committed to house arrest for the last nine years of his life for advocating the Copernican heliocentric theory of the universe.

¹⁰ -, ‘The long history of censorship’, Beacon for Freedom of Expression, see: http://www.beaconforfreedom.org/about_project/history.html (Last visited: December 28, 2005).

¹¹ The First Amendment to the US Constitution (ratified on December 15, 1791) states that, “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.” (Emphasis supplied)

¹² Incidentally, in the year 1563, Charles IX of France decreed that nothing could be printed without the special permission of the king, *supra* n. 10.

¹³ See *supra* n. 10.

¹⁴ “1. Everyone shall have the right to hold opinions without interference.

Article 13 of the American Convention on Human Rights ‘Pact Of San Jose, Costa Rica’,¹⁶ Para 2 of the Sana’a Declaration by the Arab League of 2005,¹⁷ Article 10 of the European Convention on Human Rights all provide for the freedom of expression.¹⁸

It is important to observe that all these instruments do not recognize the freedom of expression as an absolute right and allow States to place restrictions, within certain parameters. This is an outcome of the fact that the freedom of expression carries with it an equal responsibility; a principle embodied in the ICCPR. The ICCPR goes further and identifies certain specific instances where it places upon the State Parties an obligation to restrict the right to expression.¹⁹ In contrast, the UDHR provides an absolute right to expression. The probable rationale being that it does not place any specific obligations on the States and is merely an instrument recognizing the basic human rights that *ought* to be respected by them.

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.”

This Article lays down the cardinal rule that the freedom of expression is not absolute and that restrictions can be placed in the implementation of the freedom.

¹⁵ “Every individual shall have the right to express and disseminate his opinions within the law.” Although this Article does not expressly state any specific restrictions, it lays down a general caveat that the States can implement laws to (validly) restrict the implementation of this right.

¹⁶ “1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a. respect for the rights or reputations of others; or
- b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.” This Article is exhaustive in its scope, both in defining the modes of expression as well as providing the necessary restrictions.

¹⁷ “Strengthen and protect human rights, including people’s fundamental rights to express their views and adhere to their religious beliefs and ethnic identity.”

¹⁸ “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

¹⁹ Article 20, “1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

III. Understanding Flag Desecration And Its Significance Politically

“A flag is a necessity for all nations. Millions have died for it. It is no doubt a kind of idolatry which it would be a sin to destroy. For, a flag represents an ideal the unfurling of the Union Jack evokes in the English breast sentiments whose strength it is difficult to measure. The Stars and Stripes mean a world to the Americans. The Star and the Crescent will call forth the best bravery in Islam.” - Mahatma Gandhi

Having discussed the freedom of expression above, the following section examines the significance of flag desecration as a means of political dissent. Black’s Law Dictionary defines ‘desecrate’ as, “To divest (a thing) of its sacred character; to defile or profane (a sacred thing).”²⁰ The Oxford Dictionary defines ‘desecrate’ as, “(to) violate (a sacred place or thing) with violence, profanity etc.”²¹ *Flag desecration*, simply put, is therefore any act which dishonours a flag and seeks to violate its sacred character. Although this term is not limited to national flags, laws pertaining to the same will be the thrust of this Article.

A. Symbolism Attached To Flags

Symbols play an essential role in human culture.²² In the early days, flags usually had a religious significance and were venerated.²³ In history, as well, flags played a very vital role²⁴ and this is perhaps the reason for the symbolism attached to flags even today. Further, flags have also had significance on land as well as at sea, where they were used in lieu of light signals and to convey weather conditions. During military expeditions, flags continue to be used to rally troops. It is considered to be an ‘honourable seizure’ to capture an enemy’s flag in war and often marked the end of war.

Further, the symbolism attached to flags is evident from the fact that it used to mark unexplored territories.²⁵ To date, flags are used to signify crucial events such as mourning, ceding of territories and as identification at international meetings etc. All States, Regional

²⁰ Black’s Law Dictionary, Eight edition, Thomson West, p. 477.

²¹ The Oxford Modern English Dictionary, Oxford University Press, Indian Edition, New Delhi, 1992, p. 283.

²² See generally E. Cassirer, *An Essay On Man* (1944); F. Dillistone, ‘The Power Of Symbols In Religion And Culture’ (1986); H. Duncan, ‘Symbols And Social Theory’ (1969); R. Wagner, ‘Symbols That Stand For Themselves’ (1986) as cited in Sorondo Alicia Otazo, ‘Flag Burning Yes, Loud Music No: What’s the Catch?’, March, 1990, 44 U. Miami L. Rev. 1033, footnote n. 163. “**Symbolism** is the systematic or creative use of arbitrary symbols as abstracted representations of concepts or objects and the distinct relationships in between, as they define both context and the narrower definition of terms. In a narrow context, ‘symbolism’ is the applied use of any iconic representations which carry particular conventional meanings.” Wikipedia, ‘Symbolism’, at <http://en.wikipedia.org/wiki/Symbolism> (last visited: December 26, 2005).

²³ The *Manusmriti* is often regarded as the basis for Hindu laws in ancient India. Flag desecration is treated as a criminal offence in this code. Chapter 9, verse 285 states, “A person who destroys...a flag,...should repair the entire thing and pay five hundred (pennies).” (Original text in Sanskrit written by Manu) Tr. by Dongier Wendy and Smith Brian K., “The Laws of Manu”, Penguin Classics, 1991, 228.

²⁴ In European history, one of the earliest flags that is still in use is the flag of the Netherlands. In use since the second half of the sixteenth century, one observes that throughout its history, the flag was venerated. It was finally adopted as the flag pursuant to Order in Council 19 February 1937, no. 93, but there is no official law.

In the United States till date, at military funerals, the flag is folded 13 times, which symbolizes different virtues and reminds one of the 13 traditional colonies that formed the United States. This illustrates how flags have arisen as a venerated object that reminds one of history, tradition and culture.

²⁵ The flag was raised when man conquered colonies, discovered new colonies, reached the moon, climbed the Everest and other such historical events as well.

bodies, International bodies, and often corporations, universities, schools, and NGOs have flags as symbols of and to symbolise what they represent.

B. Flag Desecration as a Means of Political Dissent

It is now imperative to appreciate flag desecration as a mode of political dissent. “Political dissent refers to any expression designed to convey dissatisfaction with or opposition to the policies of a governing body. Such expression may take forms ranging from vocal disagreement to civil disobedience to the use of violence.”²⁶ It is in this regard that the issue of flag desecration arises. Considering the symbolism attached to the flags as well as its significance, desecrating a flag sends across a sharp political message. Desecrating a National Flag is usually used as a means of political dissent, targeted at the policies of the Nation concerned. Flag desecration includes a plethora of acts, including flag burning. Different jurisprudences view the legality of flag desecration differently. In the next section, an analysis of the position of flag desecration is examined in different countries.

IV. Comparative Position Around The Globe

A. Position in the US

The First Amendment of the US Constitution²⁷ provides an unrestricted freedom of speech, in particular dealing with the complete freedom of the press. This freedom was not, however, extended to acts of flag desecration. The first significant case dealing with flag desecration was raised before the US Supreme Court in *Halter v. Nebraska*.²⁸ The Court delivered a verdict in favour of the constitutionality of an anti-desecration legislation on the ground that it pertained to a prohibition on the use of the flag for advertising articles for merchandise. The verdict kept with the trend of prevailing legislations across the States.²⁹ For the better part of the first half of the 20th century, there was a strong lobby for the protection of the flag against any form of desecration, including war-veteran groups. During this period, all 48 states enacted legislation against flag desecration. A general survey of these statutes show that acts including making marks or attaching objects to the flag, using the flag for advertising purposes, defacing, mutilating or trampling the flag and even verbal attacks on the flag all fell within the scope of desecration.³⁰ The term “flag” was generally defined to mean any object of any form, size or material that resembled the American flag.

²⁶ Wikipedia, ‘Political Dissent’, available at: http://en.wikipedia.org/wiki/Political_dissent (last visited: December 29, 2005).

²⁷ See *supra* note 11.

²⁸ 205 U.S. 34 (1907). The controversy arose when the American flag was used as an advertisement on a bottle of beer, violating a 1903 Nebraska flag desecration law.

²⁹ In the mid and late 1800s, the USA saw an organized flag protection movement. After supporters failed to obtain federal legislation, Illinois, Pennsylvania, and South Dakota became the first States to adopt flag desecration statutes. By 1932, all of the States had adopted flag desecration laws. In general, these State laws outlawed: ... (iii) publicly mutilating, trampling, defacing, defiling, defying or casting contempt, either by words or by act, upon the flag. See http://www.house.gov/judiciary_democrats/dchrono.htm.

³⁰ Goldstein Robert Justin, ‘Flag burning Overview’, First Amendment Center, available at: <http://www.firstamendmentcenter.org/Speech/flagburning/overview.aspx> (Last visited: December 29, 2005).

In the landmark case of *Stromberg v. State of California*,³¹ the US Supreme Court delivered what was perhaps the first nail in the coffin of anti-desecration legislation. The Court substantially widened the scope of the term ‘speech’ in the First Amendment and held it to include ‘pure speech’ as well as ‘symbolic speech’.³² Subsequent cases decided in the US Supreme Court took forward the argument that symbolic speech fell within the safeguards of the First Amendment to a great extent.³³

The first case expressly dealing with flag desecration was that of *Street v. New York*.³⁴ Here, the Accused was charged with publicly burning an American flag in protest against the killing of a civil rights activist. The New York legislation criminalizing the act was held unconstitutional by the Supreme Court on the ground that it violated the First Amendment.³⁵

Even though subsequent cases³⁶ dealt with the issue of flag desecration as symbolic speech, the issue was not put to rest until the *Texas v. Johnson*³⁷ case, in which the Defendant was charged with burning a Flag as part of a large-scale demonstration against Government policies. On a conviction by the Texas court, the statute prohibiting flag desecration was struck down by the Supreme Court as violative of the First Amendment.

A subsequent amendment to a federal flag desecration statute was also struck down soon after in *United States v. Eichman*.³⁸ An amendment to the Constitution³⁹ has been passed by the House of Representatives and is pending Congress and Senate approval. However, in the event that the amendment is enacted, it seems unlikely that the Supreme Court will reverse either the *Johnson* or *Eichman* decisions and rule in favour of curbs on the freedom of speech.

B. Position in the Federal Republic of Germany

The freedom of expression is guaranteed as a ‘Basic Right’ by Article 5⁴⁰ of the Basic Law⁴¹ for the Federal Republic of Germany (German *Grundgesetz*). This provision does not

³¹ 283 U.S. 359 (1931).

³² See *supra* note 5 for a general differentiation between pure and symbolic speech. In the *Stromberg case*, whilst holding that the hanging of a communist flag contained some elements of speech and was therefore protected as expression of a political idea, the Court expanded speech beyond written and spoken words to encompass symbolic conduct, 283 U.S. 359 (1931), 369-370.

³³ See *Thornhill v. Alabama*, 310 U.S. 88 (1940); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *United States v. O'Brien*, 391 U.S. 367 (1968);

³⁴ 394 U.S. 576 (1969).

³⁵ The statute punished anyone casting contempt on the Flag “by words or acts”. The Court did not directly regard the act of flag burning as symbolic speech. Rather, it contemplated a possible breach of the First Amendment due to the provision of “by words” being present. The Court did, however, *obiter dicta* state that the latter part (“by acts”) could, hypothetically, breach the First Amendment as well.

³⁶ See *Smith v. Goguen*, 415 U.S. 566 (1974); *Spence v. Washington*, 418 U.S. 405 (1974).

³⁷ 109 S. Ct. 2533 (1989).

³⁸ 496 U.S. 310 (1990).

³⁹ “The Congress shall have power to prohibit the physical desecration of the flag of the United States”

⁴⁰ “(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor...”

⁴¹ The ‘Basic Law’ operates as the Constitution for the Federal Republic of Germany’.

guarantee an absolute freedom of expression. The law does not provide specific restrictions, but broadly identifies the areas which can operate as restrictions.

Provisions relating to flag desecration are expressly covered in the penal laws of the Federal Republic of Germany. Section 90a⁴² ('Disparagement of the State and its Symbols') of the Criminal Code (*Strafgesetzbuch*) prohibits flag desecration. Thus, the provisions are explicit not merely in the acts (of flag desecration) that are prohibited by law, but the punishment that will be provided as well.

In a case before the Federal Constitution Court (*Bundesverfassungsgericht*),⁴³ the publisher of a book cover depicted people urinating on the flag, sought protection on the grounds that it was an 'artistic impression'. The local court held that an academic or professor might find some so-called art in this picture, but went on to affirm that the court was not bound by any such assessment.

When the matter was passed to the Regional Court, it was observed that the federal flag, the symbol of the Federal Republic of Germany and its free democratic constitutional structure, was being belittled, which damaged the honour and reputation of the State. The Federal Court reversed these decisions and upheld the right guaranteed in Article 5 on the ground that the only situation in which the freedom may be curbed is when it endangered the continued existence of the Nation itself. Further, the Court found that the flag did not have Constitutional value of the highest ranking such as the Basic Rights and found that the latter must take precedence.

This freedom given to citizens to desecrate the German flag, does not extend to acts involving the flags of other countries. Section 104⁴⁴ of the Criminal Code is a unique piece of legislation insofar as it makes Germany one of the few countries that criminalize the burning of flags of other countries on German soil. Denmark has a similar provision,⁴⁵ whereas the United Kingdom has found another route to curb the act of desecrating flags of other nations.⁴⁶

42 "Section 90 (1) Whoever publicly, in a meeting or through the dissemination of writings (Section 11 subsection (3)): ... 2. disparages the colors, flag, coat of arms or the anthem of the Federal Republic of Germany or one of its Lands, shall be punished with imprisonment for not more than three years or a fine.

(2) Whoever removes, destroys, damages, renders unusable or unrecognizable, or commits insulting mischief on a publicly displayed flag of the Federal Republic of Germany or one of its Lands or a national emblem installed by a public authority of the Federal Republic of Germany or one of its Lands shall be similarly punished. An attempt shall be punishable.

(3) The punishment shall be imprisonment for not more than five years or a fine if the perpetrator by the act intentionally gives support to efforts against the continued existence of the Federal Republic of Germany or against its constitutional principles."

⁴³ Judgment delivered on March 7, 1990 - The 'Flag case'.

⁴⁴ "Section 104 (1) Whoever removes, destroys, damages, renders unrecognizable, or commits insulting mischief with a flag of a foreign state, which is displayed according to legal provisions or recognized custom, or a national emblem of such a state which has been publicly installed by a recognized mission of such state, shall be punished with imprisonment for not more than two years or a fine."

⁴⁵ See Annexure 'A'.

⁴⁶ In *Percy v. DPP*, the Accused was held guilty of breaching provisions of the Public Order Act, 1986 when she defaced an American flag. [2001] EWHC Admin 1125. This seems to be in sync with previous statements of the British Courts. In *DPP v. Redmond-Bate*, Sedley, LJ said, "Flag desecration is one of the most acute forms in which the freedom of expression guarantees and public order offences are likely to come into conflict. There is no doubt that the protection of the freedom of expression applies to such conduct. It includes purely physical acts of protest and extends to "the irritating, the contentious, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence", [1999] Crim.L.R. 998, 1000. See also *Handyside v. United Kingdom* (1976) 1 E.H.R.R. 737.

C. Position in Hong Kong⁴⁷

Article 27 of the Constitution of Hong Kong ('Basic Law')⁴⁸ deals with the right to 'Freedom of Expression and Association' and states that; "Hong Kong residents shall have freedom of speech, of the press, and of publication; freedom of association, of assembly, of procession, and of demonstration; and the right and freedom to form and join trade unions, and to strike."

After the 1997 handover of Hong Kong to China, the first piece of legislation dealing with flag desecration was enacted. Section 7 of the Regional Flag and Regional Emblem Bill⁴⁹ deals with 'Protection of the regional flag and regional emblem' and states, '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 on conviction to a fine at level 5 and to imprisonment for 3 years.'

The legality of flag desecration and the validity of the anti-desecration legislation were tested in the highest court in the case of *HKSAR v. Ng Kung Siu & Anor.*⁵⁰ The Respondents were arrested at a peaceful demonstration waving what appeared to be a defaced national flag and regional flag. They were booked under Section 7 of the National Flag and National Emblem Ordinance⁵¹ and for desecrating the regional flag by publicly and wilfully defiling it, contrary to Section 7 of the Regional Flag and Regional Emblem Ordinance.⁵²

The Respondents claimed that the two statutes unjustifiably restricted their right to freedom of expression envisioned under Article 19 of the ICCPR,⁵³ pursuant to Section 39 of the Basic Law,⁵⁴ which envisions the implementation of the ICCPR. After conviction at the

⁴⁷ The Special Administrative Region (SAR) of Hong Kong is a political sub division of the People's Republic of China (PRC), for the unification of China, on the principle of 'One Country, Two Systems'. Macau, incidentally, is the only other region to have such an arrangement with PRC; both these regions have a Chief Executive as head of government.

⁴⁸ The Basic Law of Hong Kong serves as the constitutional document of Hong Kong. It was adopted on April 4, 1990 and went into effect on July 1, 1997. The Seventh National People's Congress (NPC) of the People's Republic of China (PRC) adopted this document. It replaces the Letters Patent and the Royal Instructions, the law that was in force when Hong Kong was a colony of the United Kingdom.

⁴⁹ Considering the legal relationship that Hong Kong has with the PRC, it is important to understand the relationship of the Regional flag (i.e. the flag of Hong Kong) with the National flag of the PRC.

Schedule 3 (Clause II) of the Regional Flag and Regional Emblem Bill states, "In the Hong Kong Special Administrative Region, whenever the national flag is flown together with the regional flag, or the national emblem is displayed together with the regional emblem, the national flag or the national emblem is to occupy a more prominent position.

When both the national flag and the regional flag are raised in procession, the national flag is to precede the regional flag. When the national flag is flown alongside the regional flag, the national flag is to be on the right and the regional flag on the left." In this Section, we are only concerned with the desecration of the Regional flag.

⁵⁰ [2000] 1 HKC 117, Final Appeal (Criminal) No 4 of 1999, Court Of Final Appeal.

⁵¹ Section 7 of the National Flag and National Emblem Bill, 1997 states, "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."

⁵² See *supra* note 49 and associated text.

⁵³ See *supra* note 14.

⁵⁴ Article 39 states, "(1) 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. (2) 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."

trial court, the Respondents successfully appealed to the Court of Appeal.⁵⁵ The HKSAR then appealed to the Court of Final Appeal.

The Court of Final Appeal upheld the conviction on the ground that the two Ordinances under which the Respondents were convicted were justifiable restrictions placed on the freedom of speech and expression and were integral for the protection of public order.⁵⁶ The Court went on to justify that such restrictions are not disproportionate to the aims sought to be achieved.⁵⁷

The Court also countered the argument that the right derived from the ICCPR, stating that, the freedom of expression was not an absolute and that it recognized that the freedom also placed certain responsibilities on the individual exercising it.⁵⁸

The *Ng Kung Siu* case marked a paradigm shift in the rights of Hong Kong citizens since the handover and with the ever strengthening grip of the Chinese Government over the HKSAR, it seems unlikely that there will be any change in the *ratio* laid down in the near future.

D. Position in Saudi Arabia

The Constitution of Saudi Arabia, adopted by the Royal Decree of King Fahd on March 1992, states, “Information, publication, and all other media shall employ courteous language and the state’s regulations, and they shall contribute to the education of the nation and the bolstering of its unity. All acts that foster sedition or division or harm the state’s security and its public relations or detract from man’s dignity and rights shall be prohibited. The statutes shall define all that.”⁵⁹

The flag of Saudi Arabia is unique. Article 3 of the said Constitution states that, “The state’s flag shall be as follows: (a) It shall be green⁶⁰; (b) Its width shall be equal to two-thirds of its length; (c) The words “*There is but one God and Mohammed is His Prophet*”⁶¹ shall be inscribed in the center with a drawn sword under it. The statute shall define the rules pertaining to it.”

This discussion is important because since the flag of Saudi Arabia carries the most sacred line in Islam. The issue is therefore not just of national significance but also of religious

⁵⁵ See: *HKSAR v. Ng Kung Siu & Anor*, [1999] 2 HKC 10, Case nos wss 3151 and 3152 of 1998, Eastern Magistracy.

⁵⁶ *Supra* note 50, 119.

⁵⁷ *Ibid.*

⁵⁸ “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”, *supra* note 50, 136.

⁵⁹ Article 39.

⁶⁰ The green color of Islamic flags is derived from the fact that the Prophet Muhammad wore a green cloak. A sword, symbolising the victories of Ibn Saud (King of Saudi Arabia), underscores this inscription.

⁶¹ The script on the flag is Arabic, written in the Thuluth script. It contains the *shahada* or Islamic declaration of faith: *La ilaha illa Allah Muhammad Rasulu Allah*. A sword, symbolising the victories of Ibn Saud, underscores this inscription. Other countries that display the Shahadah on their flags are: the flag of the Islamic State of Afghanistan (1990 to 1992), the Islamic Emirate of Afghanistan under the Taliban Regime and the unrecognized state of Somaliland.

importance. As a probable consequence of the religious significance of the flag, it is never lowered to half-mast, even on the death of the King, the Head of State.

Further, the Constitution itself recognizes the importance of Islamic traditions. Article 7 states: "Government in Saudi Arabia derives power from the Holy Koran and the Prophet's tradition." Even Flags that are defaced or defiled, must be destroyed according to principles prescribed by traditional Islamic practices. In consideration of the above facts, it is safe to conclude that the desecration would amount to blasphemy and would warrant not only criminal proceedings under the strict Islamic criminal codes prevalent, but would also result in excommunication or the like.

E. Position in India

The Constitution of India grants certain Fundamental Rights⁶² to all Indian citizens. Under Article 19 (1), "All citizens shall have the right: (a) to freedom of speech and expression." Unlike the US, the right to freedom of speech and expression under the Indian Constitution is not an absolute right and is subject to certain 'reasonable restrictions'. Yet, the scope of the term 'reasonable restrictions' is not unrestricted and any restrictions placed upon the right must fall within certain broad categories laid down in Article 19(2), a proviso to Article 19(1)(a). The grounds under which the 'State' is permitted to restrict the freedom of speech and expression are:

- (i) interests of the sovereignty and integrity of India;
- (ii) security of the State;
- (iii) friendly relations with foreign States;
- (iv) public order, decency or morality or in relation to contempt of court;
- (v) defamation; or
- (vi) incitement to an offence.

These grounds are ostensibly ambiguous and their wide nature has provided the Courts with a great deal of discretion in interpreting them.⁶³ It is prudent to note that the onus to prove the reasonableness of the restriction has always been laid on the authority imposing it rather than on the complainant to prove its unreasonableness.

In 1971, the Indian Parliament passed The Prevention of Insults to National Honour Act. Section 2 of the Act states that,

⁶² Article 13 of the Constitution of India protects all the Fundamental Rights, including those under Article 19, "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void". "These Fundamental Rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a 'pattern of guarantees' on the basic structure of human rights and impose negative obligations on the State not to encroach on individual liberty in its various dimensions.", per Bhagwati J, *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, p. 667-668.

⁶³ For example in *Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal*, the Supreme Court stated that, "It is true that Article 19(2) does not use the words 'national interest', 'interest of society' or 'public interest' but the several grounds mentioned in Clause (2) are ultimately referable to the interest of the nation and of the society.", AIR 1995 SC 1236, para 189. In *State of Bihar v. Smt. Shailbala Devi*, it was held that the incitement of violent crimes like murder, which is an offence against 'public order', may fall within the exception 'security of the State' in Article 19 (2), AIR 1952 SC 329. Similarly, a restriction on the use of loudspeakers likely to affect the health of the inmates of residential premises or a hospital was found to be reasonable under the ground of 'public order', *State of Rajasthan v. Chawla G.*, AIR 1959 SC 544.

“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 Flag⁶⁴ or the Constitution of India or any part thereof, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.”

India has yet to witness a case of flag desecration brought before the Courts. In fact, the Flag Code⁶⁵ was so strict about the use of the national flag that until 2004, citizens were not allowed to fly the flag except on 2 designated days i.e. India’s Independence and Republic Day. It was only after a petition filed by an individual against the State that the Supreme Court⁶⁶ recognized that the right to freedom of speech and expression included the right of every citizen to fly the national flag. The Court did clarify, however, that the right to do so would continue to be subject to the ‘reasonable restrictions’ and the provisions of the Prevention of Insults to National Honour Act, 1971 and the Flag Code to ensure the respect and dignity of the flag.⁶⁷

With such a strict view of the sanctity of the flag prevailing and with little scope of any challenge to the provisions of the 1971 Act, it is improbable, if not impossible, that an Indian will ever have the right to dissent against State policy by desecrating the Indian Tricolour.

V. Conclusion

The casual desecration of a flag with no symbolic motive behind it cannot claim any protection under the freedom of expression. The differing positions of nations and their internal jurisprudence with regard to the freedom of expression as well as flag desecration brings to the fore the difficulty in attempting to arrive at a generalization when trying to reconcile the two. The freedom of expression is a fluid term and its ambit has been and continues to not only expand, but also shrink in certain jurisdictions. Further, National Flags possess an important role and are often treated as venerated objects. In some Nations such as Saudi Arabia, Nepal and Pakistan, they represent religious symbols. The prevailing political and social climate within a Nation as also between Nations also influences policies and judicial decisions on the issue.

While discussing the issue of flag desecration, it is imperative to remember that the term ‘freedom of expression’ does not represent an absolute right and many countries lay parameters on which this right can be restricted. On the basis of the samples provided in this study, we observe that globally two broad trends seem to exist. One set of jurisprudence permits flag desecration as a part of the freedom of expression, while another set (seemingly larger) does not permit flag desecration for varied reasons. These include reasons of national honour (India or Hong Kong), religious reasons (Saudi Arabia), and still others for respect to other nations and foreign policy (Germany or Denmark), while some merely prohibit it for reasons of public nuisance or to prevent possible violence (UK). Even

⁶⁴ Explanation 2 to Section 2 states, “The expression ‘Indian National Flag’ includes any picture, painting, drawing or photograph or other visible representation of the Indian National Flag, or of any part or parts thereof, made of any substance, or represented on any substance.”

⁶⁵ Available at <http://mha.nic.in/nationalflag2002.htm> (Last visited: December 27, 2005). The Flag Code of India, 2002, took effect from January 26, 2002 and supersedes the ‘Flag Code – India’ as it existed.

⁶⁶ *Union of India v. Naveen Jindal*, AIR 2004 SC 1559.

⁶⁷ *Ibid*, para 88.

in nations where it is currently permissible, like the US, there is a significant lobby which advocates against its allowance .

Considering the expanding nature of human rights in general, it is possible, albeit improbable that all Nations permit flag desecration as a valid form of political dissent. Till such time, however, the trans-boundary inconsistencies in the freedom of expression will continue and the endless debates on the right to desecrate one's own or another's national flag as a political statement will continue to prevail.

Annexure A
'The Laws Dealing With Freedom of Expression and Flags: A Comparison'

Country	Law dealing with Freedom of Expression	Laws dealing with Flags to appreciate if desecration for political dissent is permissible
CANADA	<p>Section 2(b) of the Canadian Charter of Rights and Freedoms states, "2. Everyone has the following fundamental freedoms: ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."</p> <p>This right is not absolute, by virtue of the limitation placed in Article 1 of the Charter which states that "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁶⁸</p>	<p>As per the Canadian Flag Etiquette Rules, "The National Flag of Canada should be displayed only in a manner befitting this important national symbol; it should not be subjected to indignity or displayed in a position inferior to any other flag or ensign."</p> <p>Further, it states that, "When a flag becomes tattered and is no longer in a suitable condition for use, it should be destroyed in a dignified way by burning it privately."⁶⁹ These Rules read along with the restrictions placed in Article 1 of the Canadian Charter of Rights and Freedoms suggest that restrictions can be placed on flag desecration.</p>
PHILIPPINES	<p>Section 4 of the Article III ('Bill of Rights') 1987 Constitution of the Republic of the Philippines states that, "No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances."</p>	<p>The Flag and Heraldic Code of the Philippines, Republic Act No. 8491 is the statute dealing with flags. Section 14 states that, "A flag worn out through wear and tear, shall not be thrown away. It shall be solemnly burned to avoid misuse or desecration. The flag shall be replaced immediately when it begins to show signs of wear and tear."</p> <p>Section 48 is penalizes all acts</p>

⁶⁸ In the case of *Her Majesty The Queen v. James Keegstra* [1990] 3 S.C.R. 697, p.802, the Supreme Court of Canada held that, "...that the freedom (of expression) is instrumental in promoting the free flow of ideas essential to political democracy and the functioning of democratic institutions."

⁶⁹ ---, *The Royal Union Flag*, at http://www.pch.gc.ca/progs/cpsc-ccsp/etiquette/4_e.cfm.

		that violate this Law, it states that, "Failure or refusal to observe the provisions of this Act; and any violation of the corresponding rules and regulations issued by the Office of the President, shall after proper notice and hearing, shall be penalized by public censure which shall be published at least once in a newspaper of general circulation." Based on these provisions, one can infer that desecration is not permitted in the Philippines.
SOUTH AFRICA	<p>Article 16 (1) of the Constitution of the Republic of South Africa 1996 states that, "Everyone has the right to freedom of expression, which includes a. freedom of the press and other media; b. freedom to receive or impart information or ideas; c. freedom of artistic creativity; and d. academic freedom and freedom of scientific research."</p> <p>This right is not absolute and Article 16(2) lays down the restriction by stating that, "The right in subsection (1) does not extend to a. propaganda for war; b. incitement of imminent violence; or c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."</p>	<p>The 'Instructions Regarding the Flying of the National Flag of the Republic', which appeared in the Government Gazette of 8 June 2001, Vol. 432, No. 22356, provides the guidelines for dealing with the flag of South Africa.</p> <p>Section 10 ('Respect for National Flag') The National Flag must at all times be treated with dignity and respect. The Flag must not (a) touch the floor or the ground; (b) be used as a tablecloth or be draped in front of a platform; (c) be used to cover a statue, plaque, cornerstone etc, at unveiling or similar ceremonies; or (d) be used to start or finish any competition, race or similar event.</p> <p>Flag desecration is not permissible in the light of these provisions.</p>
DENMARK	Section 77 deals with Freedom of Expression and states that, "Any person shall be entitled to publish his thoughts in printing, in writing, and in speech, provided that he may be held answerable in a court	The Wikipedia Encyclopaedia states, "In Denmark, it is illegal to desecrate foreign flags or symbols. However it is legal to desecrate and burn the Dannebrog (flag of Denmark). The reason for

	of justice. Censorship and other preventive measures shall never again be introduced.”	this is the fact that foreign states pose a threat to Denmark. A burning of such a flag could be understood as a threat by other countries.” ⁷⁰ This position is truly unique.
AUSTRALIA	“The Australian Constitution does not expressly protect freedom of speech or expression. In 1992, however, the High Court of Australia held that a right to freedom of expression, in so far as public and political discussion were concerned, was implied in the Constitution.” ^{71,72}	Section 7 of the Flags Act of 1953 states that, “The Governor-General may make, and cause to be published, rules for the guidance of persons in connection with the flying or use of flags or ensigns referred to in, or appointed under, this Act.” The Protection of Australian Flags (Desecration of the Flag) Bill 2003 was introduced in the Australian Parliament with the stated purpose of amending the <i>Flags Act 1953</i> in order to criminalise the desecration, dishonouring or destruction of <i>inter alia</i> , the Australian National Flag. ⁷³

⁷⁰ ---, ‘Flag Desecration’ at http://en.wikipedia.org/wiki/Flag_desecration#Australia.

⁷¹ “This right was thought to be an essential requirement of democratic and representative government and thus implied into the Australian Constitution, which had established such a system of government. Subsequent cases have made determinations on the scope of this implied freedom. It has been found to extend to the publication of material:

- discussing government and political matters generally;
- relating to the performance of individuals of their duties as members of the Parliament; and
- discussing the performance, conduct and fitness for office of members of the Commonwealth and State legislatures.

The right does not extend to more generally to a right to freedom of expression where political issues are not involved.” At ---, Australian Freedom of Speech Laws, http://www.hrcr.org/safrica/expression/freedom_speech.html.

⁷² In the landmark case of *Victoria v. Levy*, Chief Justice Brennan observed that given speech is often used to convey ideas about political issues; it is natural to consider the implied constitutional freedom of political communication ‘as a freedom of speech’. As far as restrictions are considered, he observed that, “non-verbal conduct which is capable of communicating an idea about the government or politics of the Commonwealth and which is intended to do so may be immune from legislative or executive restriction so far as that immunity is needed to preserve the system of representative and responsible government that the Constitution prescribes.”

⁷³ Elizabeth O’Shea, an Australian student, burned the Flag of Australia in the 2000s; she was not charged. Prime Minister John Howard has defended the right of people to burn the Australian flag, saying that while repugnant, it was a matter of free speech. “... despite my great affection for the Australian flag, I have stopped short of advocating that because, repugnant though it is to me, in the end I guess it’s part of the sort of free speech code that we have in this country” Transcript of the Prime Minister the Hon John Howard MP Interview with Neil Mitchell, Radio 3aw at <http://www.pm.gov.au/news/interviews/2002/interview1985.htm>.

SINGAPORE	<p>Article 14 on the Constitution of Singapore deals with 'Freedom of Speech, Assembly, and Association', it states that, "(1) Subject to clauses (2) and (3), (a) every citizen of Singapore has the right to freedom of speech and expression..."</p> <p>The restriction provided in sub section (b) states that, "(2) Parliament may by law impose (a) on the rights conferred by clause (1)(a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence..."</p>	<p>The National Flag Guidelines provide for rules for handling flags. It states, 'How it cannot be used or treated' in 3 articles:</p> <p>"1. The flag cannot be used: (a) in any trademark or for any commercial purpose; (b) as a means, or for the purposes, of advertisement; (c) as, or as part of, any furnishings, decoration, covering or receptacle; (d) at any private funeral activity; (e) incorporated or worn as part of any costume or attire; or (f) on any private vehicle.</p> <p>2. No person shall produce or display any flag which bears any graphics or word superimposed on the design of the flag.</p> <p>3. The flag should be cleaned when dirty, and replaced if it has faded. After any washing, it should not be hung out to dry outdoors together with other laundry. Any worn out or damaged flag should be disposed properly, not left visible in dustbins. Torn or worn-out flags should be packed into a sealed black trash bag before being disposed."⁷⁴ Thus, flag desecration does not appear to be permissible in Singapore.</p>
NIGERIA	<p>Article 39 (1) states that, "Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference."</p> <p>The restriction is provided in sub</p>	<p>Section 5 of the Flag and Coat-of-Arms Ordinance of 1960 states that, "any person who flies or exhibits the National Flag in a defaced or bad condition shall be guilty of an offence against this Ordinance." Flag desecration is permitted under this Ordinance.</p>

⁷⁴ ---, The National Flag Guidelines at http://www.sg/explore/symbols_flag_guideline.htm.

	<p>Article (3) which states that, “Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society: (a) For the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or (b) imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force or other Government security services or agencies established by law.”</p>	
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