

REDEFINING FREEDOM OF EXPRESSION VIS-À-VIS THE NATIONAL FLAG

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Freedom of expression is one of the cornerstones of democracy. Its understanding is dependant on society and prevalent values. Different decisions by the Indian Supreme Court, exemplify the varying types of freedoms that come under the freedom of expression.¹ While some rights may not find an explicit mention in Article 19(1) of the Constitution of India, yet they may be read into one of the clauses therein. But where do we draw the boundaries for this freedom? In an increasingly diverse and heterogeneous society, viewpoints that dissent or deviate from pre-existing norms may be viewed as heresy or transgressions. In matters concerning the entire nation one must proceed with caution.

One such sensitive issue relates to the use of the Indian National Flag, which for any country is a symbol of its pride, independence and is in fact analogous to its identity in the world. Prior to the decision in *Union of India v. Naveen Jindal*,² citizens could not display the flag in their private capacity, and this prohibition was absolute- even putting up the flag as an exhibition of one's patriotism was no excuse. The only exception made was for designated national holidays or special occasions, such as Independence Day or Republic Day. The decision of the Supreme Court, however, has significantly altered this position.

Ensuring dignity and respect for the Flag, does not necessitate restricted access. The rights of citizens need to be kept in mind during prioritisation. What is indisputable is that this freedom cannot be absolute and unhindered, for that would be impractical as

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¹ For instance, some of these rights are: the right to sing [*Usha Uthup v. West Bengal*, AIR 1984 Cal 268], the right to demonstrations [*Kameshwar Singh v. State of Bihar*, AIR 1962 SC 1116], the right to liberty of the press [*Sakal Papers P(Ltd.) v. Union of India*, AIR 1962 SC 305], the right to stage dramatic performances [*Charan Singh v. Union of India*, AIR 1961 Punj 272], the right to remain silent or not speak [*Bijoe Emanuel v. State of Kerala*, (1983) 3 SCC 615].

² 2004 (1) SCALE 677.

well as unreasonable. The boundaries to be set and the lines to be drawn must be done keeping in mind the nature of the activity, its constitutional implications and restrictions, prescriptive as well as proscriptive legislation.

I. The Case: Specifics

Naveen Jindal was a Joint Managing Director of a public limited company at Raigarh, Madhya Pradesh. He had displayed the national flag at the office premises of his factory, but was stopped from doing so by Government officials. The reason given was that this was not permitted under the Flag Code of India. In a writ petition before the Delhi High Court, he contended that he could not be prevented from doing so as the Flag Code merely contained executive instructions not amounting to law. He further contended that the right to display the national flag is a fundamental right, covered under Article 19(1)(a) of the Constitution of India, namely, the right to freedom of speech and expression. Therefore, the core question in the *Naveen Jindal* case, was whether or not the right to display the national flag by private citizens is a fundamental right, coming within the purview of Article 19(1)(a) of the Constitution of India.

The High Court held that as long as he did so respectfully, he could not be restricted and, therefore, Article 19(1)(a) did come to his aid in this case. On appeal the Supreme Court took into consideration the history and contemporary relevance of the flag, rules relating to its display in other countries (whether inclusionary or otherwise), constitutional and statutory provisions and Constituent Assembly debates. It ultimately concurred with the High Court and held that the right of a private citizen to display the national flag was a fundamental right within the purview of Article 19(1)(a). At the same time, this right was not absolute and was subject to the reasonable restrictions contained in Article 19(2).

Amidst several adjournments, the Union of India appointed the Shenoy Committee, to look into various issues relating to the liberalisation of the use of the national flag. The Committee ultimately supported fewer restrictions on the use of the flag.

The Court also held that a fundamental right comes coupled with a fundamental duty and if the former is granted, the latter cannot be discarded. The Court, relying on a plethora of decisions, held that the Flag Code was a mere body of executive instructions

without any statutory basis, and, therefore, did not amount to 'law' under Article 13 of the Constitution, or a law which the State was entitled to make under the provisions of clauses (2) to (6) of Article 19 in order to curtail guaranteed fundamental rights.³

II. The Flag Code, Regulatory Legislation and its Implications

The hoisting and use of the national flag is regulated by The Emblems and Names (Prevention of Improper Use) Act, 1950 and The Prevention of Insults to National Honour Act, 1971 and The Flag Code of India. As a result of the petition filed by Naveen Jindal, the original Flag Code has now been replaced with The Flag Code, 2002, which allows unrestricted display of the national flag, while ensuring that it is consistent with the dignity of the flag.

The new Flag Code of India, 2002, superseded the old one on 26th January 2002. Section 2 of the new Code recognises the right of citizens to display the national flag, and for the sake for convenience, has been divided into three parts.⁴ The old Code was more conservative in approach and disallowed the use of the national flag by private citizens.

The Flag Code is a set of executive instructions and not statutory rules or legislation. However, the Court held that The Flag Code, to the extent it provides for preserving respect and dignity of the national flag, deserves to be followed.

The new Flag Code reflects the changed attitude of the Court towards the national flag. By allowing its free use by citizens, it has recognized the importance of the freedom of expression and the extent to which it may be allowed. It would be ironic if Indians were denied access to the very symbol that denotes their freedom from slavery and independence. It is a safe assumption that citizens are mature and aware of their duties and obligations, to give the flag the reverence it deserves. In addition, the Court ought

³ *Kharak Singh v. State of UP*, AIR 1963 SC 1295; *State of Madhya Pradesh and Another v. Thakur Bharat Singh*, AIR 1967 SC 1170; *Bijoe Emmanuel and Others v. The State of Kerala and Others*, (1986) 3 SCC 619.

⁴ Part I of the Code contains a general description of the National Flag, Part II of the Code is devoted to the display of the National Flag by members of public, private organizations, educational institutions, etc. Part III of the Code relates to display of the National Flag by Central and State governments and their organisations and agencies.

to be given credit for acknowledging that there can be no restrictions on displaying the national flag as a means of displaying one's patriotism for the nation.

The new Flag Code, while adopting a more liberal stance, does provide sufficient safeguards for the appropriate usage of the flag. The freedom that it confers on citizens is not absolute, but subject to certain restrictions, as mentioned under Article 19(2) of the Indian Constitution. Incidentally, with the introduction of the new Flag Code, there has been a massive increase in the sales of the national flag.⁵

The Prevention of Insults to National Honour Act, 1971 (as amended by The Prevention of Insults to National Honour (Amendment) Act, 2003), not only describes what constitutes 'disrespect' for the national flag, but takes an additional step to ensure its respectful use as well. It prescribes a three year imprisonment or fine, or both, for anyone found treating the flag with disrespect.⁶

Thus the restrictions imposed on the display of national flag, as contained in the aforesaid Act and The Emblems and Names (Prevention of Improper Use) Act, 1950, and according to The Flag Code, 2002, will be applicable. Some of them are: the flag shall not be dipped in salute to any person or thing, it cannot be inscribed or written on, cannot be intentionally displayed with the saffron down, shall not be used as a covering for a building, shall not be intentionally allowed to touch the ground or the floor or trail in water etc.

⁵ Gaurav Vivek Bhatnagar, "Good Old Flag is Hot New Bestseller", *The Hindu*, 25th January 2002 <<http://www.hinduonnet.com/thehindu/2002/01/25/stories/2002012503070300.htm>>, last visited 21st March 2005. The sales of the national flag nearly trebled since the amendment of the Flag Code. The Khadi and Village Industries Commission has been bracing itself for the soaring demand, as stocks have dried up and college students, businessmen, government officials etc scramble with zeal and fervour to buy the national flag that they are now free to display.

⁶ Section 2 of The Prevention of Insults to National Honour Act, 1971 states: "Whoever in any public place or in any other place within public view burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon or otherwise shows disrespect to or brings into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag... or any part thereof, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both".

III. The National Flag, Freedom of Expression and some National Experiences

In order to examine the extent of freedom granted to the display of the flag in India, it would be helpful to investigate the position in other nations across the world. Countries like Canada, Brazil and Malaysia permit free use of the Flag by private citizens while this is not allowed in Egypt, Japan and Sweden.

In the United States, there now exists, what could be described as the most unhindered use. This has not always been the case, for flag desecration statutes were adopted by almost all states by 1932 and these outlawed writing on the flag, publicly mutilating or defacing it either by words or actions and using it for advertising.⁷ These state statutes could be considered to be the culmination of the organized flag protection movement that had begun to take birth in the late 1800s. Later cases have been more liberal. For instance, in 1969 in *Street v. New York*,⁸ the Supreme Court held that the State of New York could not convict a person based on his verbal remarks. Similar decisions were delivered in *Smith v. Goguen*⁹ and *Spence v. Washington*.¹⁰ Following these cases, there were revisions in many of the State Flag Desecration statutes. Ultimately, in 1989, came *Texas v Johnson*,¹¹ a landmark case, where the burning of the national flag was protected under the right to freedom of expression.¹² A similar stance was adopted by the Courts

⁷ *Halter v. Nebraska*, 205 U.S. 34 involved a conviction of two businessmen selling "Stars and Stripes" brand beer with representations of the U.S. flag affixed to the labels.

⁸ 394 U.S. 576.

⁹ In *Smith v. Goguen*, 415 U.S. 94, the Supreme Court held that Massachusetts could not prosecute a person for wearing a small cloth replica of the flag on the seat of his pants based on a state law making it a crime to publicly treat the flag of the United States with "contempt."

¹⁰ In *Spence v. Washington*, 418 U.S. 405, the Supreme Court held that the State of Washington could not convict a person for attaching removable tape in the form of a peace sign to a flag. The defendant had attached the tape to his flag and draped it outside of his window in protest of the U.S. invasion of Cambodia and the Kent State killings. Although not a flag burning case, this was the first time where the Court clearly stated that protest involving the physical use of the flag should be seen as a form of protected expression under the First Amendment.

¹¹ 105 L Ed 2d 345.

¹² Gregory Johnson, a member of the Revolutionary Communist Party, was arrested during a demonstration outside of the 1984 Republican National Convention in Dallas after he set fire to a flag while protestors chanted "America, the red, white, and blue, we spit on you." In a 5-4 decision authored by Justice Brennan, the Court found for the first time, that burning the flag was a form of symbolic speech subject to protection under the First Amendment.

in *Harold Omand Spence*¹³ and *Sidney Street v State of New York*.¹⁴

Courts in the United States, therefore, have displayed a considerable support for the First Amendment rights of citizens to be able to use their flag as a form of protest.¹⁵ Whether or not this is a positive trend is a debatable issue. Banning flag desecration or making it punishable has been argued to be unjust because it would amount to taking penal action against people for merely expressing their thoughts or ideas. Further, the fact that people resort to desecration of the national flag implies that, at some level, there is dissatisfaction with the government, and non-allowance of such expression is undemocratic. On the other hand, there are the more conservative groups, which argue that there are alternative channels of expression and the burning or mutilation of a symbol of national pride, is non justifiable, no matter what the circumstances. Instances parallel to the *Johnson* case have been found in the United Kingdom¹⁶ and Hong Kong.¹⁷

Thus, there are no universal standards that regulate the degree of freedom that may be allowed to private citizens with regard to their national flags. While some countries subject display to severe restrictions, others give priority to civil liberties, such as the

¹³ 41 L Ed 2d 842. The display of the national flag was considered to be within the contours of the First Amendment.

¹⁴ 22 L Ed 2d 572. Even a distasteful form of expression could be used if protected by the Constitution.

¹⁵ The First Amendment to the US Constitution provides: “*Congress shall make no law in abridging the freedom of speech or of the press.*” The US Courts have read the First Amendment to require a considerable amount of Laissez Faire in the marketplace of ideas. In his dissent in *Abrams v. United States*, 250 U.S. 616, 40 S.Ct 17, Holmes J. argued that the regulation of dissident speech is impermissible because the free speech clause recognizes that the “*ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market.*”

¹⁶ In *Percy v. Director of Public Prosecutions* [1995] 2 All ER, the claimant, Lindis Percy, while protesting against American military activity, stood on an American Flag and scribbled on it. The High Court accepted her submission that flag denigration was a form of protest activity renowned the world over, and quashed her conviction by a Norfolk district judge.

¹⁷ “Triumph of Freedom of Expression”, Hong Kong Voice of Democracy, March 24, 1999, <http://www.democracy.org.hk/EN/mar1999/hr_04.htm>, last visited 21st March, 2005. Activists Ng Kung Siu Chris, of the Constitutionlists Society, and Li Kin Yun, of the Chinese Liberal Democratic Party were arrested by the police for desecrating the People’s Republic of China’s national flag as a form of protest. The Court of Appeal overturned their convictions, which it held were a breach of the right of free expression as guaranteed under Article 39 of the Basic Law and Article 19 of the International Covenant on Civil and Political Rights.

freedom of expression and, therefore, are less restrictive with regard to usage of the flag. The foreseeable problem with liberalising the rules is that there would be a need for greater civic awareness, enforcement of correct usage and regulation of commercial exploitation. On the other hand, with countries like Australia and Canada permitting comparatively liberal use, there is an increased pressure to relax norms. One of the possible, and practical solutions for ensuring respect for the flag is the incorporation of its relevance and meaning within the educational curriculum. It would not only serve its purpose, but also be a much better and cleaner option than saffronised or hinduised textbooks.

IV. Conclusion: Drawing the Line

In any national context, while dealing with a symbol of national dignity such as the national flag, it is imperative to consider the historicity, cultural connotations and existing policies that stem from them.

The Constituent Assembly, adopted the tricolour as Independent India's National Flag. Jawaharlal Nehru had hoped that the flag would carry a message of freedom wherever it flew. It would then, be ironical, to make such a discriminative demarcation between ordinary citizens of a country and political dignitaries, whereby the freedom to display the very symbol of freedom itself was curtailed. One must also consider the irony involved in the peculiar fact that Indian citizens are free to display their national flags in other countries, such as Japan, while for decades after Independence they were deprived of this right in their home country. Over the past few decades, several people including members of armed forces have ungrudgingly laid down their lives to keep the tricolour flying in its full glory. The flag characterises India's existence as a nation and is symbolic of the Indian identity.

A country that has for years restricted the use of the flag out of fear of *potential* disrespect, would certainly not tolerate desecration. There is more to this than just speculation about national behaviour. Moreover, as the Court observed, allowing the use of the flag as an expression of anger would amount to disrespect. In the *Johnson* case, one of the main reasons why the respondent was let off was the failure to apply

the test evolved in *United States v. O'Brien*,¹⁸ whereby an important governmental interest in regulating non-speech can justify incidental limitations on the freedom of speech and expression. Reverting to the Indian scenario, millions of people consider the flag sacred and as such it is the duty of the government to protect it. The Constituent Assembly debates have reflected the same. Philosophical justifications regarding free speech in the United States have been based on serving the value of truth, as an essential for self government and in terms of individual liberty and self fulfillment. There are also negative theories, which focus on special reasons to distrust government in the realm of speech regulation.¹⁹

India, while granting the right to free speech under Article 19(1)(a) of the Constitution of India, has never lost sight of considerations of public interest and social control, as is illustrated through numerous judicial pronouncements.²⁰ Liberty of speech and expression guaranteed by Article 19 (1)(a) brings within its ambit the corresponding duty and responsibility and puts limitations on the exercise of that liberty. The State has legitimate interest, therefore, to regulate the freedom of speech and expression.

However, the freedom of speech offered in the United States of America is a concept that would be unacceptable in the Indian context. Free speech, in the United States, is entitled to a preferred position, with the First Amendment making this an absolute right while in India it is by no means total. There must, therefore, be a sort of middle path or compromise that should be reached. This is exactly what the Court rose to do in this case. It appreciated the momentous history of this venerated object and also the need to be fair to patriotic citizens and not prevent them from displaying their patriotism. The Court in the *Johnson* case observed: "*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.*"²¹ However, as mentioned above, the right to free expression in India is qualified, and reasonable restrictions are constitutionally recognised.

¹⁸ 391 U.S. 367.

¹⁹ See generally Kathleen M Sullivan and Gerald Gunther, "First Amendment Law", (2003).

²⁰ *C Ravichandran Iyer v. Justice AM Bhattacharjee*, 1995 (5) SCC 457; *Kedar Nath Singh v. State of Bihar*, AIR 1962 SC 129.

²¹ 105 L Ed 2d 345 at para 9.

The line has now clearly been drawn: citizens are not denied access to the national flag, but are simultaneously subject to certain restrictions that would ensure that the flag gets the respect it deserves.

Making disrespect punishable shall also lead to more responsible behaviour on the part of probable defaulters. There is a great probability that increased access to the national flag shall lead to a collective increase in national pride and sentiment. The national flag, as a symbol of nationhood, would help build a pan Indian identity.

The decision has also expanded the scope of interpretation of Article 19(1)(a). Even before the *Jindal* case, there has been a constant expansion of the scope of the right to free expression. Constitutional provisions are never static, and need to be reinterpreted and reconsidered in light of changing times. Any citizen who wishes to express his love for his nation should not be disallowed from doing so.

Finally, the most interesting revelation, as is evidenced by the positive response to the judgement and burgeoning sales, is that the Indian nationalist spirit still lives on. In an age where sectarian strife raises its ugly head constantly, and communalism is the order of the day, this is undeniably what India, as a nation, needs.

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