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UNION OF INDIA

v.

NAVEEN JINDAL AND ANR.

JANUARY 23, 2004

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[V.N. KHARE, CJ., BRIJESH KUMAR AND S.B. SINHA, JJ.]

Constitution of India, 1950:

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Article 19(1)(a), 19(2)—Right to fly National Flag by Indian citizens—Held: Right to fly National Flag freely with respect and dignity is a fundamental right within the meaning of Article 19(1)(a)—However, such right is not an absolute right but a qualified one—It is subject to reasonable restrictions under Article 19(2)—Act of 1950 and Act of 1971 regulates and control the use of National flag—Emblems and Names (Prevention of Improper Use) Act, 1950—Prevention of Insults to National Honour Act, 1971.

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Article 13(3)(a)—Flag Code, whether law—Held: Flag Code contains executive instructions of the Central Government and as such not 'law' within the meaning of Article 13(3)(a)—For the purpose of Article 19(2) it cannot restrictively regulate the free exercise of right of flying the National Flag—However, Flag Code provides for preserving respect and dignity of the National Flag and the same is to be followed—Article 19(1)(a) and 19(2)—Flag Code of India.

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Article 19(1) and 51A—Right to fly National flag—Consideration in context of fundamental duties—Held: Every right is coupled with duty—Right to fly National flag is subject to restrictions enumerated in Article 51A under Part IV-A—However, justifiability or enforceability of Article 51A not important.

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Interpretation of the Constitution—Held: Constitution being a living organ, its ongoing interpretation is permissible—Recourse can be taken to the Directive Principles of State Policy or fundamental duties to balance fundamental/legal rights and regulatory measures/restrictions—Part IV and IVA.

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Constitution of India and Constitution of United States of America:

Rights under—Distinction between—Held: First amendment of the

American Constitution confers absolute right of religion and free expression to a citizen whereas Article 19(1)(a) of Indian Constitution confers qualified right of free speech and expression—Further American Constitution approves right of burning the National Flag as an expression of anger but the Indian Constitution does not—Constitution of India, 1950—Article 19(1). A

Respondent-Joint Managing Director of a public limited company was flying National flag at his official premises. Government officials prevented him to do so as the same is not permissible under the Flag Code of India. Respondent filed writ petition on the ground that no law could prohibit flying of National flag by Indian citizens. It was contended that flying of National flag with respect and dignity being a fundamental right and the Flag Code contains only executive instructions of the Government of India, thus not being a law, it could not impose reasonable restrictions within the meaning of Article 19(2) of the Constitution of India. High Court allowed the petition holding that so long as a citizen of India flies National flag in a respectful manner no restrictions can be imposed. Hence the present appeals. B C D

Dismissing the appeals, the Court

HELD: 1.1. Right to fly the National Flag freely with respect and dignity is a fundamental right of a citizen within the meaning of Article 19(1)(a) of the Constitution of India being an expression and manifestation of his allegiance and feelings and sentiments of pride for the nation. The fundamental right to fly National Flag is not an absolute right but a qualified one being subject to reasonable restrictions under Article 19(2) of the Constitution. The right is not unfettered, unsubscribed, unrestricted and unchannelled one. The Emblems and Names (Prevention of Improper Use) Act, 1950 and the Prevention of Insults to National Honour Act, 1971 regulates and control the use of the National Flag. [1072-F, G] E F

A. Satya Phaneendra v. S.H.O. Kodad (PS) Nalgonda and Ors., (2001) 2 ALT 141, referred to.

1.2. National Flag indisputably stands for the whole nation, its honour and glory, its ideals, aspirations, its hopes and achievements. National Flags are intended to project the identity of the country they represent and foster national spirit. Their distinctive designs and colours embody each nation's particular character and proclaim the country's separate existence. Thus, it is veritably common to all nations that a G H

- A National Flag has a great amount of significance. All countries try to strike a balance between the two extremes-unrestricted use of flying flag and the restricted use, based on the cherished values of their country, the history behind the evolution of the flag in their country, etc. In order that the respect and dignity of the flag be fostered and maintained, several countries have laid down rules relating to the use, display, etc. of the flag,
- B along with rules to provide against the burning, mutilation and destruction of the flag. Thus, in order to discern whether an individual has a right to display the flag in India, one will have to discern what are the advantages and disadvantages of free use and balance that with the vital role played by the flag in India's freedom struggle; importance of National Flag and
- C Constituent Assembly Debates. Although interpretation of the Constitution must primarily be based on the materials available in India, relevant rules of the other countries are also taken for guidance. The stand taken by other countries definitely has a bearing on the course India has taken so far and the course to be adopted in the future. [1046-C; 1048-C-E; 1052-B,C]

- D *Our National Flag* by Lt. Cdr. K.V. Singh, Constituent Assembly Debates 22nd July 1947, p. 766, 771 and 780, relied on.

National Flag of Japan, Basic Rules for Hoisting; Report of the National Flag Committee, April 2001, p 14-15, referred to.

- E 1.3. The flag is definitely one of the most revered objects in our society. It must certainly be treated with the utmost respect and dignity. This might not be possible without imposing any restrictions on its use. But one can see from the global scenario that the major trend is to protect the flag against mutilation, destruction, etc. and not to prevent individuals
- F from having any access to the flag, making its use a virtual exclusive privilege of the Government. Since all Indians fought for freedom, it can never be the intention to deny them use of their National Flag-a symbol of their freedom in entirety. Thus, one can conclude that the basic intention is to provide against the destruction, mutilation, etc. of the Flag and to provide certain basic level rules for when and how it should be
- G compulsorily used. Though not expressly stated, it must therefore give a right of usage to the citizens, other than on the specific occasions specified. [1053-A, G]

- H 1.4. National Anthem, National Flag and National Song are secular symbols of the nationhood. They represent the supreme collective expression of commitment and loyalty to the nation as well as patriotism

for the country. They are necessary adjunct of sovereignty being symbols and actions associated therewith. The unity and integrity of India if to be perceived in diverse situation, the feeling of loyalty, commitment and patriotism can be judged not only by giving effect to the constitutionalism but also on their secular symbol unhidden. [1053-H 1054-A, C]

1.5. The question whether there should be free and unrestricted use of flag allowed to citizens has to be considered not from the answer as to whether there exists an express provision on the basis whereof a right to fly the National Flag can be rested or whether there is anything in the Constitution prohibiting or denying the exercise of such a right. If flying of a National Flag is considered in absence of any denial thereof either in the Constitution or in any other statute book, it may be held to be a part of the fundamental right. Furthermore, the flying of National Flag being symbol of expression would come within the purview of Article 19(1)(a) of the Constitution. [1054-C, D; 1057-A]

2.1. Flag Code of India concededly contains the executive instructions of the Central Government. It is stated that the Ministry of Home Affairs, which is competent to issue the instructions contained in the Flag Code and all matters relating thereto are one of the items of business allocated to the said Ministry by President under Government of India (Allocation of Business) Rules, 1961 framed in terms of Article 77 of the Constitution. A bare perusal of Article 13(3)(a) would clearly go to show that executive instructions would not fall within the aforementioned category. Such executive instructions may have the force of law for some other purposes. The necessity as regard determination of whether Flag Code is 'law' has arisen as the Parliament has not chosen to enact a statute which would confer at least a statutory right upon a citizen of India to fly a National Flag. An executive instruction issued by the appellant herein can any time be replaced by another set of executive instructions and thus deprive Indian citizens from flying National Flag. Furthermore, such a question will also arise in the event if it be held that right to fly the National Flag is a fundamental or a natural right within the meaning of Article 19 of the Constitution as for the purpose of regulating the exercise of right of freedom guaranteed under Article 19(1)(a) to (e) and (g) a law must be made. [1054-E, F; 1054-G, H; 1055-A, B]

2.2. Flag Code although is not a law within the meaning of Article 13(3)(a) of the Constitution for the purpose of Article 19(2) thereof, it

A would not restrictively regulate the free exercise of the right of flying the national flag. However, the Flag Code to the extent it provides for preserving respect and dignity of the National Flag, the same deserves to be followed. [1072-H; 1073-A]

B *Kharak Singh v. State of U.P.*, AIR (1963) SC 1295; *State of Madhya Pradesh and Anr v. Thakur Bharat Singh*, AIR (1967) SC 1170; *Bijoe Emmanuel and Ors. v. State of Kerala and Ors.*, [1986] 3 SCC 619; *S.C. Advocates-on-Record Assn. v. Union of India*, [1993] 4 SCC 441 and *Punit Rai v. Dinesh Chaudhary*, [2003] 8 SCC 204, referred to.

C 3.1. The Court has interpreted the provisions of the Constitution either in the light of the Directive Principles of the State Policy as contained in Part IV or fundamental duties under Part IVA thereof or both. Applying the said test and keeping in view the fact that the right to fly the National Flag is not an absolute right but a qualified right, such right can be read with having regard to Article 51A under Part IVA of the Constitution. [1060-H; 1061-A, B]

E 3.2. Every right is coupled with a duty. Part III of the Constitution although confers rights, duties and regulations are inherent thereunder. Such reasonable regulations have been found to be contained in the provisions of Part III of the Constitution, apart from clauses 2 to 4 and 6 of Article 19 of the Constitution. Thus, the right to fly National Flag is subject to certain restrictions under Part IVA. The question as to whether Article 51A is not justiciable or enforceable thus takes a backseat.

[1068-H; 1069-A]

F *Indian Handicraft Emporium and Ors v. Union of India and Ors.*, JT (2003) 7 SC 446; *S. Rangarajan etc. v. P. Jagjivan Ram and Ors.*, [1989] 2 SCC 574 and *Ranganath Misra v. Union of India and Ors.*, [2003] 7 SCC 133, referred to.

G 4. The distinction between the Constitution of India and Constitution of United States of America is that in U.S.A. the first amendment gives an absolute right of religion and free expression to a citizen, but under Indian Constitution Article 19(1)(a) does not confer such an absolute right of free speech and expression. It only provides for a qualified right. Such right is subject to the regulatory measures contained in clause (2) thereof. So long as the expression is confined to nationalism, patriotism and love for motherland, the use of the National Flag by way of expression of those

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sentiments would be a fundamental right. It cannot be used for commercial purpose or otherwise. The recent amendments made in the Flag Code by Union of India and their submission that the Central Government is not against the flying of the Flag by an individual is itself indicative of the fact that a liberal construction so far as Article 19(1)(a) is concerned may be adopted. However, the extreme proposition of law taken in the American decisions that burning of the flag is an expression of anger cannot be accepted in India as it would amount to disrespect of the National Flag. [1068-C-E; 1069-H; 1070-A-B]

Harold Omand Spence 41 L Ed 2d 842; *Sidney Street v. State of New York*, 22 L Ed 2d 572; *Texas v. Johnson*, 105 L Ed 2d 345; *US v. Shawn D. Eichman*; 110 L Ed 2d 287 and *Board of Educ. v. Barnette*, 319 US 624, referred to.

5. Constitution being a living organ, its ongoing interpretation is permissible. The supremacy of the Constitution is essential to bring social changes in the national polity evolved with the passage of time. Interpretation of the Constitution is a difficult task. While doing so, the constitutional courts are not only required to take into consideration their own experience over the time, the international treatise and covenants but also keeping the doctrine of flexibility in mind. This Court times without number has extended the scope and extent of the provisions of the fundamental rights. For the purpose of interpretation of the constitutional scheme and for the purpose of maintaining a balance between the fundamental/legal rights of citizen and the regulatory measures/restrictions, both Parts IV-Directive Principles of the State Policy and Part IVA-Fundamental Duties under the Constitution of India can be taken recourse to. [1057-G, H; 1073-A, B]

Jagdish Saran and Ors. v. Union of India, [1980] 2 SCC 768, relied on.

E.P. Royappa v. State of Tamil Nadu., AIR (1974) SC 555; *Maneka Gandhi v. Union of India*, AIR (1978) SC 597; *R.D. Shetti v. International Airport Authority of India.*, AIR (1979) SC 1628; *Ajay Hasia v. Khalid Mujib* AIR (1981) SC 487; *Neelima Misra v. Harinder Kaur*, [1990] 2 SCC 746; *People's Union for Civil Liberties (PUCL) and Anr. etc. v. Union of India, and Anr.*, [2003] 4 SCC 399; *Kameshwar Prasad v. State of Bihar*, AIR (1962) SC 1166; *L.I.C. v. Professor Manubhai D. Shah*, [1992] 3 SCC 637; *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal*

A *and Ors.*, [1995] 2 SCC 161; *Indian Express Newspapers v. Union of India and Ors.*, [1985] 1 SCC 641, *Tata Press Ltd. v. MTNL and Ors.*, [1995] 5 SCC 139; *Bennett Coleman & Co. v. Union of India and Ors.*, [1972] 2 SCC 788; *Gajanan Visheshwar Birjur v. Union of India*, [1994] 5 SCC 550 and *Hindustan Times and Ors. v. State of U.P. and Anr.*, [2003] 1 SCC 591, referred to.

B *Victor Chandler International v. Customs and Excise Commissioners and Anr.*, [2000] 2 All ER 315; *Levy v. State of Victoria and Lange v. Australian Broadcasting Corporation*, *Anne Twomey Sydney Law Review* Vol 1 No 1, March 1997; *Ford v. Quebec*, [1988] 2 SCR 90; *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 SCR 927; *National Bank of Canada v. R.C.U.*, [1984] 1 SCR 269 and *CBC v. A.G.N.B.*, [1991] 3 SCR 459, referred to.

C *The State of Play in the Constitutionally Implied Freedom of Political Discussion and Bans on Electoral Canvassing in Australia*, *George Williams, Parliamentary Library Law and Bills Digest Group Research Paper* 10, 1997, referred to.

D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2920 of 1996.

E From the Judgment and Order dated 22.9.95 of the Delhi High Court in C.W.P.No. 420 of 1995 C.M. No. 5418/95.

WITH

C.A.No.453 of 2004.

F Raju Ramachandran, Additional Solicitor General, P.P. Malhotra, Hemant Sharma, Ms. Sushma Suri, A.D.N. Rao, Brajesh Kumar and Ashok Kumar Pandey for the Appellant.

Dr. A.M. Singhvi, Ms. Gauri Rasgotra, Amit Bhandari and Suman Jyoti Khaitan for the Respondents.

G The Judgment of the Court was delivered by

V.N. KHARE, CJ. Leave granted in the S.L.P.

H In these appeals a short but an important question that arises for consideration is whether the right to fly the National Flag by Indian citizen is a fundamental right within the meaning of Article 19(1)(a) of the

Constitution of India.

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Naveen Jindal, the respondent herein, is a Joint Managing Director of a public limited company incorporated under the Companies Act. He being in charge of the factory of the said Company situated at Raigarh in Madhya Pradesh was flying National Flag at the office premises of his factory. He was not allowed to do so by the Government officials on the ground that the same is impermissible under the Flag Code of India.

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Questioning the said action, the respondent filed a writ petition before the High Court, *inter alia*, on the ground that no law could prohibit flying of National Flag by Indian citizens. Flying of National Flag with respect and dignity being a fundamental right, the Flag Code which contains only executive instructions of the Government of India and, thus, being not a law, cannot be considered to have imposed reasonable restrictions in respect thereof within the meaning of clause (2) of Article 19 of the Constitution of India.

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Before the High Court, the Appellant-Union of India raised the following contentions :

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"1. That the Central Government is authorised to impose restrictions on the use of National Flag at any public place or building and can regulate the same by the authority vested in it under Section 3 of the Emblems and Names (Prevention of Improper Use) Act, 1950;

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2. That the restriction imposed by the Act and orders issued by the Government are constitutionally valid being reasonable restrictions on the Freedom of Speech and Expression under Article 19(2) of the Constitution.

3. That the question of permitting free use of National Flag or to restrict its use is a matter of policy option available to the Parliament and to the Government. Since it is a policy option constitutionally permissible, the courts ought not to interfere with the same."

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The High Court after hearing the matter held : (1) The question as to whether the provisions of the Emblems and Names (Prevention of Improper Use) Act, 1950 (hereinafter referred to as 'the 1950 Act', for the sake of brevity) have been violated or not is a matter which would fall for determination of the court of law and not by the executive; (2) The restrictions imposed by the Flag Code on flying the National Flag being not law within

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A the meaning clause (2) of Article 19 of the Constitution of India, the same cannot be construed to be a penal provision; (3) However, if contravention of any of those instructions and guidelines had been issued under the 1950 Act or under the Prevention of Insults to National Honour Act, 1971 (hereinafter referred to as 'the 1971 Act'), the same would constitute a penal offence; (4) Referring to the debates held in the Constituent Assembly as also a passage from the book titled 'Our National Flag' by K.V. Singh, the High Court observed that the citizens were required to be educated by issue of Flag Code and the National Flag must be flown in a respectful manner and so long as a citizen of India does so, no restriction can be imposed on the basis of instructions contained in the Flag Code.

C Before we proceed further it may be remembered that from time immemorial, people have laid down their lives with a view to salute their own Flag. What is so compelling in the piece of cloth called the National Flag, that people make even the supreme sacrifice for its sake? National Flag indisputably stands for the whole nation, its ideals, aspirations, its hopes and achievements.

E "A National Flag" as pointed by Lt. Cdr. K.V. Singh in his book 'Our National Flag' is the most solemn symbol of a country. Be it a Head of the State, King or peasant, salutes it. A piece of cloth called the National Flag stands for the whole nation, its honour and glory. When it goes up the flag mast, "the heart of a true citizen is filled with pride." In his foreword to this very book, Mr. R. Venkataraman, former President of India, referred to the struggle for independence and said as under :

F "Our flag, therefore, is both a benediction and beckoning. It contains the blessings of all those great souls who brought us to freedom. But it also beckons us to fulfill their vision of a just and united India. As we confront crucial challenges to our security, our unity and integrity, we cannot but heed to the call of this flag to rededicate ourselves to the establishment of that peaceful and just order wherein all Indians irrespective of creed, caste or sex will fulfill themselves."

G When the draft of Indian Constitution was being debated, the Constituent Assembly realized the importance of the National Flag. An *ad hoc* committee therefor was constituted headed by Dr. Rajendra Prasad to design the Flag for free India. Other members of the Committee were Abul Kalam Azad, K.M. Panikar, Sarojini Naidu, C. Rajagopalachari, K.M. Munshi and Dr. B.R. H Ambedkar. The Flag Committee having been constituted held several meetings

and studied the question in depth. It arrived at the following decision :

- “(a) The flag of the Indian National Congress should be adopted as the National Flag of India with suitable modifications, to make it acceptable to all parties and communities in India.
- (b) The flag should be tricoloured, with three bands horizontally arranged.
- (c) The colours should be in the following order: saffron on top, white in the middle and dark green at the bottom.
- (d) The emblem of the flag should be an exact reproduction of the wheel on the capital of Aśoka’s Sarnath Pillar, superimposed in the middle of the central white band.
- (e) The colour of the emblem should be dark blue.”

A motion was moved by Pandit Jawahar Lal Nehru in the Constituent Assembly of India on 22nd July 1947 for the adoption of the National Flag. The responses to this motion are extremely significant and serve as apt reflections of the importance of the Indian Flag to the Indian people as a whole. The Flag played an extremely vital role in India’s struggle for freedom and its adoption was one of the indications of the culmination of that struggle. However, in the light of the present society, it is something that is much more than a mere symbol of freedom.

As said by Pandit Jawahar Lal Nehru, the flag is, “a flag of freedom not for ourselves, but a symbol of freedom to all people who may seek it.” (See Constituent Assembly Debates, 22nd July 1947, p. 766) It was not to be the flag of the rich or wealthy, but it is to be the Flag of the depressed, oppressed and submerged classes all over the country. (See the views of Shri V.I. Muniswami Pillai, in Constituent Assembly Debates, 22nd July 1947, p.771). This flag was to be the flag of the Nation, not the flag of any particular community, but the Flag of all Indians. As declared by Shri Frank Anthony, “while this is a symbol of our past, it inspires us for the future. This flag flies today as the flag of the nation, and it should be the duty and privilege of every Indian not only to cherish and live under it, but if necessary, to die for it.” (See Constituent Assembly Debates, 22nd July 1947, p. 780)

The significance of the National Flag was aptly portrayed by Pandit Govind Malaviya who said, “The importance of a National Flag does not depend on its colour, its bands or its other parts. The flag as a whole, is

A important and other things- the colours etc, that it contains- are immaterial. The flag may be of a piece of white cloth or of any other insignificant material but when it is accepted as a National Flag, it becomes the emblem of national self-respect. It becomes an expression of the sense of freedom of a nation."

B The resolution which was adopted as under :

"Resolved that the National Flag of India shall be a horizontal tricolour of deep Saffron (Kesari), white and dark green in equal proportion. In the center of the white band, there shall be a wheel of navy blue to represent the Chakra. The design of the wheel shall be that of the Wheel (Chakra) which appears on the abacus of the Sarnath Lion Capital of Asoka."

D National Flags are intended to project the identity of the country they represent and foster national spirit. Their distinctive designs and colours embody each nation's particular character and proclaim the country's separate existence. Thus it is veritably common to all nations that a national flag has a great amount of significance. In order that the respect and dignity of the flag be fostered and maintained, several countries have laid down rules relating to the use, display, etc. of the flag, along with rules to provide against the burning, mutilation and destruction of the flag. At this stage we would like to deal with the question as to how flying of national flag is understood by other countries. The question at hand relates to how many countries allow the free use of the national flag by the citizens. In stark contrast to the role the flag has played in the freedom struggles, in several countries, the usage of the flag has become a virtual sole prerogative of the government.

F RESTRICTIONS ON THE USE OF FLAG IN DIFFERENT COUNTRIES :

S.No.	Name of the country	Whether free use of National Flag is allowed to an individual
G 1.	Australia	Yes
2.	Brazil	Yes
3.	Canada	Yes
4.	China	Yes, even on certain occasions and places

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5.	Egypt	No	A
6.	Germany	No	
7.	Indonesia	No	
8.	Italy	No	
9.	Japan	No	B
10.	Malaysia	Yes	
11.	Mexico	No	
12.	Miramar	No	
13.	New Zealand	Yes	C
14.	Pakistan	No	
15.	Sri Lanka	No	
16.	Sweden	No	D
17.	Trinidad & Tobago	No	
18.	United Kingdom	No	

Countries like Canada and Brazil allow free use of the flag by individuals, with the only rider being that the flag is treated with dignity and respect and flown and displayed properly. In the US Flag Code, free use by citizens is not specifically defined. The US Flag Code advocates the flying of the flag with dignity and prohibits mutilation or defilement in public and its use as costumes, athletic uniforms, cushions, handkerchiefs, etc. While stating that the flag should be flown on all days, it specifies certain days on which the flag should be flown specially. In the United Kingdom, the flying of the flag is restricted to certain dates and on specified buildings. Japan has not defined the free use of the Flag by individuals, but has some provisions, which may allow for their usage. For example, it is stated, " Now some of you must be inviting foreign guests to your factory or company in connection with your work. You must be having reception, meetings, dining together. In such cases, as a symbol of welcome, if you want to hoist the national flag along with the flag of the other person's country, the...specifications about size, etc. are to be followed."(See National Flag of Japan [Basic Rules for Hoisting]) Among India's neighbours, Pakistan allows free display of the National Flag on specified days only as may be notified by the government. Similarly, Sri Lanka also permits display of the National Flag on days of

- A national importance only. (See the Report of the National Flag Committee, April 2001, pp. 14-15)

B Elsewhere among the Commonwealth nations, in Australia the rules for flying the national flag only relate to flying the flag with dignity. In fact, it is mentioned that the government hopes that all Australians will honour and fly it with the pride befitting a national symbol. Similarly, it will be noticed that even in New Zealand, there are no special days prescribed on which only individuals can fly the flag. In fact it is specifically stated that the New Zealand Flag may be flown on any day of the year. The rules are meant to serve as guides to simplify flag flying and lay down the correct way to display the national flag. In fact in New Zealand the flag can be used for advertising and commercial use also, provided that a faithful representation should always be achieved with the flag being reproduced in its true colours. In China, the Flag can be displayed even on New Year's Day, Spring Festival and in public places such as squares and parks. Further, even in Malaysia, there is no restriction on the flying of the flag. The Flag can be put on cars and even on the inside of cars and flags are almost all over the place. The Malaysians use stickers with the National Flag and inscriptions 'proud to be Malaysian.'

E The proceedings of this Court show that the appellant herein with a view to resolve the controversy took several adjournments in the matter. Ultimately a committee was constituted by the appellant on or about 18.10.2000 submitted its report in April 2001 upon obtaining the views of the State Governments and the Union Territory Administrations as regard the questions :

- F (a) Whether there is need to liberalize the use of the National Flag. If so, to what extent?
- (b) Whether the State Government foresee any problems in liberalizing the use of the National Flag.
- G (c) If the use of the National Flag is to be liberalised for general public, what type of reasonable restrictions may be imposed to ensure that the dignity of the flag is maintained.
- (d) Whether the provisions of the Flag Code-India should have statutory back-up.

H The Committee constituted by the Central Government took into

consideration the history and genesis of the Flag and *inter alia* noticed :

“3.1 From time immemorial, people have laid down their lives for their flags. Indeed, there is something so compelling in this piece of cloth, called the National Flag, that people make even the supreme sacrifice for its sake. The National Flag stands for the whole nation, its ideals, aspirations, its hopes and achievements. It is a beacon showing to its people the path when their very existence is threatened. It is at this time of danger that this much length of cloth inspires people to unite under its umbrella and urge them to defend the honour of their motherland.”

The recommendations made by the said Committee was placed before the Cabinet whereafter the Flag Code of India 2002 was issued which came into force with effect from 26.1.2002.

The said Flag Code has been divided into three parts. Part I of the Code contains the description of the National Flag. Part II provides for the mode and manner of hoisting/display/use of National Flag by members of the public, private organizations, educational institutions etc. Part III of the Code relates to hoisting/display of the National Flag by the Central and State Governments and their organizations and agencies. From Clause 2.1 of Section I appearing in Part II of the National Flag, it is now clear that there shall be no restriction on the display of the National Flag by members of general public, private organizations, educational institutions etc. except to the extent provided in the 1950 Act and 1971 Act and any other law enacted on the subject. Having regard to the aforementioned statutes, as regards flying of the National Flag, regulations which are 13 in number have been laid down in the Flag Code, one of them being :

“(i) the Flag shall not be used for commercial purposes in violation of the emblem and Names (Prevention of Improper Use) Act, 1950;”

Section I of Part III provides for defence installations/Heads of Missions/ Posts whereas Section II provides for official display. Section II of Part II provides for as to how the National Flag may be hoisted in educational institutions. Section III of Part III lays down the manner in which correct display of the National Flag should be made and in contrast thereto Section IV provides for incorrect display. Section V provides as to how misuse of the National Flag should be prevented. Section VI provides for salute of the Flag.

A Section VII provides that display with flags of other Nations and of United Nations.

Although interpretation of the Constitution of India is primarily must be based on the materials available in India, relevant rules of the other countries have been enumerated hereinbefore for our guidance.

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It can therefore be stated that some countries like Brazil, Canada allow for the unrestricted use of the Flag by individuals. On the other side of the spectrum, countries like the UK hold their flag so sacrosanct that individuals are not permitted to use and display the flag. Other countries all try to strike a balance between the two extremes, based on the cherished values of their country, the history behind the evolution of the flag in their country, etc. Thus, in order to discern whether an individual has a right to display the flag in India, one will have to discern what are the advantages and disadvantages of free use and balance that with the vital role played by the flag in India's freedom struggle.

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There are two main schools of thoughts governing the free use of the flag. On one hand it is contended that the policy of India has so far been to restrict the use of the National Flag with a view of ensuring that it is not dishonored in any manner. The instructions contained in the Flag Code are intended to ensure that proper respect is shown to the National Flag and that the Flag is not used indiscriminately. Moreover, a more liberal use of the National Flag would require greater civic awareness on the part of the citizens. A sudden swing to a liberal approach in the matter may create problems, particularly in the matter of ensuring that the correct usages regarding the National Flag are observed by the citizens at large. Unrestricted use of the National Flag may result in commercial exploitation of the Flag. It may be difficult to detect all such instances and take necessary action. Unrestricted use of the Flag may not attract the same level of respect and reverence from the citizens as at present. The unrestricted use of the National Flag may result in its indiscriminate use in processions, meetings, etc. Instances of insults to the National Flag as a matter of protest may also occur.

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However, on the other hand, there is another set of people who ardently believe that there exists strong reasons to liberalise the use of National Flag for a number of reasons, some of them being: -

- Due to the various restrictions imposed on the use and display of the National Flag, an impression has developed among people as

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if the national Flag is meant for Government use only and the people at large are permitted unrestricted display of National Flag only on certain limited occasions. This has probably created a feeling of dissatisfaction among certain sections of people of India. A

- With the electronic media and satellite communication becoming popular, it is very difficult to ensure that public display of the National Flag is avoided. For instance, in various international sports or cultural events, people identify themselves with their country by displacing the National Flag. It is an expression of pride. It is an expression of genuine enthusiasm. If the restrictions imposed on the use of the National Flag are implemented scrupulously, it would amount to discouraging the Indian citizens or Indian nationals from identifying themselves with the Flag of the country. B C
- The restrictions imposed on the use of the National Flag should be commensurate with the international practices being adopted by various democratic countries and the Government should not impose any restriction, which distances people from the National Flag. D

Thus, there exist two very strong views of thought on whether there should be free and unrestricted use of the flag allowed to citizens. The stand taken by other countries definitely has a bearing on the course India has taken so far and the course to be adopted in the future. It can be seen from the history, reflected very aptly from the discussions in the Constituent Assembly that the flag is definitely one of the most revered objects in our society. It must certainly be treated with the utmost respect and dignity. This might not be possible without imposing any restrictions on its use. But one can see from the global scenario, that the major trend is to protect the flag against mutilation, destruction, etc. and not to prevent individuals from having any access to the flag, making its use a virtual exclusive privilege of the government. Since all Indians fought for freedom, it can never be the intention to deny them use of their National Flag-a symbol of their freedom in entirety. F G

Thus, one can conclude that the basic intention is to provide against the destruction, mutilation, etc. of the Flag and to provide certain basic level rules for when and how it should be compulsorily used. Though not expressly stated, it must therefore give a right of usage to the citizens, other than on the specific occasions specified. H

A Then the question arises, which view is to be accepted. National anthem,
National Flag and National Song are secular symbols of the nationhood.
They represent the supreme collective expression of commitment and loyalty
to the nation as well as patriotism for the country. They are necessary adjunct
of sovereignty being symbols and actions associated therewith. Can an Indian
B citizen having regard to the law prevailing in other countries fly an Indian
flag therein or whether a foreigner can fly his flag in India. If the answer to
the question is to be rendered in the negative, a startling result will follow
therefrom inasmuch an Indian citizen traveling abroad will be entitled to fly
the National Flag but not in India whereas a foreigner would be entitled to
do so within the territory of India. The beauty of the Indian Constitution is
C that the entire structure of the country is based thereupon. It is the very pillar
upon which the democracy of India stands. The unity and integrity of India
if to be perceived in diverse situation, the feeling of loyalty, commitment and
patriotism can be judged not only by giving effect to the constitutionalism
but also on their secular symbol unhidden as noticed hereinbefore. The question
D of this nature has to be considered not from the answer as to whether there
exists an express provision on the basis whereof a right to fly the National
Flag can be rested or whether there is anything in the Constitution prohibiting
or denying the exercise of such a right. If flying of a National Flag is
considered in absence of any denial thereof either in the Constitution or in
any other statute book, it may be held to be a part of the fundamental right.

E Before we proceed further, it is necessary to deal with the question,
whether Flag Code is "law"? Flag Code concededly contains the executive
instructions of the Central Government. It is stated that the Ministry of Home
Affairs, which is competent to issue the instructions contained in the Flag
Code and all matters relating thereto are one of the items of business allocated
F to the said Ministry by the President under the Government of India (Allocation
of Business) Rules, 1961 framed in terms of Article 77 of the Constitution
of India. The question, however, is as to whether the said executive instruction
is "law" within the meaning of Article 13 of the Constitution of India. Article
13(3)(a) of the Constitution of India reads thus :

G "13. (3) (a) "Law" includes any Ordinance, order bye-law, rule,
regulation, notification, custom or usage having in the territory of
India the force of law."

H A bare perusal of the said provision would clearly go to show that
executive instructions would not fall within the aforementioned category.

Such executive instructions may have the force of law for some other purposes; as for example those instructions which are issued as a supplement to the legislative power in terms of clause (1) of Article 77 of the Constitution of India. The necessity as regard determination of the said question has arisen as the Parliament has not chosen to enact a statute which would confer at least a statutory right upon a citizen of India to fly a National Flag. An executive instruction issued by the appellant herein can any time be replaced by another set of executive instructions and thus deprive Indian citizens from flying National Flag. Furthermore, such a question will also arise in the event if it be held that right to fly the National Flag is a fundamental or a natural right within the meaning of Article 19 of the Constitution of India; as for the purpose of regulating the exercise of right of freedom guaranteed under Article 19(1)(a) to (e) and (g) a law must be made.

In *Kharak Singh v. State of U.P.*, AIR (1963) SC 1295, this Court held:

“Though learned counsel for the respondent started by attempting such a justification by invoking section 12 of the Indian Police Act he gave this up and conceded that the regulations contained in Chapter XX had no such statutory basis but were merely executive or departmental instructions framed for the guidance of the police officers. They would not therefore be “a Law” which the state is entitled to make under the relevant clauses (2) to (6) of Article 19 in order to regulate or curtail fundamental rights guaranteed by the several sub-clauses of Article 19(1), nor would the same be a “a procedure established by law” within Article 21. The position therefore is that if the action of the police which is the arm of the executive of the state is found to infringe any of the freedom guaranteed to the petitioner the petitioner would be entitled to the relief of *mandamus* which he seeks, to restrain the state from taking action under the regulations.”

To the same effect are the decisions of this Court in *State of Madhya Pradesh and Anr. v. Thakur Bharat Singh*, AIR (1967) SC 1170 and *Bijoe, Emmanuel and Ors. v. State of Kerala and Ors.*, [1986] 3 SCC 619.

In *S.C. Advocates-on-Record Assn. v. Union of India*, [1993] 4 SCC 441, it was held :

“Constitution is the “will” of the people whereas the statutory laws are the creation of the legislators who are the elected representatives of the people. Where the will of the legislature-declared in the statutes-

A stands in opposition to that of the people-declared in the constitution-
the will of the people must prevail.”

§ In *Punit Rai v. Dinesh Chaudhary*, [2003] 8 SCC 204, this Court held
that a circular letter as regard determination of caste of a child born from a
non-Scheduled Caste Hindu father and a Scheduled Caste mother shall not
B have the force of the statute, stating :

“The said circular letter has not been issued by the State in exercise
of its power under Article 162 of the Constitution of India. It is not
stated therein that the decision has been taken by the Cabinet or any
authority authorized in this behalf in terms of Article 166(3) of the
C Constitution of India. It is trite that a circular letter being an
administrative instruction is not a law within the meaning of Article
13 of the Constitution of India. See *Dwarka Nath Tewari v. State of
Bihar*, AIR (1959) SC 249.

D Now we come to the core question, whether flying of the National Flag
is a fundamental right?

Part III of the Constitution of India provides for fundamental rights. By
reason of Article 19 of the Constitution of India six rights of freedom have
been guaranteed to the citizens of India. Clause (a) of the said right speaks of
E freedom of speech and expression. Such a fundamental right is, however, not
absolute. It is subject to the regulatory provisions contained in clause (2)
which reads thus :

(2) “Nothing in sub-clause (a) of clause (1) shall affect the operation
of any existing law, or prevent the State from making any law, in so
F far as such law imposes reasonable restrictions on the exercise of the
right conferred by the said sub-clause in the interests of the sovereignty
and integrity of India, the security of the State, friendly relations with
Foreign States, public order, decency or morality or in relation to
contempt of court, defamation or incitement to an offence.”

G The rights specified in Article 19 operate against the State actions. The
rights granted to a citizen of India under Article 19 of the Constitution of
India, it is trite, is not to be considered in isolation as Part III constitutes an
amalgam of rights and, thus, a law falling under Articles 21 and 22 of the
Constitution of India has yet to satisfy the requirements of other Articles in
Part III of the Constitution, such as Articles 14 and 19 of the Constitution of
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India.

With a view to find out an answer to the aforementioned question, it was necessary for us also to take into account : importance of the National Flag; (2) Constituent Assembly Debates; and (3) Rules existing in other countries, which have already been adverted to. As would appear from the discussions made herein before, flying of National Flag being symbol of expression would come within the purview of Article 19(1). (a) of the Constitution.

In *Victor Chandler International v. Customs and Excise Commissioners and Anr.*, [2000] 2 All ER 315 at p. 322, it was stated :

“27. There are, of course, some gaps in legislation that cannot be filled by judge made law. But it is now a well known rule of statutory construction that an ‘ongoing’ statutory provision should be treated as ‘always speaking’. The principle is set out in Bennion Statutory Interpretation (3rd edn. 1997), p.686:

‘(2) It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking....(3) A fixed-time Act is intended to be applied in the same way whatever changes might occur after its passing. Updating construction is not therefore applied to it.

28. These principles received the endorsement of the Court of Appeal in *R. v. Westminster City Council, ex p A* (1997) 9 Admin LR 504 at 509, where Lord Woolf MR described the National Assistance Act 1948 as -

‘a prime example of an Act which is “always speaking” and so should be construed” on a construction, that continuously updates its wording to allow for changes since the Act was initially framed”.

Constitution being a living organ, its ongoing interpretation is permissible. The supremacy of the Constitution is essential to bring social changes in the national polity evolved with the passage of time.

Interpretation of the Constitution is a difficult task. While doing so, the constitutional courts are not only required to take into consideration their

A own experience over the time, the international treatise and covenants but also keeping the doctrine of flexibility in mind. This Court times without number has extended the scope and extent of the provisions of the fundamental rights, having regard to several factors including the intent and purport of the constitution makers as reflected in Parts IV and IVA of the Constitution of India.

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C In developed countries, like Australia, freedom of expression did not find place in the Australian Constitution. In fact, there is no list of personal rights of freedom which may be enforced in the courts, listed in the Australian Constitution, save and except certain personal rights such as the right to trial by jury (Section 80) and the right to freedom of religion (Section 116). Despite the same the High Court of Australia beginning from 1992 indicated that the citizens enjoy implied rights to free speech and communication on matters concerning politics and government, as for example, permitting political advertising during election campaigns terms as 'implied freedom of political communication'.

D We may note some case law from Australia, in this connection :

In *Levy v. State of Victoria* and *Lange v. Australian Broadcasting Corporation*, Anne Twomey, Sydney Law Review, Vol 1 No 1, March 1997, it was stated :

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G "The constitutional implication of freedom of political communication may have only recently been recognised in Australia, but it has rapidly developed through three generations of cases. It was initially recognised in 1992 on the grounds that it was necessary for the efficacious operation of the system of representative government which is mandated by the text and structure of the Commonwealth Constitution. In 1994, the application of the implication was expanded in *Theophanous v. Herald & Weekly Times Ltd.* and *Stephens v. West Australian Newspapers Ltd.* to constrain State defamation laws, both statute and common law. In 1996, however, the High Court has been more restrained in its interpretation of the extent of the implication and in the development of further implications which rest upon the constitutional system of representative government."

H In *The State of Play in the Constitutionally Implied Freedom of Political Discussion and Bans on Electoral Canvassing in Australia*, George Williams, Parliamentary Library Law and Bills Digest Group Research Paper 10, 1997,

it was observed :

“Despite judicial moves to strengthen protection for political discussion in Australia, there have been countervailing political moves to restrict certain forms of political speech. This has frequently been driven by inquiries undertaken by parliamentary committees at both the State and Federal level. ...Does this mean that Australian Parliaments and the High Court are on a collision course over free speech in the electoral process? The answer need not be yes.”

The decisions of the High Court in *Australian Capital Television Pty Ltd. v. Commonwealth* (the Political Broadcasts case) and *Nationwide News Pty Ltd v. Wills* (the Nationwide News case) mark a significant new development in Australian constitutional law, in particular because of the High Court's recognition of the freedom of communication in relation to political matters.

Article 5 of the 1988 Brazil Constitution guarantees that “the expression of thought is free, and anonymity is forbidden... the expression of intellectual, artistic, scientific, and communications activities is free, independently of censorship or license” and that “the privacy, private life, honor and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured.”

Free speech rights in the Venezuelan constitution are based on the broad definition of “freedom of expression” in Article 19 of the Universal Declaration of Human Rights, which asserts, not only a right to “freedom of opinion and expression” but also a right “to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Section 2(b) of the Canadian Charter states that “Everyone has the freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” The section potentially could cover a wide range of action, from commercial expression to political expression; from journalistic privilege to hate speech to pornography. The jurisprudence of the Supreme Court of Canada has largely been an attempt to carve out: first, the purpose of s. 2(b) what values does it seek to protect, who should be entitled to its protection; and second, the scope of s. 2(b), what is ‘expression’?

Freedom of expression is a cornerstone of functioning of the democracy.

- A Freedom of expression promotes certain values, as noted by Professor Emerson in 1963: "Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in society." Constitutional commitment to free
- B speech was held to be predicated on the belief that a free society cannot function with coercive legal censorship in the hands of persons supporting one ideology who are motivated to use the power of the censor to suppress opposing viewpoints.

- C The Canadian approach to freedom of expression allows for a wide conception of "expression" within s. 2(b). The Supreme Court of Canada has stated that a wide and inclusionary approach to the interpretation of the Charter's free expression guarantee is to be preferred (see *Ford v. Quebec*, [1988] 2 SCR 90, and *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 SCR 927. Thus, in *Irwin Toy*, Chief Justice Dickson explained that
- D "'expression' has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content." Not only is there a freedom of expression, there is also a freedom not to express. As Justice Beetz said in *National Bank of Canada v. R.C.U.*, [1984] 1 SCR 269 [p. 377] text, "all freedoms guaranteed by s. 2 of the Charter necessarily imply reciprocal rights: ... freedom of
- E expression includes the right to not express." There are of course limits to free speech and free press guarantees, as the Canadian Supreme Court is quite ready to point out (see *CBC v. A.G.N.B.*, [1991] 3 SCR 459). For example, even though the press enjoys core constitutional rights of access and publication, they do not have protection for all operational means and
- F methods the press may choose to adopt. The press does not, for example, enjoy immunity if they run a pedestrian down in pursuit of a new story under the guise of "freedom of the press". Nor is a violent attack on someone (however dramatic the attack may be) considered to be expression. Understanding freedom of expression requires not only understanding its place in the Canadian constitution, but also, understanding it within the context
- G of society and society's competing values.

This Court has also extended the meaning of Articles 14, 19 and 21 of the Constitution of India. [See; *Jagdish Saran and Ors. v. Union of India* [1980] 2 SCC 768].

- H Decisions are many where this Court read various rights in Article 21

of the Constitution of India.

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This Court has also interpreted the provisions of the Constitution of India either in the light of the Directive Principles of the State Policy as contained in Part IV of the Constitution of India or fundamental duties as adumbrated in Part IVA thereof or both. Applying the said test and keeping in view the fact that the right to fly the National Flag is not an absolute right but a qualified right, such right can be read with having regard to Article 51-A of the Constitution of India.

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In *People's Union for Civil Liberties (PUCL) and Anr etc. v. Union of India and Anr.*, [2003] 4 SCC 399 at page 403, this Court held:

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“...It is established that fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience. The attempt of the court should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation. The Constitution is required to be kept young, energetic and alive”.

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The right to have a passport was also held to be a part of personal liberty under Article 21 of the Constitution of India. [See: *Maneka Gandhi v. Union of India*, [1978] 1 SCC 248]. Disturbance to ecological balance has been held to be hazardous to life within the meaning of Article 21 of the Constitution of India [See *M.C. Mehta v. Kamal Nath*, [2000] 6 SCC 213].

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Different facets of Article 14 of the Constitution of India have been discussed in a series of judgments. The expanded notion of the principle of equality as enunciated by *E.P. Royappa v. State of Tamil Nadu*, AIR (1974) SC 555 followed in *Maneka Gandhi v. Union of India*, AIR (1978) SC 597 at para 56, *R.D. Shetti v. International Airport Authority of India* AIR (1979) SC 1628, *Ajay Hasia v. Khalid Mujib*, AIR (1981) SC 487 and *Neelima Misra v. Harinder Kaur*, [1990] 2 SCC 746.

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So far as right of speech and expression is concerned, *vis-a-vis* censor and other regulations thereof, this Court in *Kameshwar Prasad v. State of Bihar*, AIR (1962) SC 1166 observed :

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“Without going very much into the niceties of language it might be broadly stated that a demonstration is a visible manifestation of the feelings or sentiments of an individual or a group. It is thus a communication of one’s ideas to others to whom it is intended to be

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A conveyed. It is in effect therefore a form of speech or of expression, because speech need not be vocal since signs made by a dumb person would also be a form of speech.”

In *L.I.C. v. Professor Manubhai D. Shah*, [1992] 3 SCC 637, it was observed :

B “5. Speech is God’s gift to mankind. Through speech a human being conveys his thoughts, sentiments and feelings to others. Freedom of speech and expression is thus a natural right which a human being acquires on birth. It is, therefore, a basic human right. Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers.”

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E 6. A constitutional provision is never static, it is ever-evolving and ever-changing and, therefore, does not admit of a narrow, pedantic or syllogistic approach. If such an approach had been adopted by the American Courts, the First Amendment-(1971)-“Congress shall make no law abridging the freedom of speech, or of the press”-would have been restricted in its application to the situation then obtaining and would not have catered to the changed situation arising on account of the transformation of the print media. It was the broad approach adopted by the Court which enabled them to chart out the contours on ever-expanding notions of press freedom. In *Dennis v. United States*, 341 US 494 : 95 L Ed 1137 (1951) Justice Frankfurter observed:

F “... The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illuminated by the presuppositions of those who employed them.”

G Adopting this approach in *Joseph Burstyn, Inc. v. Wilson*, (343 US 495) the Court rejected its earlier determination to the contrary in *Mutual Film Corporation v. Industrial Commission of Ohio* (236 US 230) and concluded that expression through motion pictures is included within the protection of the First Amendment. The Court thus expanded the reach of the First Amendment by placing a liberal construction on the language of that provision. It will thus be seen that the American Supreme Court has always placed a broad interpretation on the constitutional provision for the obvious reason that the Constitution

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has to serve the needs of an ever-changing society.

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7. The same trend is discernible from the decisions of the Indian courts also. It must be appreciated that the Indian Constitution has separately enshrined the fundamental rights in Part III of the Constitution since they represent the basic values which the people of India cherished when they gave unto themselves the Constitution for free India. That was with a view to ensuring that their honour, dignity and self respect will be protected in free India. They had learnt a bitter lesson from the behavior of those in authority during the colonial rule. They were, therefore, not prepared to leave anything to chance. They, therefore, considered it of importance to protect specific basic human rights by incorporating a Bill of Rights in the Constitution in the form of fundamental rights. These fundamental rights were intended to serve generation after generation. They had to be stated in broad terms leaving scope for expansion by courts. Such an intention must be ascribed to the Constitution-makers since they had themselves made provisions in the Constitution to bring about a socio-economic transformation. That being so, it is reasonable to infer that the Constitution-makers employed a broad phraseology while drafting the fundamental rights so that they may be able to cater to the needs of a changing society..."

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8. The words "freedom of speech and expression" must, therefore, be broadly construed to include the freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities. It, therefore, includes the right to propagate one's views through the print media or through any other communication channel e.g. the radio and the television. Every citizen of this free country, therefore, has the right to air his or her views through the printing and/or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution. The print media, the radio and the tiny screen play the role of public educations, so vital to the growth of a healthy democracy. Freedom to air one's views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death-knell to democracy and would help usher in autocracy or dictatorship...."

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From the aforementioned observation, it is evident that LIC's refusal to publish respondent's rejoinder was unfair and amounted to denial of his right under Article 19(1)(a) of the Constitution of India.

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A In *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal and Ors.*, [1995] 2 SCC 161, it was observed :

B “The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfilment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts.”

C “45. The burden is on the authority to justify the restrictions. Public order is not the same thing as public safety and hence no restrictions can be placed on the right to freedom of speech and expression on the ground that public safety is endangered. Unlike in the American Constitution, limitations on fundamental rights are specifically spelt out under Article 19(2) of our Constitution. Hence no restrictions can be placed on the right to freedom of speech and expression on grounds other than those specified under Article 19(2).”

D Thus, the right to impart and receive information by air waves and otherwise is a species of the right of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution.

E In *Indian Express Newspapers v. Union of India and Ors.*, [1985] 1 SCC 641, the law is stated in the following terms :

F “Freedom of expression, as learned writers have observed, has four broad social purposes to serve : (i) it helps an individual to attain self fulfillment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision-making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people’s right to know. Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration.”

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Thus, the burden of import duty imposed on newsprint was held to be a restriction protected by Article 19(1)(a) of the Constitution of India. A

In *Tata Press Ltd. v. MTNL and Ors.*, [1995] 5 SCC 139, it was observed:

“In a democratic economy free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of “commercial speech”. B

Thus, commercial speech has been held to be part of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India. C

In *Bennett Coleman & Co. v. Union of India and Ors.*, [1972] 2 SCC 788 it was held :

“80. The faith of a citizen is that political wisdom and virtue will sustain themselves in the free market of ideas so long as the channels of communication are left open. The faith in the popular Government rests on the old dictum, “let the people have the truth and the freedom to discuss it and all will go well.” The liberty of the press remains an “Art of the Covenant” in every democracy. Steel will yield products of steel.” D E

It was further observed :

“97. Political philosophers and historians have taught us that intellectual advances made by our civilisation would have been impossible without freedom of speech and expression. At any rate, political democracy is based on the assumption that such freedom must be jealously guarded. Voltaire expressed a democrat’s faith when he told an adversary in argument : “I do not agree with a word you say, but I will defend to the death your right to say it”. Champions of human freedom of thought and expression, throughout the ages, have realised that intellectual paralysis creeps over a Society which denies, is however subtle a form, due freedom of thought and expression to its members.” F G

In *Gajanan Visheshwar Birjur v. Union of India*, [1994] 5 SCC 550, this court held : H

A 10. Before parting with this case, we must express our unhappiness with attempts at thought control in a democratic society like ours. Human history is witness to the fact that all evolution and all progress is because of power of thought and that every attempt at thought control is doomed to failure. An idea can never be killed. Suppression can never be a successful permanent policy. Any surface serenity it creates is a false one. It will erupt one day. Our Constitution permits a free trade, if we can use the expression, in ideas and ideologies. It guarantees freedom of thought and expression-the only limitation being a law in terms of clause (2) of Article 19 of the Constitution. Thought control is alien to our constitutional scheme. To the same effect are the observations of Robert Jackson, J. in *American Communications Association v. Douds*, 339 US 382, 442-43 (1950): 94 L Ed 925 with reference to the U.S. Constitution :

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D “Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored.”

E In *Hindustan Times and Ors v. State of U.P. and Anr.*, [2003] 1 SCC 591, this Court noticed as to how the right of its shareholders to have a free press is a fundamental right keeping in view the fact that the newspapers serve as a medium of exercise of freedom of speech. Referring to *Sakal Papers (P) Ltd. v. Union of India*, AIR (1962) SC 305, *Tata Press Ltd.*, (supra) and *Bennett Coleman*, (supra), it was held :

F “It is neither in doubt nor in dispute that for the purpose of meeting the costs of the newsprint as also for meeting other financial liabilities which would include the liability to pay wages, allowances and gratuity etc. to the working journalists as also liability to pay a reasonable profit to the shareholders *vis-a-vis* making the newspapers available to the readers at a price at which they can afford to purchase it, the petitioners have no other option but to collect more funds by publishing commercial and other advertisements in the newspaper.”

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H This Court, thus, held that no tax can be levied on the newsprint for the purpose of granting wages, allowances and gratuity etc. to the working journalists.

In this connection, it is useful to note the first amendment of the Constitution of the United States of America in respect of Religion and Free Expression :

“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.”

The law of the United States of America not only recognize the right to fly National flag but it has gone to the extent of holding that the flag burning as an expression of free speech and free expression of its citizens against the establishment but we do not approve later part of right.

In *Harold Omand Spence* 41 L Ed 2d 842, it was held

“He displayed it as a flag of his country in a way closely analogous to the manner in which flags have always been used to convey ideas. Moreover, his message was direct, likely to be understood, and within the contours of the First Amendment.”

In *Sidney Street v. State of New York*, 22 L Ed 2d 572, it was held :

“we are unable to sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects.”

In *Texas v. Johnson*, 105 L Ed 2d 345 at 345 it was held :

“But whether or not he could appreciate the enormity of the offence he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.”

In *US v. Shawn D. Eichman*, 110 L Ed 2d 287, it was held :

“Government may create national symbols, promote them, and encourage their respectful treatment. But the Flag Protection Act of 1989 goes well beyond this by criminally prescribing expressive conduct because of its likely communicative impact.”

We may, however, notice that in *Board of Educ. v. Barnette*, 319 US 624, it has been held :

A “Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

B If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”

C Here it is necessary to notice the distinction between the Constitution of India and that of United States of America and that is that in U.S.A. the first amendment gives an absolute right to a citizen of religion and free expression, but under Constitution of India Article 19(1)(a) does not confer such an absolute right of free speech and expression. It only provides for a qualified right. Such a fundamental right of a citizen of speech and expression is subject to the regulatory measures contained in clause (2) thereof. So long as the expression is confined to nationalism, patriotism and love for motherland, the use of the National Flag by way of expression of those sentiments would be a fundamental right. It cannot be used for commercial purpose or otherwise.

E Flag Code is not a statute; thereby the Fundamental Right under Article 19(1) (a) is not regulated. But the guidelines as laid down under the Flag Code deserve to be followed to the extent it provides for preservation of dignity and respect for the national flag. The right to fly the National Flag is not an absolute right. The freedom of expression for the purpose of giving a feeling of nationalism and for that purpose all that is required to be done is that the duty to respect the flag must be strictly obeyed. The pride of a person involved in flying the Flag is the pride to be an Indian and that, thus, in all respects to it must be shown. The State may not tolerate even the slightest disrespect.

G Last question which arises in this respect is whether the right to fly the National Flag is to be considered in the context of fundamental duties.

H Every right is coupled with a duty. Part III of the Constitution of India although confers rights, duties and regulations are inherent thereunder. Such reasonable regulations have been found to be contained in the provisions of

Part III of the Constitution of India, apart from clauses 2 to 4 and 6 of Article 19 of the Constitution of India. A

Thus, this right is subject to certain restrictions which can be read from Chapter IV A. Article 51A(c) reads as under:

“(c) to uphold and protect the sovereignty, unity and integrity of India.” B

The question as to whether Article 51-A is not justiciable or enforceable thus takes a backseat. In *Indian Handicraft Emporium and Ors v. Union of India and Ors.*, JT (2003) 7 SC 446, it was held :

“The provisions of the statute are also required to be considered keeping in view Article 48-A and Article 51A(g) of the Constitution of India which are in the following terms: C

“48-A. Protection and improvement of environment and safeguarding of forests and wild life.—The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.” D

“51-A. *Fundamental duties.*—It shall be the duty of every citizen of India—

..... E
(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;”

We cannot shut our eyes to the statements made in Article 48-A of the Constitution of India which enjoins upon the State to protect and improve the environment and to safeguard the forests and wild life of the country. What is destructive of environment, forest and wild life, thus, being contrary to the Directive Principles of the State Policy which is fundamental in the governance of the country must be given its full effect. Similarly, the principles of Chapter IVA must also be given its full effect. Clause (g) of Article 51A requires every citizen to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures. The amendments have to be carried out keeping in view the aforementioned provisions. F G

The recent amendments made in the Flag Code by the Union of India H

A and the stand taken by the learned Solicitor General that the Central Government is not against the flying of the Flag by an individual is itself indicative of the fact that a liberal construction so far as Article 19(1) (a) is concerned may be adopted. The extreme proposition of law taken in the American decisions that burning of the flag is an expression of anger cannot be accepted in India as it would amount to disrespect of the National Flag.

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This Court in *S. Rangarajan etc. v. P. Jagjivan Ram and Ors.*, [1989] 2 SCC 574, laid down the law in the following terms :

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“We are amused yet troubled by the stand taken by the State Government with regard to the film which has received the National Award. We want to put the anguished question, what good is the protection of freedom of expression if the State does not take care to protect it? If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and a surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression.”

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In *Ranganath Misra v. Union of India and Ors.*, [2003] 7 SCC 133, this Court referred to the recommendations of Justice Verma Committee, which has been taken note by the National Commission to Review the Working of the Constitution, which are as under :

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“Duties are observed by individuals as a result of dictates of the social system and the environment in which one lives, under the influence of role models, or on account of punitive provisions of law. It may be necessary to enact suitable legislation wherever necessary to require obedience of obligations by the citizens. If the existing laws are inadequate to enforce the needed discipline, the legislative vacuum needs to be filled. If legislation and judicial directions are available and still there are violations of fundamental duties by the citizens, this would call for other strategies for making them operational.

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The desired enforceability can be better achieved by providing

not merely for legal sanctions but also combining it with social A
sanctions and to facilitate the performance of the task through
exemplar, role models. The element of compulsion in legal sanction
when combined with the natural urge for obedience of the norms to
attract social approbation would make the citizens willing participants
in the exercise. The real task, therefore, is to devise methods which B
are a combination of these aspects to ensure a ready acceptance of the
programme by the general citizenry and the youth, in particular.

The Committee is strongly of the view that the significance of
dignity of the individual in all its facets and objective of overall
development of the personality of the individual must be emphasized C
in the curriculum at all the stages of education. This requires
consciousness of citizenship values which are a combination of rights
and duties, and together give rise to social responsibilities. Methods
must be devised to operationalize this concept as a constitutional
value in our educational curriculum and in co-curricular activities, in
schools and colleges.” D

This Court directed that the recommendations of the said Committee
should be considered by the Central Government in the right earnest and to
take appropriate steps for the implementation thereof.

The right to fly the National Flag is a fundamental right but subject to E
restrictions. The right is not unfettered, unsubscribed, unrestricted and
unchannelled one. Even assertion of the right to respectfully fly the flag *vis-*
a-vis the mere right to fly the flag is regulated and controlled by two significant
parliamentary enactments, namely, the Emblems and Names (Prevention of
Improper Use) Act, 1950 and the Prevention of Insults to National Honour
Act, 1971. F

The courts jealously protects the honour of the National Flag as would
be noticed from a decision of a Division Bench of the Andhra Pradesh Court
of which one of us, Sinha, J. was a party, in *A. Satya Phaneendra v. S.H.O.*
Kodad (PS) Nalgonda and Ors., (2001) 2 ALT 141, wherein considering a G
letter enclosing therewith a tri-coloured cloth resembling the National Flag
which was sold as handkerchief, the court referring to the provisions of the
said Acts held and directed :

“9. The aforementioned provisions, having regard to the purpose and
object thereof, must be given strict construction. They also must be H

A construed in the context of Article 51-A of the Constitution of India.

10. The provisions of the aforementioned Acts and the Flag Code of India clearly state the reasons as to why the same had to be enacted by the Parliament inasmuch as it is expected of every citizen of India to pay respect to the National Flag, National Anthem and the Constitution of India they deserve and any case involving deliberate disrespect thereto must be seriously dealt with..."

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11. The appropriate authorities including the Collector of Nalgonda District and the Superintendent of Police, Nalgonda should have taken all steps to prevent the misuse of the Indian National Flag.

C 12. They evidently have failed to perform their statutory duties.

13. Having regard to the fact that it has been stated in the letter dated 15.12.2000 that the writer thereof is not aware of the name(s) of the person(s) manufacturing the same, we direct the State and in particular the District Collector and the Superintendent of Police, Nalgonda District to take steps to conduct investigation with regard to the misuse of the National Flag and see to it that the offenders are brought to book. Let a copy of this order be sent to the Chief Secretary to the Government of Andhra Pradesh so that necessary directions to all concerned may be issued so as to prevent such misuse of the Indian National Flag. Accordingly, we dispose of this writ petition. No costs."

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We, however, hope and trust that the Parliament, keeping in view the importance of the question involved in this matter, shall make a suitable enactment for the aforementioned purpose.

F For the aforesaid reason, we hold that- (i) Right to fly the National Flag freely with respect and dignity is a fundamental right of a citizen within the meaning of Article 19(1) (a) of the Constitution of India being an expression and manifestation of his allegiance and feelings and sentiments of pride for the nation; (ii) The fundamental right to fly National Flag is not an absolute right but a qualified one being subject to reasonable restrictions under clause 2 of Article 19 of the Constitution of India; (iii) The Emblems and Names (Prevention of Improper Use) Act, 1950 and the Prevention of Insults to National Honour Act, 1971 regulate the use of the National Flag ; (iv) Flag Code although is not a law within the meaning of Article 13(3)(a) of the Constitution of India for the purpose of clause (2) of Article 19 thereof, it would not restrictively regulate the free exercise of the right of flying the

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national flag. However, the Flag Code to the extent it provides for preserving respect and dignity of the National Flag, the same deserves to be followed. (v) For the purpose of interpretation of the constitutional scheme and for the purpose of maintaining a balance between the fundamental/legal rights of a citizen *vis-a-vis*, the regulatory measures/restrictions, both Parts IV and IVA of the Constitution of India can be taken recourse to.

For the reasons aforementioned, we do not find any merit in these appeals, which are accordingly dismissed. But in the facts and circumstances of this case, there shall be no order as to costs.

N.J.

Appeals dismissed.