Stato, Chiese
e pluralismo confessionale

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Freedom of expression and the desecration of flags and religious books in Israeli law *

SUMMARY: 1. Introduction - 2. Flag Protection. Legislation - 3. Flag Protection. Jurisprudence - 4. Foreign Flags - 5. Desecration of Religious Books - 6. Conclusions.

1 - Introduction

Freedom of expression is perhaps the most fundamental and important of all in a democratic polity. It is axiomatic, essential and paramount to liberal democracy that all should be allowed to express their views and ideas freely. Without a free exchange of opinions in "the marketplace of ideas"[1] there is no hope for the pursuit of happiness and self-fulfillment, for liberty and collective self-determination, and ultimately not even for life and safety from tyranny. As Hans Kelsen noted:

> "The will of the community, in a democracy, is always created through a running discussion between majority and minority, through free consideration of arguments for and against a certain regulation of a subject matter. This discussion takes place not only in parliament, but also, and foremost, at political meetings, in newspapers, books, and other vehicles of public opinion. A democracy without public opinion is a contradiction in terms"[2].

Thus, the earliest modern constitutional texts - the French Declaration of the Rights of Man and of the Citizen[3] and the U.S. "Bill of

* Article peer evaluated.

[1] For the first use of this metaphor see, *Abrams v. United States*, 250 U.S. 616 (1919), at 630. *United States v. Rumely*, 345 U.S. 41 (1953), at 56. See also, **D.D. McGEOUGH**, *Selling the "Marketplace of Ideas" and Buying Fish, Bollinger, and Baker*, in *Kaleidoscope: A Graduate Journal of Qualitative Communication Research*, 4/2011, p. 37 ss.

[2] **H. KELSEN**, *General Theory of Law and State*, Harvard University Press, Cambridge, 1961, p. 287 s.

[3] The French Declaration of the Rights of Man and of the Citizen (August 26, 1789), Article 11: "The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may accordingly speak, write and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law."

Rights"[4] - enshrine this pillar of democracy and guarantee the freedom to communicate ideas and opinions, as do all since[5]. Naturally, the law of free speech in Western democracies has generated a vast doctrinal typography and intricate typologies, frequently questioned and reviewed, based on the same fundamental concept. However, from this point of universal consensus upon the central import of free speech to democracy there diverge very different paths and paradigms.

All agree that Freedom of Speech (FOS) is not absolute[6], nor even close to absolute. Exceptions include not only the famous, obvious and very extreme examples of crying "fire" in a crowded theater[7], or divulging state secrets; defamation[8], threats, incitement to violence or "fighting words"[9]; but also cases where one's speech will cause lesser harm, such as verbal sexual harassment for example[10]. Such is prohibited even when not of any

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[4] The Bill of Rights (September 25, 1789) includes the first 10 amendments to the U.S. Constitution to be ratified by three fourths of the state legislatures as required (December 15, 1791), the first of which states: "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."

[5] A search for the topic of freedom of expression in the recently launched Constitute Project yields 183 in-force constitutions, from Afghanistan to Zimbabwe. To this end see: *https://www.constituteproject.org/search?lang=en&key=express&status=in_force*. It should be noted that a measure of free speech was present in Greek democracy as well, in the form of Isegoria (ισηγορία) and Parrhesia (παρρησία). See, e.g., **M. FOUCAULT**, *The Meaning and Evolution of the Word Parrhesia in Discourse & Truth: the Problematization of Parrhesia*, University of California Press, Berkley, 1983.

[6] Though the more extreme view is sometimes called 'absolutist', apparently based on the dissent in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), at 285 and 275, which stated that FOS was "couched in absolute terms" and absolutely forbids its abridgement "without any 'ifs' or 'buts' or 'whereases'".

[7] See, *Schenck v. United States*, 249 U.S. 47 (1919), Justice Holmes' dissent, at 52.

[8] See, *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). See also, **R.A. EPSTEIN**, *Was New York Times v. Sullivan Wrong?*, in *University of Chicago Law Review*, 53/1986, p. 782 ss.

[9] See, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), at 571 - 572: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." See, **R. O'NEIL**, *Rights in Conflict: The First Amendment's Third Century*, in *Law and Contemporary Problems*, 2/2002, p. 7 ss. See also fn. 12, regarding "catcalling".

[10] See: *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*,

violent or threatening nature that might create an atmosphere of physical danger to the victim, but "merely" causes her the discomfort of being in a hostile and offensive environment[11]. Thus, victims' rights not to be distressed justify limiting harassers' right to express themselves[12]. Additional historical exceptions include obscene language and behavior[13], public nudity, contempt of court[14], and disorderly conduct towards police officers[15].

Finally, a very common and salient limitation upon freedom of expression which is of special significance when considering the desecration of flags and religious books, is the prohibition of "hate speech"[16] - speech that provokes or justifies racial, religious or other collective hatred. The question of hate speech is a defining watershed difference between the unique and more extremist American position on the appropriate extent of freedom of speech and the much more moderate European model[17].

Most European democracies prohibit hate speech and holocaust denial[18], as they do flag-desecration. This is the plain understanding of the

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510 U.S. 17 (1993).

[11] See, The U.S. Equal Employment Opportunity Commission (EEOC), Sexual Harassment: *https://www.eeoc.gov/laws/types/sexual_harassment.cfm*. Harassment in the workplace based on race, color, religion, national origin, age (40 or older), disability or genetic information is also prohibited.

[12] It may be of interest to note that even the American Civil Liberties Union (ACLU) - traditionally the ultimate defender of maximal FOS protection - recently tweeted an endorsement of a ban on "catcalling", i.e. street harassment of women, after France outlawed the same. The tweet was quickly deleted. At this purpose see: *https://reason.com/blog/2018/08/03/aclu-catcalling-free-speech-tweet*.

[13] See: *Roth v. United States*, 354 U.S. 476 (1957); *Jacobellis v. Ohio*, 378 U.S. 184 (1964). *Ginzburg v. United States*, 383 U.S. 463 (1965). **J.M. FINNIS**, *Reason and Passion: The Constitutional Dialectic of Free Speech and Obscenity*, in *University of Pennsylvania Law Review*, 116/1967, p. 222 ss.; **M. HEINS**, *Sex, Sin, and Blasphemy: A Guide to America's Censorship Wars*, The New Press, New York, 1993.

[14] On this matter see, though long overturned, *Patterson v. Colorado,* 205 U.S. 454 (1907).

[15] See, *State of Montana v. Malachi Cody Robinson*, 2003 MT 364.

[16] For one of the first usages of the term see, **R. DELGADO**, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, in *Harvard Civil Rights - Civil Liberties Law Review*, 16/1982, p. 133.

[17] See, **E. BLEICH**, *The Freedom to Be Racist?: How the United States and Europe Struggle to Preserve Freedom and Combat Racism*, Oxford University Press, 2011; **R. POST**, *Hate Speech*, in *Extreme Speech and Democracy*, Oxford University Press, 2011, p. 123 ss.

[18] See, *Hans-Jürgen Witzsch v. Germany*, Application no. 7485/03, 13 December 2005; *Roger Garaudy v. France*, Application no. 65831/01, 7 July 2003; *Case of Lehideux and Isorni v. France*, Application no. 55/1997/839/1045, 23 September 1998; *Marais v. France*,

International Covenant on Civil and Political Rights (ICCPR), which allows States to restrict freedom of expression for the sake of "respect of the rights or reputations of others"[19], and actually mandates the prohibition of "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence"[20].

Although not a case of hate speech, it is worth noting in this context a very disturbing decision given recently by the European Court of Human Rights, which demonstrates the extent to which Europe is willing to curb freedom of expression. The ECtHR upheld the conviction by Austrian courts of a woman for "publicly disparaging an object of veneration of a domestic church or religious society, namely Muhammad, the Prophet of Islam, in a manner capable of arousing justified indignation"[21]. The woman asserted in a public seminar titled "Basic Information on Islam", given at the Education Institute of the right-wing Freedom Party, that Muhammad was pedophilic, since he consummated a marriage to a nine-year-old girl. For this, she was sentenced to a fine of €480 or six months in prison.

American FOS doctrine, on the other hand, has developed over the last half century to liberally allow hate speech, barring clear and present danger of violence[22]. The Supreme Court of the United States has defended

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Application No. 31159/96, 24 June 1996; *Gerd Honsik v. Austria*, Application No. 25062/94, 18 October 1995. The European Court of Human Rights. Factsheet - Hate Speech *http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf*. **A. WEBBER**, *Manual on Hate Speech*, Council of Europe Publishing, Strasbourg, 2009; **M. WHINE**, *Expanding Holocaust Denial and Legislation Against It*, in edited by **I. HARE, J. WEINSTEIN**, *Extreme Speech and Democracy*, Oxford University Press, Oxford, 2011), p. 538 ss.; **P. LOBBA**, *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime*, 26:1 *The European Journal of International Law*, 2015, p. 237 ss. Of note in this context is the recent legislation in Poland criminalizing statements about Polish corroboration with the Nazis, especially using the term "Polish Death Camp", punishable by three years' imprisonment. The law attracted international condemnation and the criminal sanctions were later repealed, in a diplomatic agreement with Israel, which has aroused its own controversy. See, for example, **M. SANTORA**, *Poland's Holocaust Law Weakened After Storm and Consternation*, in *The New York Times*, June 27, 2018:

[19] The International Covenant on Civil and Political Rights, Section 19(3)(a).

[20] The International Covenant on Civil and Political Rights, Section 20(2).

[21] *Case of E.S. v. Austria*, Application no. 38450/12, 25 October 2018.

See also, *Case of Jersild v. Denmark*, Application no. 15890/89, 23 September 1994; *Mark Anthony Norwood v. United Kingdom*, Application no. 23131/03, 16 November 2004; Hate Speech, Factsheet: *https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf*.

[22] *Schenck v. United States*, 249 U.S. 47 (1919), Justice Holmes' dissent, at 52. This being in contrast to the earlier 5-4 ruling given in 1952 in *Beauharnais v. Illinois*, 343 U.S. 250, which upheld criminalizing collective vilification of blacks as group-libel. Though never explicitly overturned, subsequent decisions *de-facto* voided Beauharnais, and subjected even

a Ku-Klux-Klansman that called for violence against blacks and Jews - ruling that speech may only be proscribed if it is both "directed at inciting or producing imminent lawless action" and is also actually "likely to incite or produce such action"[23]; has allowed Nazis to hold a march in full Nazi uniform and regalia in Skokie, Illinois - a predominantly Jewish suburb of Chicago and home to many Holocaust survivors[24]; has struck down laws restricting cross-burning[25]; and has protected anti-homosexuality picketing at a military funeral[26].

While the American paradigm is more protective of FOS, it does so at the cost of deliberately ignoring the need - especially in culturally diverse societies common in democratic countries nowadays - for dialogue rather than confrontation, for tolerance rather than hostility and for a pluralistic respect of the dignity and integrity others and that which they cherish. The European paradigm on the other hand, sacrifices some freedom of expression for the sake of protecting the sensibilities of the different segments of society, though it appears be taking this to new and alarming extremes, as described above.

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individual libel laws to FOS. See Sullivan, fn. 8; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). See also the recent *Matal v. Tam*, 582 U.S. (2017). Beauharnais quotes the language of Chaplinsky, see fn. 9, which was given unanimously merely a decade earlier, concerning types of speech whose prevention raises no constitutional problem. Chaplinsky been similarly eroded by the subsequent decisions detailed infra. Similar dictum can be found in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), also given unanimously, at 309 - 310. These cases demonstrate the gradual paradigm shift in American Freedom of Speech jurisprudence, in the decades after World War II, from a unanimous emphasis on the ideational rationale of expression - which leads to results closer to the European model allowing restriction of speech lacking ideational value, to a narrow majority holding the same, and finally to an emphasis on libertarian justifications for FOS - which result in much more expansive protection of speech even when such has no value. This basic paradigm shift is of course central to other fundamental questions concerning FOS, such as corporate speech and campaign financing, the protection of artistic speech and commercial speech, wherein a parallel trend has occurred. See, for example, **M.H. REDISH, K. VOILS**, *False Commercial Speech and the First Amendment: Understanding the Implications of the Equivalency Principle*, in *William and Mary Bill of Rights Journal*, 25/2017, p. 765 ss. **M.N. WEILAND**, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69:5 *Stanford Law Review*, 5/2017) p. 1389 ss.

[23] *Brandenburg v. Ohio*, 395 U.S. 444 (1969), 447.

[24] *Smith v. Collin*, 439 U.S. 916 (1978), denying certiorari. See *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) 1206.

[25] *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). See also, *Virginia v. Black*, 538 U.S. 343 (2003), which ruled that prohibiting cross burning intended to intimidate is constitutional, if such intent is proven and not presumed.

[26] *Snyder v. Phelps*, 562 U.S. 443 (2011).

The theoretical question of the proper perimeters of such infringements upon freedom of expression aside, legislation outlawing the desecration of flags or other national symbols on the one hand, and of religious books or other venerated objects on the other hand, can be seen as a measure of the emphasis ascribed in a jurisdiction to tolerance and pluralism as a justification for limiting democratic rights.

Following, is a critical review of the legislation and case-law of flag burning statutes, and statutes outlawing the desecration of religious books, in Israel. Besides the historic and comparative insights to be gleaned from this research, it will also include some analysis of the arguments given in favor of such legislation, or their rejection.

2 - Flag Protection. Legislation

The Israeli flag, which consists of a light blue Star-of-David between two horizontal stripes of the same color over a white background, had for half a century been the flag of the Zionist Organization[27]. It was authorized as the state flag in October 1948 by the Provisional Council-of-State. The Provisional Government had called upon the public to submit their proposals to an especially formed committee and, out of the hundreds suggested, selected a design consisting of seven golden stars between two blue stripes over a white background. However, the Provisional Council-of-State rejected the Provisional Government's decision and after appointing a committee of its own approved the existing design[28].

The state emblem contains a Menorah (Biblical seven-branched candelabrum) in the center, modeled after its depiction on Titus' Arch in Rome, flanked by olive branches on either side and the word "Israel" connecting the branches at the bottom. It was chosen in February 1949 by the Provisional Council-of-State, after similarly rejecting the design endorsed by the Provisional Government after considering the public's proposals, as well as other designs later proposed. The Provisional Council-of-State called for a second round of proposals from the public, in which the existing emblem was finally chosen, with slight modifications[29].

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[27] Today called the World Zionist Organization.

[28] See, State Archives of Israel, "Blue and White Pages 2018". See also, the flag of Israel's merchant marine, Ships Ordinance (Nationality and Flag) 1948, Official Gazette (Provisional Government) 2 (21 May 1948) p. 6 s. Shipping (Vessels) Law 5720 - 1960, Section 86. "Book of Laws" 315 (14 August 1960) p. 70 ss.

[29] *Ibidem*.

In May 1949, the Israeli Knesset enacted the "Law of the Flag and the Emblem, 5709-1949"[30] [heretofore: the Flag Law or the law][31]. The Flag Law references the specifications of the flag and the emblem[32], as per the respective declarations of the Provisional Government which were published in the Official Gazette[33].

The law then prohibits any commercial use of the flag without written permission from the Minister of the Interior[34], save for its display, manufacture and sale[35], punishable by up to six months' imprisonment, a fine of up to 150 pounds[36], or both[37]. The law is even stricter with regard to the state emblem[38], proscribing the production of any object bearing the emblem[39], as well as any use of the emblem, without similar authorization[40], and ascribing similar penalties to unauthorized production or use[41]. This difference is due to the fact that unlike the flag, which citizens are expected

[30] "Book of Laws" 8 (24 May 1949) p. 37 s. In 2004, the law's name was amended, and it is now "The Law of the Flag, the Emblem and the Anthem of the State, 5709-1949".

[31] Heretofore, where applicable and not otherwise specified, mention of the flag includes the emblem as well.

[32] The Flag Law, Section 1 - Interpretation, 1(a) and 1(b), respectively. Section 1(a) also includes flags of any size or any object that has an image of the state flag on it. See also, Section 8(a) and 8(b), fn. 34, 38 and 67.

[33] Deceleration of the Flag of the State of Israel, Official Gazette (Provisional Government) 32 (12 November 1948) p. 62. Declaration of the Emblem of the State of Israel, Official Gazette (Provisional Government) 50 (12 February 1949) p. 404.

[34] Flag Law, Section 2 - Use of State Flag for Purposes of Commerce, Etc. This applies to flags that are similar to the state flag and might be mistaken for it, and objects bearing its design, as well. See Section 8 - Similar Flags and Emblems, 8(a).

[35] The Flag Law, Section 2(a).

[36] This amount is equivalent to the purchasing power of almost 1500 USD today. Independent penal legislation greatly increases the maximum amount to 29,200 NIS, adjusted for inflation. See, Penal Law, Section 61(a)(2), "Book of Laws" 959 (08 February 1980) p. 60. As further amended by Penal Order (Change of Fine Amounts) 5770 - 2010, Section 1(3). See, "Regulations Compilation" 6877 (14 March 2010) p. 948.

[37] The Flag Law, Section 2(b). See also, section 4(a)-(b) as to the manner of granting of such permission.

[38] This applies to an emblem that is similar to the state emblem and might be mistaken for it, as well. See Section 8 - Similar Flags and Emblems, 8(b).

[39] The Flag Law, Section 3 - Use of State Emblem, 3(a). See also, Section 4 - Conditions of License or Permit.

[40] The Flag Law, Section 3(b).

[41] The Flag Law, Section 3(c).

to fly and must necessarily be manufactured and sold, the emblem is not intended for private use at all[42].

These clauses, which may today seem archaic, are not fully implemented. They have never been criminally prosecuted. But the prohibition of unauthorized use of the emblem is cited and reiterated in internal government guidelines and codes of conduct[43], and has been grounds for disciplinary action against a senior government official who used letterheads and business cards with the national insignia for his own political purposes, although he paid for their printing out of his own pocket[44].

They are also very significant for gleaning a proper understanding of the law's paradigm as to the essential nature of national symbols. These are seen as actually belonging to the collectivity of the nation, the manifestation of which achieves legal personality and competency in the state, which must therefore grant its consent for them to be used privately in any manner beyond their intended purposes[45].

It is of interest to note in this context, that the same approach was echoed in Israel's Penal Law. Enacted in 1977, the law gave Israeli courts extraterritorial jurisdiction over offenses committed against Israeli interests. The law goes on to specifically include in this authority[46], *inter alia*, offences under the Flag Law and the State Seal Law[47]. Here too, national symbols are seen as property of the state, which must protect them and punish those who harm them, wherever they may be. Of course, from a practical perspective this is quite unfeasible and perhaps dated, and the law was in fact amended in 1994[48]. But the core paradigm is nevertheless sound, and

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[42] See, minutes of the Knesset plenary's 32 session (18 May 1949) p, 538.

[43] See, Civil Service Regulations (Takshir) Section 62.261.

[44] See, Government Disciplinary Tribunal 94/04, Adv. Galit Shoham v. John Doe (21 June 2005). The sentence in the case was a reprimand. See, (Supreme Court) Appeal of Government Disciplinary Tribunal Decision 9345/05, State of Israel v. Yoel Chasson (13 November 2007).

[45] And *Cf.*, Law of the State Seal 5710 - 1949, Section 5(b). "Book of Laws" 28 (07 December 1949); Law for the Protection of Emblems, 5735 - 1974, Section 4. "Book of Laws" 751 (19 December 1974) p. 22 s.

[46] The Penal Law 5737 - 1977, Part One: General Provisions, Chapter Two: Territorial Application, Section 5(b)(2) - Offences Against the State. "Book of Laws" 864 (4 August 1977) pp. 224 - 306. See official English translation, Laws of the State of Israel, Special Volume (31A) Penal Law 5737 - 1977, p. 11.

[47] See fn. 45.

[48] The Penal Law (Amendment No. 49) (Preliminary Part and General Part) 5754 - 1994. "Book of Laws" 1481 (23 August 1994) pp. 348 - 359.

particularly pertinent to our analysis and understanding of limiting freedom of expression for the sake of protecting national symbols.

We now come to the substantive part of the Flag Law, the desecration clause, which assigns a punishment for offending the dignity of the flag or the emblem:

> "A person who insults, or causes to be insulted, the State Flag or the State emblem, or uses the State flag or the State emblem in a manner constituting an insult to it, shall be liable to imprisonment for a term not exceeding […] or to a fine not exceeding […] or to both such penalties"[49].

Originally, the penalty was double that prescribed to unauthorized use or manufacture of the flag or the emblem, i.e., up to one year's imprisonment, a fine of up to 300 pounds, or both. The Knesset amended the law in 2016[50], tripling the maximum prison term for desecrating the flag from one year to three, thus aligning it with the maximal punishment for the desecration of foreign flags, and doubling the maximum fine to over 58,400 NIS[51].

But as we shall later see, the law's punch is in practice not as strong as it may immediately seem. The legal establishment in Israel is mindful of the constitutional difficulty of restricting expression, and wary of wielding the law's power too freely. Despite the letter of the law, it is applied sparingly and with great restraint[52].

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[49] Flag Law, Section 5 - Insult to the State Flag or the State Emblem.

[50] See, Law of the Flag, the Emblem and the Anthem of the State (Amendment No. 7) 5776 - 2016, "Book of Laws" 2567 (27 July 2016) p. 1078.

[51] The amount of the maximal fine is not specified, but is linked to double the maximal amount of penal fines for crimes carrying a maximal imprisonment term of one year, which is 29,200 NIS, adjusted for inflation. The maximal fine for crimes carrying a maximal prison term of three years, as the amended clause does, is much more than double that amount, 75,300. See fn. 36. It is not clear why the amendment tripled the maximal prison term, but only doubled the maximal fine. A punishment of a fine, which is of course less harsh than imprisonment, is not available for insulting a foreign flag. Hence, the amendment did not entirely eliminate the inconsistency between the punishments for insulting the state flag and foreign flags.

[52] Additional legislation which is protective of the flag is Amendment No. 40 to the Budget Foundations Law 5745 - 1985, passed in 2011. This permits the Minister of Finance to reduce state funding for an entity that financially supports: the rejection of the State of Israel as a Jewish and democratic state; incitement to racism, violence or terrorism; terrorist activity; commemorating Independence Day or the day of the establishment of the state as a day of mourning; and vandalism or physical desecration that dishonors the state's flag or symbol. The permitted reduction is up to three times the amount used for the above purposes. The amendment is intentionally limited to physical desecration and contains several additional caveats as well. See, Budget Foundations Law (Amendment No. 40) 5771

Another criminal offence which could hypothetically be considered in cases of flag desecration is the prohibition of sedition, which is punishable by five years' imprisonment[53], and defined in Israel's Penal Law as[54].

> "For the purposes of this article, 'sedition' means -
> (1) to bring into hatred or contempt or to excite disaffection against the State or its duly constituted administrative or judicial authorities; or
> (2) to incite or excite inhabitants of Israel to attempt to procure the alteration otherwise than by lawful means of any matter by law established; or
> (3) or to raise discontent or disaffection amongst inhabitants of Israel; or
> (4) to promote feelings of ill-will and enmity between different sections of the population".

Burning the flag of a state is an expression of animus and malice towards the state and the nation for which it stands. It is a seditious and subversive act which is inherently a call to violence against the state. These sentiments are often explicit in instances of flag burning by foreign enemies of the state, such as the frequent burnings of the flag of the United States of America (the "Big Satan") in Iran and other Middle-Eastern countries, but also in some domestic cases. The protesters in the famous American case of *Texas v. Johnson* in which the U.S. Supreme Court ruled that flag desecration

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- 2011, "Book of Laws" 2286 (30 March 2011) pp. 686 - 687. This matter relates to the unique circumstances of Israel's national struggle as a Jewish state and is in any case beyond the scope of this work, which is focused on the criminalization of the desecration of national and religious artifacts. Nevertheless, it should be noted that a petition to the Supreme Court to strike down the amendment as unconstitutional was rejected as "unripe", as the law had not been implemented. See, High Court of Justice 3429/11, Alumni Association of the Arab Orthodox School in Haifa v. Minister of Finance (5 January 2012).

[53] Penal Law 5737 - 1977, Part Two: Offences, Chapter Eight: Offences Against the Political and Social Order, Article One: Sedition, Section 133 - Seditious Acts. Chapter Eight is the second chapter in Part Two, after the chapter dealing with treason and espionage, as well as impairment of foreign relations (see fn. 129). These offences originated in the Criminal Code Ordinance of 1936, available at fn. 132, where they are located in the first chapter of Part Two, which includes together treason and sedition, as well as three offences against foreign states. See, *infra*, Section **Errore. L'origine riferimento non è stata trovata.** - Criminal Code Ordinance, 1936, and fn. 133 and 140. In the Ordinance, however, the crime of sedition is a misdemeanor, punishable by three years' imprisonment.

[54] *Ibidem*, Section 166 - Sedition Defined. This section is based on Section 60(1) of the Criminal Code Ordinance almost verbatim, *mutatis mutandis*, though not divided into subsections as in the Penal Law.

statutes are unconstitutional[55], for example, were chanting "America the red, white and blue, we spit on you, you stand for plunder, you will go under"[56]. And while some flag burners will prudently deny such motivation and explain their actions otherwise, the fact is that their choice of expression is a violent one which undeniably implies a strong urge to hurt that and those for which the flag stands.

In the unique American paradigm, this is of course irrelevant, since even explicitly seditious calls for violence must be tolerated as long as they do not pose the likelihood of inciting imminent lawless action. But for jurisdictions that espouse a more moderate paradigm of freedom of expression, as does Israel, seeing flag desecration as sedition is quite cogent. In March of 1990, three months before the Johnson decision was given by the U.S. Supreme Court, the Federal Constitutional Court of the Republic of Germany used this rationale to justify the constitutionality of the law which penalizes expressing contempt for the state or insulting its flag, its national emblem or its national anthem by up to three years' imprisonment[57]. The

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[55] *Texas v. Johnson*, 491 U.S. 397 (June 21, 1989).

[56] *Ibidem*, at 431.

[57] See, Strafgesetzbuch (StGB) 15 May 1871, Reichsgesetzblatt I 127; 10 February 2009, Bundgesetzblatt I 3214, Specific Part, Chapter One - Crimes Against the Peace of Nations; High Treason; Endangering the Democratic State under the Rule of Law, Third Title - Endangering the Democratic State under the Rule of Law, Section 90a - Defamation of the State and its Symbols:

(1) Whosoever publicly, in a meeting or through the dissemination of written materials

1. insults or maliciously expresses contempt of the Federal Republic of Germany or one of its states or its constitutional order; or

2. insults the colors, flag, coat of arms or the anthem of the Federal Republic of Germany or one of its states shall be liable to imprisonment not exceeding three years or a fine.

(2) Whosoever removes, destroys, damages, renders unusable or defaces, or otherwise insults by mischief a publicly displayed flag of the Federal Republic of Germany or one of its states or a national emblem installed by a public authority of the Federal Republic of Germany or one of its states shall incur the same liability. Attempt to commit the above shall be punishable.

(3) The penalty shall be imprisonment not exceeding five years or a fine if the offender by the act intentionally supports efforts against the continued existence of the Federal Republic of Germany or against its constitutional principles.

See also section 90 - Defamation of the President of the Federation, and Section 90b - Anti-Constitutional Defamation of Constitutional Organs. It is noteworthy here that the StGB also prohibits insult to officially flown flags of foreign states with which Germany maintains diplomatic relations and reciprocate this prohibition. The offence may be prosecuted if the foreign state requests it, and it must be authorized by the federal government of Germany. See, Specific Part, Chapter Three - Offences Against Foreign States, Section 104 - Violation of Flags and State symbols of Foreign States; Section 104a - Conditions for Prosecution. (See also, Deutscher Bundestag, Wissenschaftliche Dienste,

court held that the flag is constitutionally protected[58], that "the Republic is dependent on the identification of its citizens with the basic values symbolized by the flag", and that defaming the flag could "injure the authority of the state which is necessary for internal peace"[59].

WD 3 - 3000 - 042/18, Verfassungsrechtliche Fragen zur Strafbarkeit der Verunglimpfung Israelischer Flaggen, 5 March 2018). Chapter Three contains two additional offences against foreign states, Section 102 - Attacks Against Organs and Representatives of Foreign States, and Section 103 - Defamation of Organs and Representatives of Foreign States. Section 103 was recently repealed as outdated. See, Bundesgesetzblatt I, 2017 Nr. 48, 21 July 2017, Gesetz zur Reform der Straftaten gegen ausländische Staaten.

[58] The right to artistic expression is protected by of the German constitution (Basic Law), Section 5(3). This artistic privilege is more expansive than the general freedom to express opinions, and may only be restricted to protect constitutional values, such as human dignity. Hence, the court had to assert that protecting the flag is a constitutional value. In fact, the constitution merely states that the federal flag shall be black, red and gold. See, *Grundgesetz der Bundesrepublik Deutschland*, 23 May 1949, Bundesgesetzblatt 1, Article 22 - Federal Capital; Federal Flag. See also, Article 5 - Freedom of expression, Arts and Sciences.

[59] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 81, 278 (1 BvR 266/86, 913/87) 7 March 1990, 32 Neue Juristische Wochenschrift, 1983. **P.E. QUINT**, *The Comparative Law of Flag Desecration: The United States and the Federal Republic of Germany*, in *Hastings International and Comparative Law Review*, 15/1992, p. 613 ss.; **B. J. BLEISE**, *Freedom of Speech and Flag Desecration: A Comparative Study of German, European and United States Laws*, 20:3 *Denver Journal of International Law and Policy*, 1992, p. 471 ss. In the case, a bookseller was prosecuted for selling an anti-militarist collection with a collage of urinating on the flag on its back cover. He was fined by a lower court in the sum of 4,500 DM. (Criminal fines in Germany run as between 5 and 360 "daily income" units, based on the defendant's income, with a maximal cap of 30,000 per day. See, StGB Section 40. This was a 30 days' fine for the defendant). Despite the Constitutional Court's theoretical justification of the flag desecration clause, it declined to actually enforce the law and punish the defendant. Rather, the Constitutional Court ruled that the lower court did not properly balance the law with the right to artistic expression protected by the Section 5(3) of the constitution (Basic Law), as the "expressive core" of the collage was not actually aimed at the state. The court interpreted the "expressive core" of the artistic expression as being an attack on militarism and not on the flag or the state, which is the goal of the attack "only insofar as it was responsible for the establishment of military service". Thus, the urination on the flag is merely the "form" of the expression, not its essential core. In a similar case decided by the Constitutional Court on the same day, a lower court sentenced the defendant to four months' imprisonment for publishing a parody of the national anthem, finding that his purpose was to attack the anthem and thus the Federal Republic itself, which impairs the "state-feeling" and therefore endangers the basic democratic order. The Constitutional Court again acknowledged the theoretical constitutionality of the law but remanded the case to the lower court for considering that the "expressive core" of the parody may have been an attack on "contradictions between pretension and reality" that was merely "clothed" in the altered wording of the anthem. Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 81, 298 (1 BvR 1215/87) 7 March 1990. See, **P.E. QUINT**, *The Comparative Law cit.* See also, **B. J. BLEISE**, *Freedom of Speech cit.*, p. 390, for a conviction in a lower court for the desecration of the State of Bavaria by calling it "the

The possibility of prosecuting flag desecration as a seditious act was never raised in Israel. This comes as no surprise, considering the reluctance described below to charge and convict desecrators of the flag even for violating the Flag Law, which is more specific and less punitively severe. However, it is interesting to compare and contrast to this a famous case in which plotting to commit an act that is offensive to religious sensibilities was indeed prosecuted and convicted as being seditious, in addition to more specific offences.

In November 1997, Demian Pekovich plotted to catapult the head of a pig with a Koran in its mouth into the Temple Mount. For this he was charged and convicted in late March 1999 by a District Court[60], of plotting to desecrate a Holy Place and to violate feelings regarding it[61], and with sedition as defined in subsection (4): promoting feelings of ill-will and enmity between different sections of the population[62]. He committed two additional crimes for which he was judged and convicted together[63], and given a combined sentence of five years' imprisonment, 18 months of which were suspended[64]. An appeal of the conviction and the severity of the sentence was rejected by the Supreme Court[65].

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madhouse of the Republic". The Supreme Penal Court (Bundesgerichtshof) recently affirmed the Federal Constitutional Court's 1990 decision. See BGH 3 StR 27/18, Order of 30 October 2018.

[60] In Israel, the District Courts are the court of first instance for crimes carrying a maximal punishment of more than seven years' imprisonment.

[61] See, the Protection of Holy Places Law 5727 - 1967, Sections 2(a) and 2(b), and Section 499 of the Penal Law. Protection of Holy Places Law, "Book of Laws" 499 (28 June 1967) p. 75. See, official English translation, Laws of the State of Israel, Vol. 21, 5727 - 1966/67, p. 76. Despite the existence of other protections of freedom of religion and worship, Israel enacted the Protection of Holy Places Law immediately after the liberation of Jerusalem and Judea and Samaria in the Six Day War, when many holy places to different religions came under its control.

[62] Criminal Case (Jerusalem district Court) 109/98, *State of Israel v. Demian Pekovich* (30 March 1999).

[63] Plotting to place the head of a pig on the gravesite of Izz ad-Din al-Qassam, and torching offices of a left-wing organization.

[64] Criminal Case (Jerusalem district Court) 109/98, *State of Israel v. Demian Pekovich* (15 April 1999).

[65] Criminal Appeal (Supreme Court) 3338/99, *Demian Pekovich v. State of Israel* (20 December 2000). The Supreme Court concluded its decision with an acknowledgement of the need to amend the law of sedition in a manner that will be clearer and compatible with the necessity of protecting democracy whilst respecting the principle of legality. For a discussion in English of the offence of sedition in Israel see, **M. GUR-ARYE**, *Can Freedom of Expression Survive Social Trauma: The Israeli Experience*, in *Duke Journal of Comparative and International Law*, 1/2003, p. 155 ss.

This disparity in enforcement between offences to national interests and to religious ones might be due to the very dissimilar repercussions that are expected in each of the different cases. Offences to Islam regularly cause violence and loss of life[66], whereas offences to national sensibilities do not. Therefore, enforcement authorities may naturally wish to pursue more rigorous enforcement policies when dealing with such, in order to increase and reinforce the deterrence of potential offenders in the future, than when dealing with similar offences to national symbols.

The next clause of the law authorizes the Minister of the Interior to enact regulations concerning the proper flying and treatment of the flag and the preservation of its dignity[67]. These were enacted in 1953[68], and contain several additional prohibitions pertaining to the flag, each punishable by a fine of up to 50 pounds[69]. These include[70]:

- Displaying the flag in public in a layout different than that in the Declaration of the Flag of the State of Israel[71], in a state not befitting dignified use[72], or in a place, a time, in circumstances or in a manner that constitute an offense to the flag's honor[73].

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[66] See, e.g., **R. POST**, *Religion and Freedom of Speech: Portraits of Muhammad*. 14:1 *Constellations*, 2007, p. 72 ss.

[67] The Flag Law, Section 6 - Implementation and Regulations. See also Section 7 - Delegation of Powers. This applies to flags and emblems that are similar to those of the state and might be mistaken for them, as well. See Section 8 - Similar Flags and Emblems, 8(a), (b). This section of the law was amended in 1981 (Amendment No. 1), to include the enactment of regulations concerning the flying of the flag on government buildings and public institutions. New regulations to that effect were not drafted, but the law itself was amended in 1986 (Amendment No. 2, Section 2A) and again in 1997 (Amendment No. 3) to include such and obligation. Failing to fulfill this obligation is punishable by imprisonment for one year. See, "Book of Laws" 1025 (26 May 1981) p. 272. See official English translation, Laws of the State of Israel, Vol. 35, 5741 - 1980/81, p. 328. "Book of Laws" 1201 (1 January 1987) p. 24. See official English translation, Laws of the State of Israel, Vol. 41, 5747 - 1988/87, p. 24 ss. "Book of Laws" 1631 (24 July 1997) p. 194.

[68] The Flag and Emblem Regulations (Use of the State Flag) 5713 - 1953 (heretofore: Flag Regulations). "Regulations Compilation" 355 (16 April 1953) p. 910.

[69] Flag Regulations, Section 4. The maximum for these today stands at 14,400 NIS. See, Penal Law, Section 61(a)(1), Penal Order (Change of Fine Amounts) 5770 - 2010, Section 1(3).

[70] *Cf.*, IDF General Staff Order 33.04 - The State Flag, IDF Flags and Portraits.

[71] Flag Regulations, Section 1(a)(1); Deceleration of the Flag of the State of Israel, Official Gazette (Provisional Government) 32 (12 November 1948) p. 62.

[72] Flag Regulations, Section 1(a)(2).

[73] Flag Regulations, Section 1(a)(3). See also, Section 1(b).

- Flying the flag on a staff shorter than approximately three times its breadth[74], or not at the top of the staff[75].
- Flying the state flag together with other flags, unless[76]:
  - They aren't flown on the same staff;
  - The state flag is flown on the right, when facing out, or in the middle;
  - No other flag is larger or flown higher;
  - No other flagstaff is longer;
  - The state flag is hoisted first and lowered last.
  - It is equal in size to the flags of other countries or nations[77].

As stated above, the law did not include any reference to the national anthem. Since 2004 the law's name was changed to "The Law of the Flag, the Emblem and the Anthem of the State, 5709-1949"[78], in an amendment intended to officially enshrine the national anthem into Israeli law. It is of interest to note that the amendment did not envisage any desecration of the anthem that might require its protection in a manner similar to that provided for the flag and emblem[79]. Hence, none of the material clauses of the law were amended, besides referencing the language of the anthem[80], by appending it to the law. Interestingly too, the anthem's melody is not mentioned.

3 - Flag Protection. Jurisprudence

[74] Flag Regulations, Section 2(a).

[75] Flag Regulations, Section 2(b). Except at half-staff in mourning.

[76] Flag Regulations, Section 3(a) - (e). See, High Court of Justice 11190/07, Joseph Azgad v. The National Company for Roads in Israel, Ltd. (25 March 2008).

[77] Flag Regulations, Section 3(b).

[78] Amendment No. 4, "Book of Laws" 1961 (17 November 2004) p. 6.

[79] This was noted by the Supreme Court in the decision concerning insulting the anthem in an election campaign.

[80] In subsection (c), which was added to Section 1. A similar amendment was made in 2016 (Amendment No. 6) in which the name of the state, "Israel", was officially enshrined in the law by adding subsection (d) to Section 1, and broadening the Minister of the Interior's authority to include the enactment of regulations not only concerning the proper use of the state flag and emblem, but also concerning the proper use of the name of the state (but not of the anthem)."Book of Laws" 2537 (17 March 2016) 628. [Amendment No. 5 of the law, mandating that publicly funded institutions purchase flags that are manufactured in Israel, is not relevant to our topic.]

Despite lacking a formal constitution for historical and political reasons[81], and long before Basic Law: Human Dignity and Liberty - which Israel's very judicially active Supreme Court has used as a basis for judicial review of legislation for over 20 years[82], freedom of speech has always been recognized in Israel's legal system as a fundamental human liberty[83], deriving directly from the very nature of the State as a liberal democracy[84]. The Israeli legal establishment is well aware of the constitutional challenge posed by the Flag Law, the prohibitions of which pointedly suppress expressive conduct[85]. Hence, the authorities are hesitant to wield the law's power too freely and apply it cautiously.

In this vein, the Attorney General has issued a directive to the state prosecution about certain cases that require his approval prior to indictment, even where the law itself does not formally demand his authorization[86]. Inter alia, this is the case for charges involving flag desecration[87]. Although not explicated, it is safe to presume that this is due to the problematical constitutional aspect of such charges vis-à-vis freedom of speech. And indeed, such charges and convictions are relatively few and far between, and they are also not punished severely as we shall describe below.

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[81] On this see, e.g., **R. GAVISON**, *The Israeli Constitutional Process: Legislative Ambivalence and Judicial Resolute Drive, Center for the Study of Rationality*, *Discussion Paper # 380, 2/2005*, in *http://www.ratio.huji.ac.il/sites/default/files/publications/dp380.pdf*.

[82] Along with Basic Law: Freedom of Occupation.

[83] High Court of Justice 73/53, *Kol HaAm (Voice of the Nation) Co., Ltd. v. Minister of the Interior* (16 October 1953).

[84] High Court of Justice 243/62, *Ulpanei Hassrata BeIsrael Ltd. v. Levi Geri* (10 December 1962).

[85] This of course touches upon the theoretical questions of whether or not speech is unique and deserving of special protection from proscription, what it is that makes speech different from conduct, and whether expressive conduct ought to be equally protected. See, for example, **F. SCHAUER**, *On the Distinction Between Speech and Action*, in *Emory Law Journal*, 2/2015, p. 426 ss. See also *Halter v. Nebraska*, 205 U.S. 34 (1907); *Stromberg v. California*, 283 U.S. 359 (1931); *West Virginia State Board of Education et al. v. Barnette*, 319 U.S. 624 (1943); *United States v. O'Brien*, 391 U.S. 367 (1968); *Spence v. Washington*, 418 U.S. 405 (1974); *Texas v. Johnson*, 491 U.S. 397 (1989). Herein we shall assume that expressive conduct is constitutionally equivalent to speech.

[86] Crimes for which this is required by law include those in Chapter Seven of Part II of the Penal Law, e.g. those in fn. 129. See Penal Law, available at fn. 46, Section 123; Section 135(a). And see, *supra*, Chapter **Errore. L'origine riferimento non è stata trovata.** - Sedition.

[87] Attorney General Directive 4.1004 - Prior Authorization to Submit Indictment, Section 2(c).

The Attorney General's caution in administering the law was expressed very clearly in a prominent case of verbally insulting the flag in 1996, in which no charges were pressed. A Deputy Mayor of Jerusalem called the flag 'a rag on a pole' in an interview on national radio. A concerned citizen urged the Attorney General to open a criminal investigation into the matter and press charges. The Attorney general's response is very telling:

> "The prosecution acts with much restraint and extreme caution about initiating criminal proceedings for crimes whose prosecution entails an intrusion on freedom of speech. The statement in question is appalling, as the flag is our national symbol, cherished by all who cherish the State, but freedom of expression includes the freedom to express views which the public loathes. Though prosecution for violating the flag law is possible, the supreme status of freedom of expression in our legal system is definitely a relevant factor when the prosecution considers whether to indict. There is no public interest in pressing charges, especially since the Deputy Mayor sent a letter the Mayor in wake of the public backlash to his statements, in which he apologized. The public interest is better served by removing the affair off the public agenda than by an investigation or a prosecution, which will cause further public turmoil for no purpose (emphases added)".

A petition filed by the same individual to the Supreme Court against the Attorney General's decision was rejected by a three judge panel[88].

It is noteworthy that although no charges were pressed in the case for the reasons described, as a matter of principle neither the Attorney General nor the Supreme Court raised any objection to the application of the law in cases where the flag is not physically desecrated but merely derided verbally, and agreed that a criminal offense had in fact been committed. This is surprising for several reasons, all of which were

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[88] High Court of Justice 8507/96, *Theodor Orin v. State of Israel* (7 January 1997). While the court's decision not to overrule the Attorney General was unanimous, there was a difference in the Justice's opinions. Justice Eliyahu Matza, stressed the reasonableness of the Attorney General's decision, with Chief Justice Aharon Barak concurring, while justice Mishael Cheshin penned a separate opinion, elaborated on the criminality of affronting the flag and the insincerity of the apology. It is of interest to note that Cheshin was the Chairman of the Central Elections Committee for the Sixteenth Knesset, that disqualified Cherut's campaign jingle discussed below. The additional justices, Barak and Matza, were also on the panel that upheld Cheshin's disqualification. See fn. 124. In that case, Chief Justice Barak was in the minority, finding Cheshin's disqualification incorrect and falling outside the "zone of reasonableness" in which the court should intervene and overrule his decision, with justices Matza and Tova Strassberg-Cohen finding Cheshin's decision correct.

apparently overlooked by the Attorney General and the court in their written analyses of the case.

First, at the very core of the democratically paramount principle of freedom of speech is the protection of opinions. The criminalization of ideational speech is much harder to justify from a constitutional perspective than the criminalization of acts that go beyond what is essential to the ideational message of the opinion they seek to express. If one is not allowed to burn the flag, he may still otherwise express his opinions about the value of the flag, about the state which it represents, about its citizens and about what he hopes and wishes for them[89]. Therefore, there may be valid reasons that justify prohibiting the flag's desecration, as such a prohibition does not essentially contradict freedom of expression. But if one is not able to express the very opinion that the flag has no intrinsic value, then there is absolutely nothing left of freedom of expression, without which there is no democracy.

Additionally, the official English translation of the law uses the term "insult" to the flag. This lends itself to the interpretation that it is inclusive of verbal offense more easily, though not decisively. But the actual Hebrew term "Pgi'a" may in fact more accurately be translated as injury or damage. Thus, the law literally proscribes "injuring the honor of the flag". This may properly be understood as only applying to physical acts that are offensive to the flag's honor, even if not permanently damaging the flag itself[90]. This

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[89] See, for example, *Smith v. Goguen*, 415 U.S. 566 (1974), at 603, Justice Rehnquist, dissenting; *Texas v. Johnson*, 491 U.S. 397 (1989) 397 - 439, at 438- 439, Justice Stevens, dissenting. **R. C. POST**, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, in *California Law Review*, 76/1988, p. 297 ss., Part II (rejecting the distinction). The distinction between ideational speech and speech that lacks ideational value was also made by the European Court of Human Rights in *Otto-Preminger-Institut v. Austria*, Application no. 13470/87, 20 September 1994, paragraph 49. In addition, see, Council of Europe Venice Commission, Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society, Science and Technique of Democracy Series, No. 47, March 2010, at 27, paragraph 61. See also, *Cohen v. California*, 403 U.S. 15 (1971) at 25. This same distinction, rejected in Cohen, was asserted approvingly in: *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), at 571 - 572; *Cantwell v. Connecticut*, 310 U.S. 296 (1940) at 309 - 310.

[90] E.g., such was the case in *Smith v. Goguen*, 415 U.S. 566 (1974);*Spence v. Washington*, 418 U.S. 405 (1974). In Smith, given in March 1974, Valarie Goguen was sentenced to six months' imprisonment for sewing a small flag to the seat of his pants. In Spence, Harold Omand Spence was sentenced, first to 90 days' imprisonment with 60 days suspended by a local court and then to 10 days' suspended imprisonment and a fine of $75 by a jury in Superior Court, for hanging an American flag upside down, with peace symbols made out of removable tape affixed to it on both sides, to protest the killing of four protesters against the war in Vietnam at Kent State University in 1970. Both convictions were reversed by the Supreme Court. Given in March 1974, a decade and a half before the cases of *Johnson* and *Eichman* that permitted flag burning outright, the 6-3 majority in Smith relied on vagueness and overbreadth. In Spence, given three months later, the *per curiam* majority opinion of

interpretation, less constitutionally challenging as well as more accurate, could have gone a long way in diffusing the constitutional tension inherent in the law.

Another problem with an indictment in this case, is that the statement in question does not actually insult the Israeli flag. The statement was indeed directed at the Israeli flag, the full statement being that "the flag is no more than an expression of a stick with a blue-and-white rag on it". When taken in context however, it is questionable, at the very least, whether the speaker actually had any intention of insulting the Israeli flag *per se*. Essentially, the statement relates to flags in general, to all flags and any flag, not particularly to the Israeli flag. The speaker was trying to express the opinion, clearly not very prudently or effectively, that standing a moment of silence or waving a flag lack any inherent spiritual value, as opposed to saying a prayer. Had the speaker expressed this opinion more cautiously and politely, he could hardly have been accused of insult towards flags, let alone the Israeli flag specifically. Hence, it is quite questionable whether his unfortunate choice of words is enough to turn his statement into an insult and injury to the Israeli flag.

A search in the legal databases yields no more than a handful of criminal convictions for flag desecration, the earliest of them going back to 2007. In none of the cases was there a sentence of actual imprisonment imposed, with the prosecution not even demanding such in all the cases but one[91], nor was a fine imposed. There are also two criminal cases on other charges in which earlier convictions for flag desecration are mentioned[92], one acquittal[93], and two arrests which were apparently not further

six justices (five of the six in Smith) based their decision on the fact that Spence owned the flag, displayed it on private property, did not inflict permanent damage to the flag and community peace had not been disturbed.

[91] We also learn from an old newspaper report that two Arab men that tore the flag on Independence Day of 1968 in Kfar Kanne, an Arab village in the Galilee, were sentenced by an Arab judge in the Nazareth Peace Court to 3 months' imprisonment and a fine of 500 pounds. See, "Imprisonment for Two Young Arabs that Tore the Flag on Independence Day", Ma'ariv, 1 October 1968.

[92] See, Criminal Case (Nazareth Peace Court) 1279/02, *State of Israel v. Adnan Ben Muhammad Salman* (5 November 2003), mention of earlier conviction for flag desecration; Miscellaneous Petitions (Kfar-Saba Peace Court) 3675/09 (Criminal Case 1815/09), *State of Israel v. Salem Salame* (23 June 2009), mention of a conviction in 1982 for violation the Flag and Emblem Regulations.

[93] See, Criminal Case (Jerusalem Peace Court) 4295/00, *State of Israel v. Slaime Tarek* (19 March 2001), acquittal due to insufficient evidence.

prosecuted[94], as well as cases reported in the press that have not been prosecuted[95].

This dearth of indictments, almost all of which were in cases that received much publicity and could not be overlooked, taken together with the Attorney General's directive and his refusal to prosecute in the Orin case and response to Mr. Orin, and the relatively mild sentencing in cases that were prosecuted, give a distinct impression of uneasiness with the law, and a reluctance and hesitation to implement it strictly and rigorously.

There have not yet been any flag desecration indictments since the Flag Law's recent amendment[96], in which the maximum penalty of imprisonment was tripled and the maximum fine doubled. In light of the unease with the law and cautious prosecution described above, and the mild sentencing as detailed below, it remains to be seen whether this legislative amendment will have any significant affect upon the prosecutive and penal policy of the Attorney General's office and the courts. Such is a possibility that seems quite unlikely to this writer, barring a fundamental paradigmatic shift about the constitutional validity of a flag-desecration statute limiting freedom of expression.

Following is a description of the five criminal cases on record, and a discussion of some legal issues addressed in one of them.

The first case is that of a man that burned a flag at a rally in August 2007, together with a juvenile accomplice. In November 2009 he was convicted and sentenced to a suspended prison term of six months for a probation period of three years. He was also ordered to sign a Good Behavior Bond[97], in which he obligates himself not to commit any of the offenses in the Flag Law for a period of three years, in the sum of 3,000 NIS, or 15 days' imprisonment instead[98]. The prosecution had requested an

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[94] See, Arrest (Tel Aviv - Jaffa Peace Court) 50156-05-11, *State of Israel v. Daniel Karmon* (28 May 2011), released on bail; Miscellaneous Criminal Petitions (Supreme Court) 8418/12, *John Doe* (not one of the defendants in the criminal cases detailed below) *v. State of Israel* (20 November 2012), arrest for desecrating the flag.

[95] See, e.g., Rebecca Anna Stoil, "'Satanist' Teens Allegedly Burn Flag", The Jerusalem Post, January 30, 2007.

[96] Several cases of flag desecration that have been reported in recent years, have not yielded indictments thus far. In this context, allegations of selective enforcement are sometimes made in the press. See, for example, Yif'at Ehrlich, "Blue Flag Whereto?", Yedi'ot Acharonot, 8 December 2016.

[97] See (available at fn. 46) Penal Law 5737 - 1977, Part One: General Provisions, Chapter Six: Modes of Punishment, Article Five: Recognizance to Abstain from Offence, Section 72 - Recognizance by Sentenced Person to Abstain from Offence.

[98] Criminal Case (Akko Peace Court) 13240-01-09, *State of Israel v. Mahammud Hoseri* (18 November 2009).

unspecified suspended sentence, along with a fine[99]. The defendant's confession, clear criminal record and additional personal circumstances contributed to his mild sentence. The juvenile was sentenced to community service without conviction, as well as signing a Good Behavior Bond[100].

The next case is that of a man charged with rioting and desecration of the flag, which he publicly burned and trampled on the eve of Memorial Day, in April 2010. He was convicted and sentenced in December 2012, in a plea bargain, to 120 hours of community service[101]. The case itself is typical. The sentence is mild, in line with the leniency generally shown in such cases by the prosecution and by the courts. But an earlier decision of Judge Dov Pollock, given about preliminary arguments submitted by the defense, draws special attention because of its importance for our theoretical inquiry into the burning of national and religious artifacts.

First, the defense argued that the law is in fact a dead letter which isn't implemented, and that countless law abiding and patriotic citizens would become criminals if it were to be implemented. This being the case because the law doesn't require any malice, and thousands of flags are inadvertently desecrated and trampled after celebrations, flown when torn or dirty[102], and manufactured and used by organizations and individuals in ways that do not comply with the law[103], such as with altered colors, together with slogans and on clothing and various products and merchandise.

Pollock dismissed this argument, though conceding that there are many cases, which he calls "marginal" although they are in fact quite clear cut as per the letter of the law, where indictment would be unjustified despite the letter of the law. The judge postulates that this, as well as freedom of speech considerations, are the reason for the Attorney General's directive requiring his approval prior to indictment[104]. He concludes that the existence of such cases does not warrant eliminating the law's

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[99] *Ibidem*, paragraph 4.

[100] The details of the accomplice's sentence are based on references from Hosseri's sentencing decision, and are therefore incomplete.

[101] Criminal Case (Jerusalem Peace Court) 42062-04-10, *State of Israel v. Yechiel Chazan* (17 May 2011).

[102] See, Flag Regulations, Section 1(a)(2), supra Section 2.3. - The Flag and Emblem Regulations.

[103] *Ibidem*, Section 1(a)(1).

[104] See *supra*, Section 3.1. - Attorney General.

implementation entirely, even in cases where the offense is clearly contrary to the spirit of the law[105].

More significant for our purposes, the defense directly attacked the constitutional validity of the law, as being fundamentally contrary to the principle of free speech. Echoing the American paradigm of freedom of speech trumping protection of the flag and citing *Texas v. Johnson*[106], the defense maintained that freedom of expression should be protected in a democracy even when it is abusive, offensive and outrageous, and should overcome the desire to safeguard public sensibilities. The defense contended that the law was archaic and should be revisited in light of Basic Law: Human Dignity and Liberty.

In the relatively short decision, the judge rejects this view. While not elaborating and substantiating his approach[107], he equates flag desecration to the desecration of religious symbols and books, comparing both to a copyright or trademark. He thus sees the flag as the intellectual property of the collectivity of the nation. Since the flag "belongs" to the citizens of the state, the state may protect it from abuse and proscribe its desecration, even when its tangible ownership belongs to the desecrator.

Though Pollock calls his approach novel, the recognition of the deep emotional connection of citizens to their flag, the fundamental insight that national symbols rightly belong collectively to the nation, and the intuition that these ought to be protectable analogously to copyright, have in fact already been expressed in the minority opinions in the U.S. Supreme Court flag-desecration cases[108].

The novelty of the decision may be in the parallel that he draws between flags as national symbols, and religious books and symbols. However, Pollock sees religious books and symbols as belonging to humanity at large: "It may be asserted that the Jewish bible and the Talmud, the Koran and the Christian holy texts belong to all of humanity, as well as the symbols of the various religions". Under more rigorous analysis, though, it seems that this conception is in fact counterproductive to his purpose. If religious books indeed "belonged" to everyone, a single state would not have the authority to proscribe their desecration. On the

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[105] On the rejection of this argument see also, Criminal Case (Jerusalem) 5224-07-12, *State of Israel v. Ersterovitz*, (11 December 2014).

[106] *Texas v. Johnson*, 491 U.S. 397 (1989).

[107] For example, such substantiation is found in the law itself, which prohibits unauthorized production and use of the flag.

[108] See, *Smith v. Goguen*, 415 U.S. 566 (1974), at 587, Justice White, concurring in judgement (quoted in Johnson, 434), at 602 - 604, Justice Rehnquist, dissenting; *Texas v. Johnson*, 491 U.S. 397 (1989), at 438- 439, Justice Stevens, dissenting.

contrary, that would make them part of the public domain, which is available for all to use and exploit without restriction[109]. That is precisely what could permit hostile adherents of one religion to freely desecrate the books sacred to their opponents.

Rather, the proper analogy would be to say that the religious books of each religion are the intellectual property of the collectivity of the specific Religion's adherents, just as flags belong to the collectivity of the nation. The "citizens" of Religions naturally have the right to proscribe the desecration of their collective intellectual property. Therefore, states are justified in protecting such property from abuse.

Of course, this approach raises many questions and possible objections. The contours of what may rightly be considered intellectual property created by the collectivity and therefore rightly belonging to it and protected from abuse, and what is merely imagery that represents the collective but does not "belong" to it, are not clearly defined. The scope of the protection this conception should provide is also difficult to delineate. A thorough discussion of these issues is well beyond the scope of this work. Nevertheless, the core paradigm of seeing flags, national symbols, religious books and religious artifacts as morally belonging to their collective originators, is a compelling articulation of the prevalent intuition that they should be protected from abuse. This can explain why these should be treated exceptionally, and excluded from the broad scope of the protection that must normally be afforded to freedom of expression and expressive conduct.

This case, which occurred in the spring of 2012 and was sentenced three years later in April 2015, included multiple counts of trespass into memorial sites, painting hateful graffiti on monuments and damaging property, as well as desecrating the flag by burning the flag-rope thus causing it to fall to the ground. In a partial plea bargain, the defendant was sentenced to six months' imprisonment to be served by community service[110], as well as a suspended term of three months' imprisonment on

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[109] See, World Intellectual Property Organization, Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, July 5, 2018.

[110] In the Israeli penal system, there is a distinction between a sentence of community service, as was given in the Chazan case, and a sentence of imprisonment served as community service, as given in this case. In the latter case the service is performed during the regular work day, which precludes commercial employment, and under the supervision of the Prison Service, which can commute the sentence to actual imprisonment if the "prisoner" doesn't properly perform his community service. A sentence of community service can also be given without a conviction, in which case the defendant is not burdened with a criminal record. See, text accompanying fn. **Errore. Il segnalibro non**

probation for all of the counts of the conviction, for a period of three years[111]. The prosecution had only demanded a sentence of six month's imprisonment to be served by community service[112], yet the judge issued a harsher sentence by adding the additional suspended sentence of three months.

The lower court's conviction was appealed to the District Court on free speech grounds. The District Court upheld the conviction and the sentence[113]. A petition to appeal the constitutional question to the Supreme Court was denied[114].

We find the next conviction in a case that occurred on Independence Day in early May 2014 and was sentenced in July 2016. A drunken man stabbed a flag on display in the street several times with a big knife. He was charged and convicted for desecrating the flag, as well as possession of the knife. The defendant already had three prior convictions: two counts of absence without leave from military duty, from 2004 and 2005, for which he had served sentences of 70 and 75 days' imprisonment; and one count of possession of a knife for an improper purpose from 2013, for which he received a suspended sentence of six months' imprisonment, for a period of three years. Since the offender repeated the same crime within the three years of his suspended sentence, he should normally have been imprisoned for the six months he was to which he was sentenced. The prosecution requested a combined sentence of 10 months' imprisonment to be actually served[115], for both the previous suspended sentence and the current conviction[116].

Despite all of the above, the judge was wary of impairing the rehabilitation process which the defendant had begun, and therefore did not sentence him to serve any actual time in prison. Instead, he sentenced him to a suspended prison term of five months', for a probation period of three years, while further postponing the execution of the previous

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è definito..

[111] Criminal Case (Jerusalem Peace Court) 5224-07-12 *State of Israel v. Esterovitz* (2 April 2015).

[112] *Ibidem*, paragraph 3.

[113] Criminal Appeal (Jerusalem District Court) 31749-05-15, *Esterovitz v. State of Israel* (17 December 2015).

[114] Petition to Appeal (Supreme Court) 797/16, *Esterovitz v. State of Israel* (14 December 2016).

[115] This is the only case in which the prosecution demanded actual imprisonment.

[116] Criminal Case (Petach-Tikvah Peace Court) 9220-05-14, *State of Israel v. Gai Ando Chaim Baruch* (17 July 2016), paragraph 3.

suspended prison term of six months, and extending the probation period for two more years[117]. He was also sentenced to pay 1,500 NIS, for violating a Good Behavior Bond he had previously signed, in five monthly installments[118].

This case occurred several days before the Baruch case, but was sentenced in June 2017. Shortly before Memorial Day for fallen soldiers and Independence Day, when the streets are regularly decorated with flags, a Jewish woman and a Christian Arab man conspired to desecrate Israeli flags in the mixed city of Jaffa, by spraying them with red paint in the pre-dawn hours of the night. Belonging to an anarchistic group, they were under police surveillance[119], and were caught after spraying two flags.

Though the woman's role in the crime was greater, the man also tried to escape and resisted arrest, thus accruing him two additional criminal charges. Tried separately, they were both convicted. The woman had been sentenced to a suspended prison term of five months and a fine of 3,000 NIS[120]. The prosecution requested that the defendant be given a sentence equal to that of the woman[121]. The court sentenced the man to a lighter sentence of a suspended prison term of three months for a probation period of three years, as well as a fine of 2,000 NIS, to be paid in four monthly installments, or 15 days imprisonment instead[122].

Though not criminal proceedings, there were several cases in which the Flag Law's prohibition of desecrating national symbols was invoked to restrain freedom of expression in political campaigning. Unlike the criminal cases discussed earlier, which were decided by the lower courts, these were ultimately decided by the Supreme Court.

In the election cycle of 2003 for the sixteenth Knesset, the right-wing Cherut party produced an election jingle in which the tune of the national anthem is accompanied by words in Arabic praising terrorism and Palestinian terror organizations and calling for the ouster of Jews from "holy Palestine". The visual version of the same includes the flag of Israel flying

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[117] See (available at fn. 46) Penal Law 5737 - 1977, Part One: General Provisions, Chapter Six: Modes of Punishment, Article Three: Conditional Imprisonment, Section 56(a) - Extension of Period of Suspension.

[118] *Ibidem*, paragraph 25.

[119] Miscellaneous Criminal Petitions (Supreme Court) 3480/15, *John Doe v. State of Israel* (11 June 2015)

[120] The details of the woman's sentence are based on references from Amsis' sentencing decision, and are therefore incomplete.

[121] *Ibidem*, paragraph 12.

[122] Criminal Case (Tel-Aviv Peace Court) 11125-05-14, *State of Israel v. Adel Amsis* (14 July 2017).

over the Knesset, gradually turning into a Palestinian flag. The Chairman of the Central Elections Committee, a position held each election cycle by one of the justices of the Supreme Court, used his legal authority over radio and television election broadcasts to disqualify both segments. The chairman explained his decision by writing that they contain "a display of contempt towards the national anthem and a desecration of it - contempt and desecration which lead to provocation and even incitement", *inter alia* citing section 5 of the Flag Law[123]. The decision was appealed to the Supreme Court on constitutional grounds, as abridging freedom of speech. The court upheld the disqualification, in a two to one decision[124].

Ten years and three election cycles later, an election campaign jingle for the left-wing Balad party, depicting right-wing Jewish Members of Knesset singing the words of the national anthem to the tune of a popular Arab melody, was similarly disqualified. This decision too was appealed to the Supreme Court. In this case, a five-seat panel unanimously overruled the disqualification, distinguishing it from the Cherut case as less offensive to the public, *inter alia* because it includes no use of the flag[125].

4 - Foreign Flags

While just until several years ago the maximum penalty prescribed in Israel's Flag Law for desecrating the state flag was imprisonment for one year, the punishment assigned in Israel's Penal Law of 1977 (heretofore: the Penal Law) for the crime of insulting flags of friendly foreign states has always been imprisonment for three years. The prohibiting clause states[126]:

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[123] The National Anthem, the law actually does not apply or refer to the anthem's tune, but only to its lyrics.

In 2009, a petition to the Chairman of the Central Elections Committee for the 18th Knesset to ban the use of the national anthem in political campaigning completely, as well as the use of the anthem's name "Hatikvah" (The Hope) as the name of a political party, was rejected. Knesset Election Committee Petition 5/18, *Loui Lipsky v. Kadima* (27 January 2009).

[124] High Court of Justice 212/03, *Cherut - The National Jewish Movement v. Justice Mishael Cheshin, Chairman of the Central Elections Committee for the Sixteenth Knesset* (16 January 2003). See also, the Supreme Court's decision of one week later, to overrule the Chairman's disqualification of two Arab parties' use of a Palestinian flag in their election broadcasts. High Court of Justice 651/03, *Association for Civil Rights in Israel v. Chairman of the Central Elections Committee for the Sixteenth Knesse*t (23 January 2003).

[125] High Court of Justice 246/13, *MK Jamal Zachalka v. Chairman of the Central Election Committee* (15 January 2013). See paragraph 24.

[126] Penal Law 5737 - 1977, Part Two: Offences, Chapter Eight: Offences Against the

"A person who publicly pulls down, destroys or does any act to injure the flag or emblem of a friendly state with intent to show hostility or contempt for such state is liable to imprisonment for three years".

While on the one hand the maximal punishment for this offence is harsher than that of the Flag Law[127], and it also does not include a fine, there are additional differences between the components of this prohibition and those of the desecration clause of the Flag Law, which mitigate its purview.

First, it is clear from the clause's language that the offence only applies to an act, to the exclusion of any verbal affront, whereas this is not evidently the case regarding the Flag Law. Second, the offence's applicability is limited to acts committed in public, whereas the Flag Law includes no such limiting factor. Finally, the offence requires intent to show hostility or contempt towards the foreign state, whereas the Flag Law requires no such malice towards the state when desecrating the flag.

These additional differences are quite compatible with the different rationales of the two prohibitions, despite their outward similarity. Whereas the Flag Law criminalizes the desecration of that which is of inherent value to the nation, legally embodied in the state as the prohibiting sovereign, the Penal Law is here criminalizing the insult of foreign flags and emblems, which lack any inherent value to the state.

The state prohibits insulting the flags and emblems of friendly foreign states not in the interest of protecting an object of inherent moral value, but in the interest of protecting its diplomatic relations and security. This is evident from the location of this clause, in the article that deals with offences against foreign states, which is located within the chapter that deals with offences against the political and social order. The said article includes three similar offences[128]: Violence Against a Foreign State,

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Political and Social Order, Article Five: Offences Against a Foreign State, Section 167 - Insult to Flag or Emblem of Friendly State. Available at, fn. 46.

[127] Though the section's language, unlike that of the Flag Law, does not explicate that the punishment is for a period of up to three years that is in fact the case. See Penal Law 5737 - 1977, Part One: General Provisions, Chapter Six: Modes of Punishment, Article One: General, Section 35 - Penalties to be Maximum Penalties.

[128] Sections 165, 166 and 168, respectively. In all of the four prohibitions in this article, publicity and intent are required components, besides for the disparagement of foreign personalities where intent is only required to aggravate the offence and increase the punishment from a fine of 1500 Pounds to imprisonment for three years. Whereas the prohibitions of violence against a foreign state and disparagement of foreign personalities are not limited to friendly states, incitement to hostilities and insult to a flag and emblem are. The reason for this difference, or for the ordering of the four sections is not entirely clear. Perhaps violence and disparagement are seen as more seriously damaging than incitement and insult, and therefore problematic even when directed at unfriendly states.

Incitement to Hostilities Against a Friendly State and Disparagement of Foreign Personalities[129].

As the rationale for this offence being diplomatic in nature, it is clear why the offence only applies to flags and emblems of friendly states[130], and why verbal affronts, as well as private or unintentional ones are not included, as opposed to the protection of the state flag and emblem Quite understandably, the state simply has no interest in protecting foreign flags to the same degree that it does its own. Obviously, though, this cannot explain the discrepancy in punishment between these two prohibitions. On the contrary, considering the different interests they are meant to protect, desecrating the state flag ought to be punished more severely than insulting a foreign one.

There are states that do not prohibit the desecration of their own flag although they do prohibit desecrating foreign flags. This is the case in Denmark[131], for example. This however is quite different than punishing

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[129] It should be noted that the Penal Law includes another prohibition of a similar nature, in Chapter Seven - State Security, Foreign Relations and Official Secrets, Article Six - Impairment of Foreign Relations, Section 121 - Impairment of Foreign Relations:

(a) A person who conspires to commit an act against a friendly state or its representatives or against an organization or agency of states or its representatives, such acts being calculated to prejudice an interest, which Israel has in maintaining relations with such state, organization, or agency, is liable to imprisonment for seven years.

(b) Notwithstanding the provisions of any law, a person who commits an offence with intent to damage relations between Israel and any state, organization or agency referred to in subsection (a), or an interest which Israel has in maintaining such relations, is liable to imprisonment for ten years; but if even without proof of the intent referred to in this subsection, the penalty for the offence would be imprisonment for seven years or more, ha shall be liable to imprisonment for life.

(c) In this section, "friendly state" means a state, which maintains diplomatic or trade relations with Israel or permits Israeli nationals to visit its territory.

This article contains one additional section, Section 122 - Enlistment in Foreign Forces. These clauses did not originate in the Mandatory Criminal Code Ordinance of 1936, see *infra*, but in the Israeli Penal Law (State Security, Foreign Relations and Official Secrets) 5717 - 1957 (heretofore: State Security Law) as did all 43 sections of this chapter (though many of them predate it, see Section 42 of the State Security Law). "Book of Laws" 235 (9 August 1957) pp. 172 - 178. See official English translation, Laws of the State of Israel, Vol. 11, 5717 - 1956/57, pp. 186 - 195. There is no record to be found in public databases of a prosecution for section 121. (As for Section 122 see, Criminal Case 4439/04 (Jerusalem peace Court) *State of Israel v. Abu Zayad Ziyad* (5 March 2006).)

[130] The definition of a friendly state is not provided in this article, or in the Criminal Code Ordinance of 1936, and see fn. 129.

[131] See, Straffeloven (Penal Law), Chapter 12 - Crimes Against the State's Independence and Security, Section 110e: Any person who publicly insults any foreign nation, foreign state, its flag or any other recognized symbol of nationality, or the flag of the United Nations or the Council of Europe, shall be liable to a fine or imprisonment for a term not

less harshly for insulting the national flag than for doing so to a foreign flag. A state may decide it does not wish to criminalize the desecration of its own flag, thus waiving the right to enforce the respect that ought to be afforded to the state flag as a symbol of national identity and sovereignty, for ideological or practical reasons. It may consider it wiser to let dissidents "let off steam" by burning the national flag than to grace and enhance their dissent by prosecuting them, for example. At the same time, the state may wish to prohibit such insult towards other countries, for the reasons described above. This may be unusual, but it is not contradictory. It seems patently discordant, however, for a state to consider the desecration of its

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exceeding two years. With a similar intention of protecting foreign relations, Section 110d increases the criminal penalties for defamation committed against heads of foreign states or diplomatic missions. It is noteworthy in this context that law of the Faroe Islands, which are part of the Kingdom of Denmark, does prohibit desecration of their flag, by words or deeds, punishable by an unspecified fine. See, "Løgtingslóg no. 42 frá 17. juli 1959 um flaggið, sum broytt við løgtingslóg nr. 109 frá 29. desember 1998". The law also specifies the flag's colors and dimensions, which may not be altered; prohibits its marking; instructs how and when it be flown; and prohibits its use to identify persons companies or institutions, as well as for marketing products not produced in the Faroe Islands.

See also, Starffeloven, Chapter 15 - Crimes Against Public Order and Peace, Section 139, which penalizes the violation of cemeteries and corpses, or objects belonging to a church and used for religious purposes, punishable by a fine or up to six months' imprisonment; and Section 140, which penalizes public blaspheme or ridicule of the doctrines or worship of any lawfully existing religious community, punishable by a fine or up to four months' imprisonment. Chapter 27 - Crimes Against Personal Rights and Defamation, Section 266b, which penalizes publicly threatening, insulting or degrading groups of people based on race, color, national or ethnic origin, religion, or sexual orientation, punishable by a fine or up to two years' imprisonment. This section was added to the Straffeloven in 1971, upon Denmark's ratification of the International Convention on the Elimination of All Forms of Racial Discrimination. See, Council of Europe, Venice Commission, Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society (heretofore: Blasphemy), Science and Technique of Democracy Series, No. 47, March 2010, 163. For a discussion of these clauses, their historical background, jurisprudence and implementation see, *op. cit.*, 246 - 260. While it is not immediately clear to this author that burning the Koran necessarily violates section 140 as blasphemy (or section 266b, as hate speech), such was in fact recently prosecuted under this clause. See, Kimiko de Freytas-Tamura, "Danish Man Who Burned Quran Is Prosecuted for Blasphemy", *The New York Times*, Februay 23, 2017. It should be noted in this context that this clause was used only a handful of times since its enactment in 1866, the most recent conviction being in 1946. The sole indictment after that was in 1971, for a song mocking Christianity broadcast on National radio, was acquitted. See, Blasphemy, p. 253. It is noteworthy as well that these clauses were considered and dismissed by the prosecution authorities in the famous Danish Muhammad Cartoons case in 2005. On this matter, see also, **M. GATTI**, *Blasphemy in European Law*, in (edited by M. DÍEZ-BOSCH, J. SÀNCHEZ-TORRENTS), *On Blasphemy*, Universitat Ramon Llull Press, Blanquerna, 2015, p. 49 ss.

flag a crime worth prosecuting yet punish those doing so less harshly than those desecrating foreign flags.

Rather, this oddity is apparently an oversight which occurred at some phase of the legislative history of these two prohibitions. To shed further light on this matter, we must look back at the penal legislation that existed in Israel prior to the enactment of the Penal Law and Flag Law by the Knesset.

The Israeli Penal Law was drafted as an integrated version of the British Mandatory Criminal Code Ordinance of 1936 (heretofore: the Criminal Code Ordinance or the Ordinance)[132], and the numerous amendments it underwent during the British Mandate and after the establishment of the state, thus replacing it[133]. The Ordinance was based on the Queensland Criminal Code Act of 1899 (heretofore: the Queensland Code)[134], which was used by the Colonial Office in many parts of the British Empire, including in Cyprus in 1928[135], from where it was directly imported in 1936[136].

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[132] The Ordinance replaced the Ottoman Penal Code previously in force, with Mandatory Amendments. For a background and description of the Ordinance see, **N. BENTWICH**, *The New Criminal Code for Palestine*, in *Journal of Comparative Legislation and International Law*, 1/1938, p. 71 ss. (Norman Bentwich was the Attorney General of the Mandatory Government until 1930). The Bill of the Ordinance was first published in the Mandatory Government's official gazette, *The Palestine Gazette*, No. 367, 6th June 1933, p. 40 (on blue paper, as customary for Bills). It was republished again in *Palestine Gazette* No. 633, 28th September 1936, p. 973 ss., presumably due to the long period of time between its first publication and the actual enactment of the Ordinance. The Ordinance was adopted and published in a special edition of the gazette, *Palestine Gazette* No. 652, Supplement No. 1, Criminal Code Ordinance 1936, 14th December 1936, at 40. ("Supplement No. 1" of the Palestine Gazette is where Ordinances where published between 1934 and 1948.) See also, The Israel State Archives, Criminal Code Ordinance 1936 - Palestine Gazette 1933, ISA-MandatoryOrganizations-MandateAtrnGen-000v07o.

[133] See, Penal Law p. 4. Both the Ordinance and the Penal Law are divided into two parts, the first containing general provisions and the second specific offences. The Ordinance contains 44 chapters that are numbered in sequence through both parts. The second part, which begins with Chapter VIII, is further divided into eight divisions. The Penal Law consists of 15 chapters also sequentially ordered through both parts, with most of the chapters in the second part, which begins with Chapter Seven, further divided into articles, numbered separately in every chapter. The Ordinance contained 391 sections, whereas the Penal Law contains over 500.

[134] The Criminal Code Act, 1899, p. 6825 ss. The Queensland Code contains 707 sections and is 270 pages long, including 30 pages of appendices.

[135] The Cyprus Criminal Code, Order in Council, 1928, *The Cyprus Gazette*, No. 1947, 17th October 1928, p. 695 ss.

[136] See, **N. ABRAMS**, *Interpreting the Criminal Code Ordinance. The Untapped Well*, in *Israel Law Review*, 7/1936, p. 25 ss.; **Y. SHACHAR**, *The Origins of the Criminal Code Ordinance*,

The Queensland Code was based on James Fitzjames Stephen's Draft Criminal Code of 1878. The Draft Code, billed in Parliament in 1879, failed with the fall of D'Israeli's government in 1880. However, Stephen's Draft Code influenced codifications throughout the British Commonwealth, beginning with Canada in 1892[137], New Zealand in 1893[138], Queensland in 1899, as well as other parts of Australia later on[139].

The four sections of this article in the Penal Law are from Sections 67(1), 67(2), 68 and 77 of the Criminal Code Ordinance[140]. In fact, the

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1936, in *Tel Aviv University Law Review (Iyunei Mishpat)*, 1/1979, p. 75 ss. It is noteworthy, however, that of the four sections in this article in the Penal Law and the Criminal Code Ordinance, only one has its origin in the Queensland Code, the other three being absent from the Canadian and New Zealand codes, as well. See, Queensland Criminal Code, Part II - Offences Against Public Order, Chapter VII - Sedition, Section 53 - Defamation of Foreign Princes, the last section of the chapter after nine sections dealing with sedition proper, which is very similar to Section 77 of the Ordinance and Section 168 of the Penal Law. The only material difference is that the penalty for prescribed for this offence in the Queensland Code is two years' imprisonment, rather than three. The same offence in the Canadian and New Zealand Codes carries a penalty of one years' imprisonment. See, The Canadian Criminal Code, 1892 (available at, fn. 137) Title II - Offences Against Public Order, Internal and External, Part VII - Seditious Offences, Section 125 - Libels on Foreign Sovereigns; New Zealand Criminal Code 1893 (available at, fn. 138) Title II - Offences Against Public Order, Internal and External, Part VII - Seditious Offences, Section 103 - Libels on Sovereigns of Foreign States.

[137] The Criminal Code, 1892, 55 - 56 Victoria, Chapter 29. The Code contains 983 sections and is 403 pages long, including 91 pages of appendices.

[138] New Zealand Criminal Code, 1893, 57 Victoria No. 56. The code contains 424 sections and is 106 pages long, including 6 pages of appendices.

[139] See, **J. D. HEYDON**, *Reflections on James Fitzjames Stephen*, in *University of Queensland Law Journal*, 29/2010, p. 43 ss.; **M.L. FRIEDLAND**, *R.S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law*, in *Oxford Journal of Legal Studies*, 3/1981) p. 307 ss.; **S. H. KADISH**, *Codifiers of the Criminal Law: Wechsler's Predecessors*, in *Columbia Law Review*, 78/1978, p. 1098 ss. See also, **R.A. POSNER**, *The Romance of Force: James Fitzjames Stephen on Criminal Law*, in *Ohio State Journal of Criminal Law*, 10/2012, p. 263 ss.

[140] Criminal Code Ordinance 1936, Part II - Offences, Division I - Offences Against Public Order, Chapter VIII - Treason and Other Offences Against the Authority of the Government, Section 67(1) - Attempt to Organise Violent. Attempt Against Constitution of Foreign Country; Section 67(2) - Incitement to Hostilities Against Friendly Powers; Section 68 - Insult to Flag; Chapter X - Offences Affecting Relations with Foreign States and External Tranquility, Section 77 - Defamation of Foreign Princes, Etc. *Cf*. fn. 128, and accompanying text. It is quite odd that the first three prohibitions are separate from the fourth in the Ordinance and located in Chapter VII, which deals with a long list of crimes like treason, and not in Chapter X which deals with offences against foreign states, like Article Five of Chapter Eight of the Penal law, wherein they fit more accurately. Chapter X contains but one additional section, Section 78 - Piracy (which is a separate article containing but one section in the Penal Law - Article Six, Section 169 - identical in language to the Ordinance except for the harsher punishment in the Ordinance). This combination

language of these four sections in the Criminal Code Ordinance is almost identical to that of their parallels in the Penal Law, with only minor alterations. The only exception is Section 68 - Insult to the Flag, which has two subsections in the ordinance. The second subsection prohibits insulting flags and emblems of friendly states, as does the parallel clause in the Penal Law, after the first subsection prohibits the same towards flags and emblems of Great Britain.

Of course, this subsection was not included in the Penal Law because it became obsolete upon the enactment of the Flag Law[141]. But because of its comparative importance, especially for our immediate purpose, it is worthwhile to quote here the full text of the section:

> "Any person who:
>
> (a) publicly pulls down, destroys, or does any act to injure the flag or any emblem of Great Britain; or
>
> (b) publicly pulls down, destroys, or does any act to injure the flag or any emblem of any friendly state, with intent to show hatred or contempt for such state
>
> is guilty of a misdemeanour".

As clarified earlier in the Criminal Code Ordinance, where not otherwise prescribed a misdemeanour is liable to imprisonment for three years, or to a fine of one hundred pounds, or to both such penalties[142].

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is present in the Cyprus Code as well. See, Cyprus Criminal Code, Part II - Crimes, Division I - Offences Against Public Order, Chapter XI - Offences Affecting Relations with Foreign States and External Tranquillity (*sic*). When considering the legislative history of the Ordinance, however, it becomes obvious why this is so. Unlike the other three offences, defamation of foreign princes is an offence originating in the Queensland Code, as well its Canadian and New Zealand counterparts, see fn. 136. The additional three offences were either originally drafted for the Ordinance or patched with it from some later source (they are not present in the Cyprus Code), whilst overlooking the similarity to the existing offence when deciding on where to locate them. (For a similar oversight of similarity). The legislative history of the Ordinance also explains the presence of the offence of piracy in the same chapter as defamation of foreign princes. In the Canadian and New Zealand codes, piracy is Chapter VIII of Title II, following libel on a foreign sovereign at the end of Chapter VII. (In the Queensland Code, piracy is three chapters further away, in Chapter XI.) Their proximity in theses codes apparently caused their placing under the same chapter in the Ordinance.

[141] The Flag Law ought to have formally repealed Section 68(a) of the Ordinance, but no such repeal is included in the act. The clause had no effect though, besides singling out the flag and emblem of Great Britain, which would otherwise be included in the prohibition of Section 68(b) as those of other friendly countries.

[142] Criminal Code Ordinance 1936, Part I - General Provisions, Chapter VII - Punishments, Section 47 - General Punishment for Misdemeanor.

We see here that the Ordinance does bring together both prohibitions, because of their structural similarity and despite their different rationales. However, the punishment for both is equal. But it is certainly counterintuitive to punish for the desecration of the state flag more leniently than for the desecration of a foreign flag. Additionally, the Ordinance also treats the desecration of Great Britain's flag more severely than the desecration of a foreign flag. Whereas the former prohibition applies regardless of intent, for the latter prohibition to apply there must be intent to show hatred or contempt for the foreign state.

Unlike the four offences against a foreign state in the Penal Law mentioned above, the text of the desecration clause in the Flag Law is not derived from that of Section 68(a) in the Ordinance. Its language appears to be originally drafted, though naturally similar in content. Yet it does maintain some similarity to the Ordinance. First, it prohibits desecrating the flag as well as the emblem, like the parallel clause in the Ordinance. Second, the structure of the punishment is similar to that in the Ordinance, imprisonment or a fine or both, and the text of this part of the clause is almost identical to that of the Ordinance: liable to imprisonment for … or to a fine … or to both such penalties.

When the Flag Law was drafted in 1949, it was decided that its application should not be limited to defiling actions committed in public, and so this component was eliminated from the desecration clause. Yet concurrently with this more stringent approach to the very prohibition of desecrating the state flag, it was also decided that the appropriate maximal punishment for such desecration is imprisonment for but one year instead of three. Apparently, the penal standard in 1949 was simply more lenient than it was in the past.

In tailoring the Flag Law to the preferences of the Israeli legislature of 1949, however, the drafters ignored the disparity between the punishment for desecrating the state flag and for desecrating foreign flags. It should be noted that the even after the amendment which increased the maximum prison term in the Flag Law to three years, this gap has not been entirely closed[143]. Insulting the state flag may still be punished by the more

[143] In the opinion of this author, the language of the Flag Law's desecration clause: "imprisonment for a term not exceeding imprisonment for a term not exceeding three years, or to a fine not exceeding (see fn. 51 and accompanying text) or to both such penalties", is properly understood as allowing the imposition of a fine only if the sentence does not include the maximal imprisonment term of three years. Thus, the maximal penalty for is three years' imprisonment, but nor three years plus a fine. If this is not the case, then the maximal penalty for flag desecration is greater than the maximal penalty for desecrating foreign flags.

lenient penalty of a fine[144], whereas the only punishment prescribed for insulting a foreign flag is imprisonment, though prison sentences are often suspended, thus in fact being lighter than a fine.

The entire discussion above, however, remains largely hypothetical and declaratory in nature. Its practical significance appears highly questionable, when considering the case law for insulting foreign flags - or any of the offences against a foreign state, for that matter - which is practically non-existent. There is but one case available in the databases of an indictment for the crime of desecrating a foreign flag, and none for any of the other offences in the article of offences against a foreign state. It appears that these clauses are anachronistic and have turned into a dead-letter relic of the past.

In the case on record, the defendant threw stones at the Egyptian consulate in the city of Eilat in the early morning hours of September 4th 2011. On September 8th, after the police renewed his arrest twice as required by law[145], and being charged with insulting the flag of a friendly state as well as with an attempt to cause damage with malice[146], the prosecution requested of the court that he be remanded in custody until trail. The request was denied by the court, which ordered that he be released on bail to home arrest. No further record of the case exists, suggesting that the charges were later dropped[147].

5 - Desecration of Religious Books

Israel's Penal Law contains two prohibitions which restrict expression for the sake of protecting religious sentiment. One of these includes within it the desecration of religious books and other objects of veneration. Chapter Eight of the Penal Law deals with offences against the political and social order. Article Seven of this chapter, which immediately follows the articles

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[144] It is of interest to note that no fines have been given for flag desecration in recent years.

[145] See, Arrest (Eilat Peace Court) 5418-09-11, *State of Israel v. David Mekmil* (5 September 2011); Arrest (Eilat Peace Court) 5418-09-11, *State of Israel v. David Mekmil* (6 September 2011). In the first arrest request, the suspect is alleged with committing additional offences, Driving Under the Influence of alcohol, Impairment of Foreign Relations and "Rock Throwing", a military offence.

[146] Penal Law, Section 452. This may also be due to the prosecution's reluctance to indict based solely on the prohibition of insulting a foreign flag.

[147] Remand (Be'er Sheva Peace Court) 17373-09-11, *State of Israel v. David Mekmil* (8 September 2011).

dealing with offences against a foreign state and piracy, contained five prohibitions intended to protect against offence to sentiments of religion and tradition[148]. These prohibitions also originated in the Criminal Code Ordinance of 1936[149], almost verbatim[150].

The first of these five is the prohibition of insult to religion, which states[151]:

> "A person who destroys, damages or desecrates a place of worship or any object which is held sacred by a group of persons, with the intention of thereby reviling their religion or with the knowledge that they are likely to consider such destruction, damage or desecration as an insult to their religion, is liable to imprisonment for three years".

Thus, desecrating a religious book or other object venerated by members of a religion is a criminal offence. A comparison between this clause and the desecration clause in the Flag Law shows that they are practically of a similar nature. While flag desecration does not require intent

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[148] See, Penal Law 5737 - 1977, Part Two: Offences, Chapter Eight: Offences Against the Political and Social Order, Article Seven: Offences Against Sentiments of Religion and Tradition, Sections 170 - 174. Besides insult to religion and outrage to religious feelings discussed below, the other three prohibitions are, Section 171 - Disturbing Worship; Section 172 - Trespassing on Place of Worship or Burial; and Section 174 - Destroying or Damaging Public Buildings or Monuments. And see the Protection of Holy Places Law. Section 174 was repealed in 2009. See, "Book of Laws" 2213 (3 November 2009) 236.

[149] Criminal Code Ordinance 1936, Part II - Offences, Division III - Offences Injurious to the Public in General, Chapter XVI - Offences Relating to Religion and Public Monuments, Section 146 - Insult to Religion of any Class; Section 147 - Disturbing Religious Worship; Section 148 - Trespassing on Burial Places; Section 149 - Outrage to Religious Feelings; and Section 150 - Destroying or Damaging Public Buildings and Monuments. Note that in the Ordinance, unlike the Penal Law, this chapter is far removed from those dealing with offences against foreign states and piracy.

[150] The penalty in the Ordinance for disturbing religious worship is imprisonment for two months or a fine of twenty pounds, whereas in the Penal Law it is imprisonment for one year. This change to the Ordinance was made in 1966. See Criminal Code Ordinance (Amendment no. 28) Law 5726 - 1966. "Book of Laws" 481 (29 July 1966) pp. 64 - 68. See official English translation, Laws of the State of Israel, Vol. 20, 58. Of these offences against religion, the Queensland, Canadian and New-Zealand codes only include prohibitions against clergymen and worship (the latter two, dating some years earlier, also prohibit blasphemy). See, Queensland Criminal Code 1899, Part IV - Acts Injurious to the Public in General, Chapter XXI - Offences Relating to Religious Worship, Sections 206 - 207. Available at, fn. 134; The Canadian Criminal Code 1892, Title IV - Offences Against Religion, Morals and Public Convenience, Part XII - Offences Against Religion, Sections 170 - 173. Available at, fn. 137; New Zealand Criminal Code 1893 Title IV - Crimes Against Religion, Morals and Public Convenience, Part XII - Crimes Against Religion, Sections 133 - 135. Available at, fn. 155.

[151] Penal Law, Section 170 - Insult to Religion.

or knowledge of insult, this is apparently due to differing legislative drafting styles, with little substantive significance. It is difficult to imagine a case of knowingly desecrating a religiously venerated object without intended or expected insult[152] so apparently this language is merely meant to exclude accidental or unintentional acts. And acts of unintentional insult to the flag are not penalized either. On the other hand, the punishment for desecrating religiously venerated objects is harsher, in that it does not include the option of a fine. This being the case even after the 2016 amendment to the flag law, which raised the maximal punishment for flag desecration from one year to three.

Though not directly relevant to the desecration of religious books, there is an additional prohibition in this article which restricts freedom of expression to protect religious sentiment. The prohibition of outrage to religious feelings states[153]:

> "A person who does any of the following is liable to imprisonment for one year:
>
> (1) Publishes any print, writing, picture or effigy calculated to outrage the religious feelings or belief of other persons;
>
> (2) Utters in a public place and in the hearing of another person any word or sound calculated to outrage his religious feelings or belief".

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[152] However, at least theoretically, there is a possibility of desecrating a sacred object without knowledge that it is sacred. See, Criminal Case (Jerusalem Peace Court) 53179-10-13, *State of Israel v. John Does* (10 November 2015). In this case, two Arab youths strolled through the Jewish cemetery on the Mount of Olives, treading upon graves, and removed prayer books from a cabinet they discovered, setting fire to them. They admitted to the facts but claimed they did not know that the books were sacred and did so merely as an act of playful mischief and should therefore only be convicted of deliberate damage to property. The court rejected their claim, observing that the acts were motivated either as an insult to religion or for racial reasons - which would aggravate the crime of deliberate damage to property - yet still convicted them only of deliberate damage to property. The court observed that at the very least they suspected that the books were sacred but ruled that such suspicion is not enough to establish the offense of insult to religion. Therefore, since neither of their two possible motivations could be proven beyond doubt, they were acquitted of both possibilities. It is noteworthy that the court's conclusion that suspecting an object to be sacred is not sufficient for conviction was based on a comparison of the Hebrew language of Section 170 to that of Section 173 regarding the criminal intent required by the Mandatory legislator, concluding that Section 170 required more than mere suspicion. Though the Hebrew text is indeed legally binding, since the original language of both sections was English and since a comparison of the English language of both sections does not yield the same results, the conclusion drawn by the court is questionable. And see, High Court of Justice 351/72, *Amos Keinan v. The Film Review Board* (21 November 1972).

[153] Penal Law, Section 173 - Insult to Religious Feelings.

As we see, the punishment for desecrating a sacred place or object is triple that for otherwise causing outrage to religion and religious sentiment. While this is understandable insofar as it pertains to a place of worship or even to a sacred object belonging to others, as such desecration involves trespass and vandalism along with the very desecration and insult to religion, each of which aggregating the severity of the other, the prohibition applies to desecration of a sacred object owned by the aggressor as well. It is only in such cases that the prohibition comes at the cost of restricting freedom of expression, and thus comes under the scope of our inquiry. In such cases, it is not immediately obvious why such desecration should be treated so much more harshly than outrage to religion by speech, print or actions other than physical desecration of the sacred.

The answer to this may lie with the insight of "Collective Intellectual Property" shortly discussed above. The religious books and sacred articles of a Religion are morally the intellectual property of the collectivity of that Religion's adherents, just as flags belong to the collectivity of the nation. These collective intellectual property rights inhere in the collective. Hence, the "citizens" of religions naturally have the right to proscribe the desecration of their collective intellectual property as do the citizens of a state and members of a People, even if the physical ownership of that property lies with others. Therefore, desecrating these is much worse than otherwise insulting religion.

That is what differentiates between cartooning Muhammad as a pig and burning the Koran, for example. In the latter case, it is not merely the very expression of the idea that the Koran is despicable and should be eliminated that would cause anguish to Muslims, but much more so the actual physical desecration of a tangible book which is deeply venerated and sanctified by them and is in fact their Collective Intellectual Property, part of their collective identity and personality.

This principle that the Koran morally "belongs" to Muslims is simultaneously what makes such an act so abhorrent to them and to those that empathize with their pain, and that is also exactly what makes it so attractive to those who wish to offend their dignity and torment them. Likewise, this is the appeal of burning the flag, rather than merely chanting "America the red, white and blue, we spit on you, you stand for plunder, you will go under". The very choice to burn the flag or the Koran in public is driven precisely by the desire to desecrate, antagonize and provoke those who cherish them. Otherwise, there are much simpler ways to express one's opinions about how evil, stupid or satanic America or Islam is, and what

their fate should be[154]. The aggresor in this case is unethically appropriating that which morally and inherently "belongs" to them, and is doing so purely for the sake of causing them anguish. Therefore, this rightly deserves a much harsher punishment.

There have not been many cases in Israel of desecrating venerated objects, and those that have occurred involved the desecration of venerated objects that did not belong to the desecrator, through tresspass or vandalism. Such actions obviously do not fall under the protection of the principle of freedom of expression, and therefore do not shed light on the subject of this study into the proper limits of freedom of expression for the sake of tolerance and pluralism and the criminalization of expression that desecrates the "collective intellectual property" of nations or religions. Instead, the famous "pig poster" case, somewhat similar in nature to that of the Danish Cartoons and Charlie Hebdo, sheds light on how such desecration of a religiously venerated object would be treated by the authorities.

In late June 1997, Tatiana Soskin created posters depicting a pig wearing a Kaffiyeh, labeled as Muhammad in Arabic and English, trampling a book similarly labeled as the Koran. She was accused of entering an area controlled by the Palestinian Authority in the city of Hebron and posting some of them to property belonging to the locals, thus "publishing" them as well as defacing property.

In the District Court, she was convicted of attempted defacing of property, aggrevated by being racially motivated, and attempted unsult to religious feelings, since there was only enough evidence that she intended to paste the posters but not that she actually did so[155]. For this and additional charges for which she was tried and convicted together[156], she received a combined sentence of three years' imprisonment, one of them suspended for a probation period of three years[157]. The court stressed the

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[154] Whereas saying that Muhammad was a pig or depicting him as such may be driven by similarly deplorable motivation, the actual expression is ideational at core, and is in fact relevant to non-Muslims as well as Muslims. The public burning of a flag or a Koran, however, carries no significance to non-Muslims or non-patriots, for whom doing so is no more potent than simply stating one's opinion about them. See a short discussion of the distinction between ideational expression and expression lacking ideational value.

[155] Though not necessarily fully implemented, attempts may be punished as completed offences.

[156] The additional charges were identifying with a terrorist organization for wearing a T-shirt with an imprint of the "Kach" movement's symbol, and throwing a stone at an Arab car thus endangering traffic.

[157] Criminal Case (Jerusalem District Court) 436/97, *State of Israel v. Tatiana Soskin* (8

centrality of insult to religious feelings within these charges, and ruled that the appropriate desert for it was close to the maximal punishment of imprisonment for one year. This, even after the court weighed her psychiatric background as reason for leniency[158]. An appeal of the conviction and the sentence to the Supreme Court was unanomously rejected[159].

Here too, as already seen above, we find a disparity between the treatment of violating national symbols and violating religious ones. Whereas violations of the Flag Law are dealt with forgivingly, not easily prosecuted and do not lead to actual imprisonment despite the maximal punishment available for them, attempting to cause outrage to religious feelings is punished harshly to the full extent of the law.

This disparity is due to the dangerous consequences that often follow offences to Islam, but do not follow offences to national symbols. The enforcement authorities thus wish to deter offences to Islam more vigorously than offences to the flag. This rationale was in fact expressed by the court in response to the defense's argument of selective enforcement, citing examples of comparable caricutures, some of which the court said were "highly shocking and potentially dangerous", that were published but not prosecuted[160]. This consideration was echoed by the Supreme Court[161].

But while such a policy is definitely understandable, this "heckler's veto"[162], or "terrorists' penal deterrence" of speech, is constitutionally problematic in that it rewards a culture of violence by protecting the feelings of those who subscribe to it and punishing those that offend it, while disadvantaging cultures that espouse tolerance by allowing offences to the sensibilities of their members.

6 - Conclusions

January 1998).

[158] As well as her clear criminal record, and her remorse and promise to refrain from such behavior in the future.

[159] Criminal Appeal (Supreme Court) 697/98, *Tatiana Soskin v. State of Israel* (8 July 1998).

[160] Criminal Case (Jerusalem District Court) 436/97, *State of Israel v. Tatiana Soskin* (30 December 1997).

[161] See, Criminal Appeal (Supreme Court) 697/98, *Tatiana Soskin v. State of Israel* (8 July 1998), available at fn. 159, paragraph 43.

[162] The term "Heckler's Veto" refers to restricting the right to free speech because of reactions by its audience. See, e.g., **R. McGAFFEY**, *The Heckler's Veto*, in *Marquette Law Review*, 1/1973, p. 39 ss.

Israeli law curbs freedom of expression to protect national symbols and religiously venerated objects from desecration. Though the Flag Law is more detailed, the essential protection afforded to both is essentially similar. The paradigm expressed by the legislation regarding the flag and national symbols is that these belong to the nation, as manifested by the state, which created them. Hence, the state must consent to their use and protect them from harm, even overseas. It is feasible to entertain a similar paradigm regarding religious books and artifacts, as belonging to the collectivity of the Religion that venerates them. Such a paradigm has in fact been expressed in one case by an Israeli court, as well as in the minority opinions of the United States Supreme Court. This idea can also explain the harsher punishment for insulting religion by desecrating venerated objects than for otherwise insulting religious feelings.

In principle, it appears that Israeli jurisprudence would penalize verbal desecration of the flag. We criticized this not only as an unnecessary and expansive interpretation of the Flag Law's language, but also as an extreme restriction upon the very core of freedom of expression. The criminalization of ideational speech is unjustified from a constitutional perspective. If one may not burn a flag, but is still able to express his opinions about the state and the flag which stands for it, then freedom of expression has not been significantly harmed. But if one is not able to express those very opinions, then nothing is left of freedom of expression.

Previously, flag desecration was punishable by one years' imprisonment or a fine of 29,200 NIS. In 2016, the law was amended to bring the maximal punishment to three years imprisonment, in line with the punishment for insulting foreign flags, and doubling the fine. The prohibition of insulting foreign flags originated in the Criminal Code Ordinance of 1936, which was based on earlier British codes, and the harsher punishment for desecrating foreign flags than the domestic flag was due to historical oversight.

Another amendment, made in 2004, enshrined the words of the national anthem into the law, but envisaged no desecration to it that might require its protection in a manner similar to the protection afforded to the state flag and emblem. The anthem's melody was also not included. In fact, cases of insult to the national anthem's language and melody have come up, in election campaigning.

Secondary legislation regulates the proper flying and treatment of the flag and preservation of its dignity, but these regulations have rarely been enforced. Cognizant of the constitutional difficulty of suppressing expression, the Israeli prosecution and courts also apply the primary legislation very cautiously and sparingly, and mete out mild sentences in those cases that are indicted and convicted.

Though theoretically possible, and in fact used regarding offence to religious feelings, the charge of sedition was never considered in regards to flag desecration. A similar disparity exists between the hesitant enforcement of the Flag Law and the more vigorous enforcement of the prohibition of insult to religious feelings. While this is understandable in light of the violent consequences often experienced after offences to Islam, it poses a constitutional problem and discriminates in favor of violence.