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“A man’s maturity is measured by his ability to tolerate those who criticize him, disrespect him, even abuse him – surely we can demand no less from our country.”¹

ABSTRACT: This article compares the protection of the national flag in the United States with the situation in New Zealand, focusing on the act of flag burning. While flag desecration has a long history in the United States, the New Zealand High Court had to decide on this matter for the first time in *Hopkinson v New Zealand Police* in 2004. The key issue is whether the state can prohibit flag desecration without violating the right to freedom of speech. It is argued that – with the exception of obscene conduct in the United States – a ban on flag desecration is a violation of the right to freedom of speech in either jurisdiction. Interestingly, unlike in the United States, flag desecration can be banned in New Zealand despite its inconsistency with the New Zealand Bill of Rights Act. This is due to the fact that NZBORA is an ordinary statute and the Judiciary has not been granted the power to invalidate statutes enacted in contravention to the Bill of Rights.

I INTRODUCTION

When people begin to associate particular ideas with a particular object, a symbol is born. Although a symbol conveys different ideas to different people, using the symbol is a convenient way to communicate these ideas. Additionally, symbols often operate on a subconscious and emotional level. The national flag of a country is a particularly popular symbol and gladly used for communication by both those who have a positive and those who have a negative attitude towards it.

In the United States flag desecration is an old and well-known problem, whereas the High Court of New Zealand had to deal with this issue for the first time in 2004. The national flag of New Zealand was burned by Paul Barry Hopkinson on 10 March 2003 during a political demonstration as a sign of protest. The High Court handed down its decision on 23 July 2004, quashing the conviction of Mr Hopkinson on grounds of freedom of speech.

This paper analyses flag protection in the United States and in New Zealand, focusing on the act of flag burning. It raises the issue of whether the state can prohibit flag desecration without violating the right to freedom of speech.

¹ Arnold H Loewy “Punishing Flag Desecrators: The Ultimate in Flag Desecration” (1970) 49 NCL Rev 48, 48.

While Chapter II of the paper provides a short overview of the relevant history in terms of flag desecration in the United States and in New Zealand, the actual analysis of flag burning is placed in Chapter III. First, the paper will determine whether flag burning, as non-verbal conduct, is protected under the right to freedom of speech in both countries and concludes that it is. Secondly, the prohibition of such conduct will be scrutinized against the backdrop of freedom of speech. The paper will show that a ban of flag burning cannot be justified in either jurisdiction. Chapter IV will survey the impact of the Court decisions on legislation prohibiting flag desecration. It asks whether there is a conceivable statute that bans flag burning without infringing freedom of speech and determines that there is none. Furthermore, the possibility of a constitutional amendment in the United States will be discussed and rejected. This part of the paper will also examine the issue of whether s 11(1)(b) of the Flags, Emblems, and Names Protection Act 1981 can be read consistently with freedom of speech and will reach the result that it cannot. Chapter V will discuss other forms of flag desecration in general and obscene conduct regarding the flag in particular. The conclusion in Chapter VI will be that flag desecration – with the exception of obscene conduct – cannot be banned in either country without infringing freedom of speech.

II A BRIEF HISTORY OF GOVERNMENTAL AND JUDICIAL EFFORTS TO PROTECT THE NATIONAL FLAG

A *United States*

Although the history of flag desecration goes back to the nineteenth century,² due to limited space I will only give a short overview relevant to this paper, focusing on the history from 1968 onwards.

While almost every state had enacted flag desecration laws by 1920,³ no federal bill became law until 1968.⁴ The catalyst for the Flag Protection Act 1968 was a flag burning that occurred at New York's Central Park during an anti-war demonstration in April 1967. Unlike previous acts, it was widely televised and thus triggered a wave of indignation and demands for punitive legislation.⁵ The result was a law that made it illegal to “knowingly cast ... contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it.”⁶ Rather than flag desecration ending with this Act, instead it evoked an

² Robert Justin Goldstein “The Great 1989-1990 Flag Flap: An Historical, Political, and Legal Analysis” (1990) 45 U Miami L Rev 19, 37.

³ Note “Flag Burning, Flag Waving and the Law” (1970) 4 Val UL Rev 345, 362; cited in Goldstein, *ibid* 38.

⁴ *Ibid*.

⁵ *Ibid* 48.

⁶ *Ibid* 49. Flag Protection Act 1968 (USA) 18 USC § 700(b) (1988).

explosion of flag desecration prosecutions unparalleled in American history.⁷ A survey of nearly sixty flag desecration cases undertaken by Robert Justin Goldstein noted that about sixty percent of the cases eventually resulted in acquittals.⁸

Although the United States Supreme Court was confronted with the constitutionality of the prohibition of flag burning in political protest for the first time in *Street*,⁹ the Court avoided the crucial issue of whether the burning of the flag itself was protected by the right to freedom of speech guaranteed by the First Amendment. Since the accused accompanied his act of flag burning by words, and since the flag desecration statute under which the trial court convicted him made it a misdemeanour to cast contempt upon any flag of the United States “either by words or act,”¹⁰ the Court was able to sidestep the issue.¹¹

The next flag desecration case the Supreme Court had to decide was *Goguen*.¹² The State of Massachusetts prosecuted the defendant for wearing a small flag sewn on the seat of his pants under a statute that made everyone criminally liable who “treats contemptuously”¹³ the flag of the United States or Massachusetts in public. The Court reversed the conviction, holding that the statute was void for vagueness,¹⁴ and thus sidestepped the vital issue again.

In *Spence*¹⁵ the Supreme Court again faced the question of whether the symbolic use of the flag – but this time not combined with words – was protected speech under the First Amendment and circumvented it once again. The defendant had affixed with removable tape a peace sign to an American flag and hung it upside down outside his window to demonstrate his protest against the United States invasion of Cambodia, and thus was convicted. The Court speculated that there might have been a state interest in “preserving the national flag as an unalloyed symbol”¹⁶ but held that the Washington flag misuse statute was “unconstitutional as applied”,¹⁷ since there was neither a risk of breach of peace nor was the flag permanently disfigured or destroyed.¹⁸

⁷ Goldstein, *supra* n 2, 52.

⁸ *Ibid* 53.

⁹ *Street v New York* 394 US 576 (USSC 1969) (Warren CJ, Black, White and Fortas JJ dissenting) (*Street*).

¹⁰ N.Y. Penal Law (USA) § 1425 (16) (d) (McKinney 1909); cited in *Street*, *supra* n 9, 578.

¹¹ *Street*, *supra* n 9, 590.

¹² *Smith v Goguen* 415 US 566 (USSC 1974) (Blackmun, Rehnquist JJ dissenting, joined by Burger JC) (*Goguen*).

¹³ Mass. Gen. Laws Ann. Ch. 264 (USA) § 5; cited in *Goguen*, *supra* n 12, 568-569.

¹⁴ *Goguen*, *supra* n 12, 582.

¹⁵ *Spence v Washington* 418 US 405 (USSC 1974) (Burger CJ, Rehnquist and White JJ dissenting) (*Spence*).

¹⁶ *Ibid* 412.

¹⁷ *Ibid* 414.

¹⁸ *Ibid* 414-415.

In the landmark decision of *Johnson*,¹⁹ the Supreme Court finally held that burning the flag was expressive conduct covered by the First Amendment. Gregory Lee Johnson was convicted under a Texas penal section entitled “Desecration of Venerated Objects,” which forbade intentionally or knowingly desecrating a “state or national flag”,²⁰ after he had publicly burned an American flag to protest Republican party policies. The Texas law defined “desecrate” as “deface, damage, or otherwise physically mistreat in a way that the actor knows will *seriously offend* one or more persons likely to observe or discover his action.”²¹ Hence this statute was explicitly content-based; that is, it was prohibiting a particular use of the flag solely because of the message it conveyed. In short, the Court argued that the statute was related to the suppression of expression²² and thus subject to strict scrutiny, which it could not survive.²³

A huge uproar followed the Court’s decision, culminating in an attempt to amend the Constitution in order to allow the state to prohibit flag desecration by carving out an exception to the First Amendment.²⁴ After sober reflection, Congress realized that such a dramatic reaction was unjustified in the light of the importance of the issue, and instead enacted the Flag Protection Act 1989. Hoping that the Supreme Court might uphold a content-neutral flag desecration statute, the Act provides in relevant part:²⁵

- (a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined...

Only one year later the Supreme Court in *Eichman*²⁶ had to rule on the constitutionality of this Act. Eichman and several other persons had burned flags in Seattle and on the steps of the Capitol in Washington DC while protesting various aspects of the Government’s domestic and foreign policy. The Court held:²⁷

Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government’s asserted interest is “related to the suppression of free expression,” and concerned with the content of such expression.

¹⁹ *Texas v Johnson* 491 US 397 (USSC 1989) (Rehnquist CJ, White, O’Connor and Stevens JJ dissenting) (*Johnson*).

²⁰ Tex Penal Code Ann (USA) § 42.09(a)(3) (West 1989); cited in *Johnson*, *ibid* 400.

²¹ Tex Penal Code Ann (USA) § 42.09(b) (West 1989); *ibid*.

²² *Johnson*, *supra* n 19, 410-411.

²³ *Johnson*, *supra* n 19.

²⁴ Ute Krüdewagen “Political Symbols in Two Constitutional Orders: The Flag Desecration Decisions of the United States Supreme Court and the German Federal Constitutional Court” (2002) 19 Ar J Int’l & Comp L 679, 692.

²⁵ Flag Protection Act 1989 (USA) 18 USC § 700 (Supp I 1988).

²⁶ *United States v Eichman* 496 US 310 (USSC 1990) (Rehnquist CJ, Stevens, White and O’Connor dissenting) (*Eichman*).

²⁷ Brennan J (delivering majority opinion) in *Eichman*; *ibid* 315.

Having determined that “the Act still suffers from the same fundamental flaw” as the Texas statute at issue in *Johnson* – “it suppresses expression out of concern for its likely communicative impact”²⁸ – the Court followed its reasoning in *Johnson* and held that the “Government’s interest cannot justify its infringement on First Amendment rights.”²⁹

The *Eichman* decision triggered public indignation similar to the reaction after *Johnson* and calls for amendment to the Constitution were renewed.³⁰ However, in June 1990 the proposed Amendment fell short of the two-third majority required to amend the Constitution. Since then, a Constitutional Amendment³¹ has frequently been re-introduced into Congress, but has failed consistently in the Senate.³² The Senate of the 108th Congress had to deal with this issue in June 2003 and referred the proposed Constitutional Amendment to “The Committee of the Judiciary”.³³ Although the Committee reported favorably on the amendment, and recommended that the joint resolution pass, the Senate has not yet approved it.³⁴ In addition, there has been a Bill pending before the Senate since March 2004 for the declared purpose of providing “maximum protection against the use of the flag of the United States to promote violence while respecting the liberties that it symbolizes.”³⁵

B *New Zealand*

Defacement of the flag has been prohibited in New Zealand since 1901. Section 4 of the New Zealand Ensign Act 1901 made it an offence to deface the ensign “by placing any sign, representation, or letter thereon”. Both the Shipping and Seamen Act 1908 and the Shipping and Seamen Act 1952 repeated the provision.³⁶

Section 11 of the current Flags, Emblems, and Names Protection Act 1981,³⁷ which came into force on the first day of January 1982,³⁸ provides in its relevant part that:

²⁸ *Ibid* 317.

²⁹ *Ibid*.

³⁰ Krüdwagen, *supra* n 24, 693-694.

³¹ The text of the proposed amendment, which was presented before the 106th Congress in 1999, read as follows: “The Congress shall have power to prohibit the physical desecration of the flag of the United States.” See HJ Res 33, 106th Congress, 1st Session, available at <<http://www.congress.gov>> (at 20 August 2004).

³² *Ibid*.

³³ HJ Res 4, 108th Congress, 1st Session, available at <<http://www.congress.gov>> (at 20 August 2004).

³⁴ See Report of the Committee of the Judiciary, available at <<http://www.congress.gov/cgi-bin/cpquery/T?&report=sr334&dbname=cp108&>> (at 20 August 2004).

³⁵ The Flag Protection Act 2004 (USA) S 2259, 108th Congress, 2nd Session, available at <<http://www.congress.gov>> (at 20 August 2004).

³⁶ *Hopkinson*, *infra* n 41, [45].

³⁷ Hereafter “FENPA”.

³⁸ Flags, Emblems, and Names Protection Act 1981 (NZ), s 1(2).

- (1) Every person commits an offence against this Act, who –
- (a) without lawful authority, alters the New Zealand Flag by the placement thereon of any letter, emblem, or representation:
 - (b) in or within view of any public place, uses, displays, destroys, or damages the New Zealand Flag in any manner with the intention of dishonouring it.

Although this Act has now been in force for 22 years, Paul Barry Hopkinson was the first and only person who has been convicted under this statute.³⁹ On 10 March 2003 Mr. Hopkinson publicly burned a New Zealand flag in parliamentary grounds to protest at the New Zealand Government's hosting of the Australian Prime Minister (this was due to Australia's support for the United States in its war against Iraq). This confronted the High Court of New Zealand for the first time with the question of whether s 11 FENPA is consistent with freedom of speech, as guaranteed by s 14 of the New Zealand Bill of Rights Act 1990.⁴⁰ The Court held, in the landmark decision *Hopkinson*,⁴¹ that it can at least be read consistently.⁴² Even though the Court considered that the state's objective "to protect and preserve the flag as an emblem of national significance"⁴³ is an important one, it reversed Hopkinson's conviction on the grounds that "the rational connection part of the s 5 test"⁴⁴ was not met, which meant that the prohibition on the appellant's conduct was not a justified limit on his free speech."⁴⁵

However, the Court emphasized that its decision is only related to this particular appellant and his conduct.⁴⁶

III FLAG BURNING

A *Is Flag Burning Protected under the Right to Freedom of Expression?*

1 *United States*

(a) *Non-verbal conduct as protected "speech"*

The First Amendment of the United States Constitution establishes *inter alia* that "Congress shall make no law...abridging the freedom of speech".⁴⁷ Since the

³⁹ In 1966 the Court confirmed the conviction of a protester who had carried a burning Union Jack on a pole in a political demonstration and was thus convicted for offensive behaviour. *Derbyshire v Police* [1967] NZLR 391 (*Derbyshire*).

⁴⁰ Hereafter "NZBORA".

⁴¹ *Hopkinson v New Zealand Police* [23 July 2004] HC, Wellington, CRI-2004-485-23 (*Hopkinson*).

⁴² *Ibid* [78]-[82].

⁴³ *Ibid* [49].

⁴⁴ See *infra* IIIB2(b).

⁴⁵ *Ibid* [77].

⁴⁶ *Ibid* [81].

⁴⁷ See First Amendment of the Constitution of the United States; hereafter "First Amendment".

Supreme Court's decision in *Stromberg*⁴⁸ in 1931 it has been clear that "speech" within the meaning of the first amendment's guarantee of "freedom of speech" includes more than merely verbal communications. In that case, the Court held invalid a California statute which prohibited the public display of "any flag, badge, banner or device...as a sign, symbol or emblem of opposition to organized government" because it was "so vague and indefinite as to permit the punishment" of conduct protected by the Constitution.⁴⁹ Subsequent judgments also applied the First Amendment to non-verbal conduct. For example, the Court in *Barnette*⁵⁰ held that:⁵¹

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.

Further, in *Braun*⁵² Fortas J, speaking for the majority of the Court, stated that "freedom of expression is not confined to verbal expression" but encompasses appropriate types of action.⁵³ In *Tinker*⁵⁴ the Court held that the wearing of an armband for the purpose of expressing certain views is "closely akin to 'pure speech'", and "the type of symbolic act that is within the Free Speech Clause of the First Amendment."⁵⁵

Although these cases show that conduct sometimes constitutes protected "speech", it was far from clear at what point the communicative element becomes sufficient to invoke the First Amendment. In fact Warren CJ, speaking for the Court in *O'Brien*,⁵⁶ declared that it "can not accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea,"⁵⁷ but failed to establish any prerequisites.

What standards should be applied in determining whether given conduct constitutes symbolic speech? It is surely not enough for conduct to convey some meaning to observers. If it were, almost every act seen by others would qualify for First

⁴⁸ *Stromberg v California* 283 US 359 (USSC 1931) (McReynolds and Butler JJ dissenting) (*Stromberg*).

⁴⁹ *Ibid* 369.

⁵⁰ *West Virginia State Board of Education v Barnette* 319 US 624 (USSC 1943) (Frankfurter, Roberts and Reed JJ dissenting) (*Barnette*).

⁵¹ *Ibid* 632.

⁵² *Braun v Louisiana* 383 US 131 (USSC 1966) (Black, Clark, Harlan and Stewart JJ dissenting) (*Braun*).

⁵³ *Ibid* 142.

⁵⁴ *Tinker v Des Moines Independent Community School District* 393 US 503 (USSC 1969) (Black and Harlan JJ dissenting) (*Tinker*).

⁵⁵ *Ibid* 505.

⁵⁶ *United States v O'Brien* 391 US 367 (USSC 1968) (Douglas J dissenting) (*O'Brien*).

⁵⁷ *Ibid* 376.

Amendment protection.⁵⁸ Moreover, it is not sufficient that an actor have a subjective aim to communicate.⁵⁹ As a minimum requirement non-verbal conduct must constitute communication. That, in turn, implies both a speaker and an audience.⁶⁰ Accordingly, the Supreme Court asked in *Spence* whether the “intent to convey a particularized message was present,” and whether “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”⁶¹

(b) *The protection of flag burning in particular*

Applying the test developed in *Spence*, the Court found that “Johnson’s burning of the flag was conduct ‘sufficiently imbued with elements of communication’ to implicate the First Amendment.” The Court considered the context in which the flag burning occurred, with Brennan J holding that “the expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent.”⁶² Given that Johnson burned a flag as part of a political demonstration, “anyone who observed the act would have understood the message that [the] appellant intended to convey.”⁶³ The Court could indeed reach no other conclusion. Since protesters usually burn flags in response to given issues or incidents, such conduct clearly always expresses ideas.

Nevertheless, Rehnquist CJ, dissenting, said in *Johnson* that the public burning of a flag was the “equivalent of an inarticulate grunt or roar.”⁶⁴ According to him, it was “no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace.”⁶⁵ Rehnquist CJ thereby suggested that flag burning – although it usually conveys a bitter dislike of what the country’s leader are doing – does not constitute symbolic speech within the ambit of the First Amendment. In his view the burning flag does not contribute to the marketplace of ideas.⁶⁶ In

⁵⁸ Even the ordinary act of getting out of bed communicates to an observer that the person undertaking the act is not tired any more or perhaps has to go to an appointment; certainly the content depends on the particular circumstances.

⁵⁹ Kent Greenawalt “O’er the Land of the Free: Flag Burning as Speech” (1990) 37 UCLA L Rev 925, 928-930.

⁶⁰ Melville B Nimmer “The Meaning of Symbolic Speech under the First Amendment” (1973) 21 UCLA L Rev 29, 36.

⁶¹ *Spence*, supra n 15, 410-411.

⁶² Brennan J (delivering majority opinion) in *Johnson*, supra n 19, 406.

⁶³ *Ibid* 400.

⁶⁴ Rehnquist CJ in *Johnson*, supra n 19, 432.

⁶⁵ *Ibid* 430.

⁶⁶ Arnold H Loewy “The Flag-Burning Case: Freedom of Speech when we need it most” (1989) 68 NCL Rev 165, 169. Holmes J’s understanding of the “marketplace of ideas” in *Abrams v United States* 250 US 616, 630 (USSC 1919) is one of the major theories underlying freedom of speech. According to this theory, “the best test of truth is the power of thought to get itself accepted in the competition of the market”. Therefore, the basic idea to protect freedom of speech is to find

supporting his opinion he referred to *Chaplinsky*,⁶⁷ where the Court acted on the theory that “fighting words” – those words “which by their very utterance inflict injury or tend to incite an immediate breach of peace” – are not protected by the First Amendment.⁶⁸

But, for the following reasons, it is suggested that this argument is not very persuasive. First, very few cases can be excluded from the First Amendment protection on grounds of the narrow “fighting words” doctrine. It only applies to verbal assaults made in a face-to-face encounter where the speech is directed at a particular individual addressee. Moreover, it contains an implicit requirement of likely or imminent danger in that the speech must be expected to cause the average addressee to fight. None of these elements was present in *Johnson*.⁶⁹ Besides, this doctrine cannot be applied to any act of flag burning for the obvious reason that non-verbal conduct can never be regarded as a “verbal assault”. This would be the case even if the conduct could be said to be directed at some particular person.

Nor can the conduct of flag burning be excluded from First Amendment protection due to the “hostile audience” doctrine, whatever vitality this doctrine may retain beyond the narrow confines of the “fighting words” doctrine. On this view, the government can prohibit flag desecration because such expressive conduct may incite others to react in a hostile manner, but only when the danger of violent audience response is likely, imminent, grave, and beyond the capacity of government to control with reasonable law enforcement resources.⁷⁰ Even though *Johnson* was not remotely such a situation, an audience member who commits a breach of the peace undoubtedly commits a crime. There is no defence of provocation to the commission of assault or criminal damage. Banning flag desecration on account of the threat to public order is the prohibition of an otherwise lawful act for the reason that others will commit crimes in response.⁷¹ The Court points out that offence is often not followed by violence and thus flag burning – although it might be offensive – cannot be prohibited on this ground. Much controversial speech causes offence, but the state cannot forbid all offensive speech because violence may occasionally result.

the truth. However, truth is not absolute; rather it is the decision reached by the people in the marketplace and always subject to replacement. Rishworth, *infra* n 73, 309.

⁶⁷ *Chaplinsky v New Hampshire* 315 US 568 (USSC 1942) (*Chaplinsky*).

⁶⁸ *Ibid* 571-572.

⁶⁹ Brennan J (delivering majority opinion) in *Johnson*, *supra* n 19, 409.

⁷⁰ Geoffrey R Stone “Flag Burning and the Constitution” (1989) 75 *Iowa L Rev* 111, 115.

⁷¹ Rob Weeks *Should Flag Burning as a Form of Protest be Prohibited?* (2002) Deatabase <http://www.deatabase.org/details_print.asp?topicID=175> (at 8 September 2004).

2 *New Zealand*(a) *Non-verbal conduct as protected “speech”*

Under section 14 of the New Zealand Bill of Rights, “[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”⁷²

Although the scope of this right is defined in inclusive terms, emphasizing protection of the printed and spoken word, it is sufficiently broad to encompass art and other symbolic forms of expression regardless of the nature of a particular communication or the context in which it occurs.⁷³ The Court of Appeal has stated that the right to freedom of expression “is as wide as human thought and imagination.”⁷⁴

It cannot be supposed that the right is inherently limited on the basis that some forms of expression are excluded from the scope. If questions of limits are integrated into the definition of the right – e.g. that “expression” does not encompass obscene or hateful expression – than “the state would be excused from having to justify restrictions of those types.”⁷⁵ However, the problem with ‘definitional balancing’ is that crucial questions of justifying legislative limits might remain unexplored if whole areas of expression were excluded at the outset.⁷⁶ The mere existence of s 5 NZBORA – which puts the burden on the state of demonstrating that limits on the right are reasonable – shows that this approach is not intended, even though it has been applied in some decisions in New Zealand.

Further, it cannot be said that a particular form of expression is excluded from the right just because it is in breach of the law.⁷⁷ Otherwise the substance of the right to freedom of expression would be at the discretion of the legislature. This would be contrary to the intention of the Bill of Rights, which is to safeguard people from the arbitrary infringement on their rights by the state.

Since symbolic expression is within the scope of the right, and since nearly all conduct can potentially be said to have an expressive component anyway, one has to be aware that if the mere presence of an expressive component brings conduct within the protection of the right, then the right is rendered meaningless. Thus difficult judgments on a case-to-case-basis have to be made.⁷⁸ Given that there exists

⁷² Bill of Rights Act 1990 (NZ), s 14.

⁷³ Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Auckland, New Zealand, 2003) 311.

⁷⁴ *Moonen v. Film and Literature Board of Review* [2000] 2 NZLR 9, 15 (CA) (*Moonen No1*).

⁷⁵ Rishworth et al, supra n 73, 52.

⁷⁶ Ibid 53.

⁷⁷ Ibid 312.

⁷⁸ Ibid 313.

no case law in New Zealand regarding an applicable test to determine at what point the expressive element of conduct becomes so significant that it is encompassed by freedom of expression, the test of the United States Supreme Court developed in *Spence*⁷⁹ is a useful guide.

(b) *The protection of flag burning in particular*

Accordingly, there can be no doubt that burning a national flag “with the intention of dishonouring it”⁸⁰ to protest against the government is non-verbal conduct with a significant expressive component and, therefore, protected by the right to freedom of expression. This is even more the case when one considers that it is *political* expression, which is described as being at the core of the right and thus enjoying the greatest protection.⁸¹

France J in *Hopkinson* affirmed that it is “well-established” that the scope of the right “includes non-verbal conduct such as flag burning.”⁸²

B *Is the Prohibition of Flag Burning a Justified Limit on Freedom of Expression?*

Having determined that flag burning is protected speech, it goes without saying that the prohibition of such conduct abridges the right to freedom of expression. But this does not inevitably amount to an infringement of the right.

1 *United States*

Although the language for the First Amendment does not allow any restrictions on freedom of speech it is well established that it is nevertheless not unlimited.

(a) *The extent of protection regarding flag burning*

Once it is determined that the conduct at issue is protected by the First Amendment, there is nothing said about the breadth of that protection. Goldberg J, speaking for the majority in *Cox*,⁸³ stated that the First Amendment did not afford the same kind of freedom to communication of ideas by conduct as to

⁷⁹ See n 61 supra and accompanying text.

⁸⁰ Flag, Emblems, and Names Protection Act 1981 (NZ), s 11(1)(b).

⁸¹ Ibid 312-314.

⁸² *Hopkinson*, supra n 41, [41].

⁸³ *Cox v Louisiana* 379 US 536 (USSC 1965) (White, and Harlan JJ dissenting) (*Cox*).

communication by “pure speech”.⁸⁴ But there seems to be no great rational cause to grant expressive conduct a lesser protection than “pure speech”, since both have the identical purpose of expressing ideas, thoughts and feelings.⁸⁵ In fact neither in *Johnson* nor in *Eichman* did the Court state anything about lesser protection of flag burning because it was conduct and not “pure speech”.

(b) *The constitutional level of scrutiny – the O’Brien test*

At this stage of analysis it is important to determine the constitutional level of scrutiny by applying the test elaborated in *O’Brien*.⁸⁶ O’Brien was convicted for publicly burning his draft card to influence others to adopt his antiwar beliefs.

(i) *The Texas statute*

In determining the level of scrutiny the Court stated that:⁸⁷

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The major question is whether the governmental interest in prohibiting flag burning is related to the “suppression of free expression” or not. If the State’s regulation is not related to expression, then it is subject to the less stringent standard stated above. If it is, then it must be asked whether this interest justifies the conviction of flag burners under a more demanding standard.

The state in *Johnson* asserted an interest in preserving the flag as a symbol of nationhood and national unity. Since this interest seeks to preserve the flag as a symbol only for a limited range of messages it has a close nexus with expression and is therefore related to the suppression of free expression. Brennan J argued that:⁸⁸

The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person’s treatment

⁸⁴ Ibid 555.

⁸⁵ Actions might lead to consequences more directly than speech and thus there might be different reasons for restrictions, for instance fire safety. But this is a question about limits and their justification and not about granting a lesser protection to expressive conduct in the first place.

⁸⁶ See n 56 supra and accompanying text.

⁸⁷ Warren CJ (delivering majority opinion) in *O’Brien*, supra n 56, 377.

⁸⁸ Brennan J (delivering majority opinion) in *Johnson*, supra n 19, 410.

of the flag communicates some message, and thus are related “to the suppression of free expression”.

In determining the level of scrutiny, the Court next argued that “[t]he Texas law is ...not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offence to others.”

Since burning has been a recommended way to dispose of worn out flags, not every burning of the flag is offensive. The State would not prosecute a person who ceremoniously burns a dirty or torn flag. But, allowing respectful or pro-American government burnings while prohibiting disrespectful or anti-American government burnings is clearly viewpoint discriminative. The Court thus concluded that the expression was restricted because of the content of the message Johnson conveyed and therefore subjected the State’s interest in preserving the special symbolic character of the flag to “most exacting scrutiny.”⁸⁹

For the following reasons, the dissenters in *Johnson* seem to doubt this finding. First, they stated that Johnson was not punished for the idea he conveys, but rather for the use of the particular symbol. Hence the prohibition should be understood not as a restriction on the content of an expression, but as a regulation of means.⁹⁰ To this extent this argument is clearly tenuous, given that the Texas statute restricted the use of the flag as a means of expression *only* when it was used to convey ideas that are “offensive” to others. This is a paradigm of content-based regulation.⁹¹ Furthermore, the choice of a particular form or method of expression cannot readily be separated from the content of that expression.

Rehnquist CJ argued that Johnson “conveyed nothing that could not have been conveyed...just as forcefully in a dozen different ways”,⁹² and thus the Texas statute deprived him of only one rather inarticulate symbolic form of protest. Hence it did not totally ban the expression of an idea and therefore should be exempt from “the most exacting scrutiny.” For several quite compelling reasons, however, including the equality principle, the risk of destroying the substantive content of public debate, and the inability confidently to distinguish between “significant” and “modest” content based restrictions, the Court has never accepted such a limitation on its scrutiny of content-based restrictions.⁹³ The Court instead argued that there is “no indication – either in the text of the Constitution or in our cases interpreting it – that a separate juridical category exists for the American flag alone.”⁹⁴

⁸⁹ Ibid 411-412.

⁹⁰ Rehnquist CJ in *Johnson*, supra n 19, 432; Stevens in *Johnson*, supra n 19, 438.

⁹¹ Stone, supra n 70, 116.

⁹² Rehnquist CJ in *Johnson*, supra n 19.

⁹³ Ibid.

⁹⁴ Brennan J (delivering majority opinion) in *Johnson*, supra n 19, 417.

Moreover, there appears to be no principled way to preclude the creation of other exceptions to the First Amendment once an exception for the flag has been granted. Furthermore, this would establish courts as the ultimate censor of ideas.

(ii) *The Flag Protection Act 1989*⁹⁵

The FPA proscribed conduct that damaged or mistreated a flag, without regard to the actor's motive, his intended message, or the likely effects of his conduct on onlookers, and thus was content-neutral in its language. The Government asserted an interest in "protect[ing] the physical integrity of the flag under all circumstances" in order to safeguard the flag's identity "as the unique and unalloyed symbol of the Nation."⁹⁶ The idea was to preserve the flag as an embodiment of diverse views and not as a representative of any one view. Nevertheless, the Court held that the asserted interest was "related 'to the suppression of free expression'".⁹⁷

It seems quite obvious that the Act was tailored to circumvent the Court's decision in *Johnson* while achieving the same result – the prohibition of flag desecration. First of all, the mere destruction of a particular physical manifestation of a symbol, without more, does not diminish or otherwise affect the symbol itself in any way. For example, the secret destruction of a flag in one's own basement would not threaten the flag's recognized meaning. Thus, the government's interest is only met when a person treats the flag in a way that communicates a message inconsistent with those specified ideals. The Court further noticed that – with the exception of "burns" – each of the specified terms used in the FPA – "mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" – unmistakably connoted disrespectful treatment. The explicit exemption for disposal of "worn or soiled" flags protected certain acts traditionally associated with patriotic respect for the flag. This combination indicated a focus on those acts likely to damage the flag's symbolic value. The Court therefore subjected the Act to "the most exacting scrutiny."⁹⁸

The dissenters argued again that the interest behind the FPA was not related to "suppression of free expression," since the protester was free to express his thoughts by other means.⁹⁹

Since the flag – aside from its association with particular ideals – is emblematic of the Nation as a sovereign entity, the state asserted a nonspeech-related interest in safeguarding this "eminently practical legal aspect of the flag."¹⁰⁰ The Court

⁹⁵ Hereafter "FPA".

⁹⁶ Brennan J (delivering majority opinion) in *Eichman*, supra n 26, 315.

⁹⁷ Ibid.

⁹⁸ Ibid 317.

⁹⁹ Stevens J in *Eichman*, supra n 26, 321-322.

¹⁰⁰ Brennan J (delivering majority opinion) in *Eichman*, supra n 26, 316, FN 6.

acknowledged that this was indeed a legitimate interest, but refused to determine whether it was related to the “suppression of free expression” or not. The Court instead argued that the FPA could not foster this interest, since flag burning did not threaten to interfere with the association between the flag and the Nation in any way.¹⁰¹

(c) *Applying “most exacting scrutiny”*¹⁰²

To pass this test the state’s interest in preserving the symbolic value of the flag had to be compelling and the restriction on freedom of expression had to be narrowly tailored to further this interest.¹⁰³

First, the majority in *Johnson* did not doubt that the government had a legitimate interest in preserving the national flag as an unalloyed symbol of the country. However, it stated that this “is not to say that it may criminally punish a person for burning a flag as a means of political protest.”¹⁰⁴ Brennan J suggested that the interest was not compelling, because the flag’s symbolic role was not endangered, stating that “nobody can suppose that this one gesture of an unknown man will change our Nation’s attitude towards its flag.”¹⁰⁵ Finally, the Court found that this interest could be furthered by less coercive means,¹⁰⁶ namely by “more speech, not enforced silence...We can imagine no more appropriate response to burning a flag than waving one’s own.” Moreover, the Court added that “[t]he way to preserve the flag’s special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.”¹⁰⁷

Brennan J referred to the “bedrock principle underlying the First Amendment, which is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,” and emphasized that they had not accepted an exception to this principle even where the flag had been involved.¹⁰⁸

¹⁰¹ Ibid.

¹⁰² Since *Eichman* is largely a derivative decision, and the Judges added relatively little to their earlier and more extensive opinion in *Johnson*, it is *Johnson* that merits attention. Therefore, my analysis is primarily focused on the arguments made in *Johnson*, although the discussion relates equally to *Eichman*.

¹⁰³ Gregory Herbert “Waiving Rights and Burning Flags: The Search for a Valid State Interest in Flag Protection” (1990) 25 Harv CR-CLL Rev 592, 616-617.

¹⁰⁴ Brennan J (delivering majority opinion) in *Johnson*, supra n 19, 418.

¹⁰⁵ Ibid 418-419; paraphrasing Holmes J’s dissent in *Abrams v United States* 250 US 616, 628 (USSC 1919) (Holmes J dissenting) (*Abrams*).

¹⁰⁶ Herbert, supra n 103, 607.

¹⁰⁷ Brennan J (delivering majority opinion) in *Johnson*, supra n 19, 419.

¹⁰⁸ Ibid 414.

Chief Justice Rehnquist tried to justify the prohibition of flag burning by developing a property theory granting the state a kind of property right in the flag as a symbol. Since the flag conveyed the message of certain attributes of American government to others,¹⁰⁹ it represented a form of governmental speech. The “tarnishing” of that symbolic value was, according to the Chief Justice, equivalent to an interruption of the governmental speech. Hence, the government’s interest lay in allowing the country’s flag to continue to express certain ideas without having that message impaired or interrupted by the ideas of others. This interest – perhaps broadly analogous to copyright¹¹⁰ – amounted to an intangible property interest in the design and its message even if the tangible cloth belonged to a private individual.¹¹¹ The principle weakness of this theory is that nothing in the flag burners’ actions involved the commercial appropriation of things such as trade marks, which lies at the heart of the doctrine that Rehnquist CJ invoked.¹¹² It is obvious that those who burn flags are not trying to take a “free ride” on the work of others. Nor do they devalue the reputation of the flag.¹¹³ However, this would be necessary to rely on the principle that an unauthorised use of a registered and well-known trademark is an infringement if it is used in a way that is detrimental to the repute of the mark.¹¹⁴

Moreover, the state – in contrast to the flag burner – has no First Amendment right to assert in support of its interest in communicating a message through the flag without being disturbed. It seems odd that the state could use someone else’s flag to exercise a right it does not hold. Correspondingly, Brennan J affirmed no precedent “suggest[ing] that a State may foster its own view of the flag by prohibiting expressive conduct relating to it”.¹¹⁵ He also recognized that the government may not ensure that a symbol be used to express only one view of that symbol or its referents.¹¹⁶

Stevens J likewise argued on the basis of property rights when he compared the government’s power to prohibit flag desecration with the power to prevent someone from spraying paint on the Lincoln Memorial as a form of protest.¹¹⁷ But this analogy is clearly wrong since the circumstances are plainly not comparable. First of all, the Lincoln Memorial is public property, whereas the statute prohibiting flag desecration also applied to privately owned flags. Additionally, the state’s interest in prohibiting paint spraying on the Lincoln Memorial lies clearly in the conservation of a unique physical object of national heritage. Contrary to this, the state has no

¹⁰⁹ Liberty, equality, and tolerance; see Stevens J in *Johnson*, supra n 19, 437.

¹¹⁰ Peter E Quint “The Comparative Law of Flag Desecration: The United States and the Federal Republic of Germany” (1992) 15 *Hastings Int’l & Comp L Rev* 613, 624.

¹¹¹ Rehnquist CJ in *Johnson*, supra n 19, 433.

¹¹² Quint, supra n 110, 625.

¹¹³ See text at IIIB2(b)(iii) infra.

¹¹⁴ For instance Trade Marks Act 2002 (NZ), s 89(1)(d).

¹¹⁵ Brennan J (delivering the majority opinion) in *Johnson*, supra n 19, 415.

¹¹⁶ *Ibid* 417.

¹¹⁷ Stevens J in *Johnson*, supra n 19, 437-438.

interest in preserving the physical integrity of a flag but rather maintaining the intangible value as a symbol of nationhood. National monuments are protected because they are physically unique. The flag, however, is not.¹¹⁸

Rehnquist CJ tried to support his view by arguing that Johnson could have conveyed his message *as forcefully* in a dozen different ways. However, this is neither true nor would it be of any particular importance. Certainly, Johnson could have conveyed his message in many different ways, but not as powerfully as he did by burning the flag. Indeed, because of its unique emotive power, symbolic expression is often an especially effective means of conveying the depth of one's convictions. Thus, sometimes it is necessary to resort to such drastic means to attract attention and enter the "marketplace" of ideas. Moreover, the burning itself imparts a message that cannot be translated into other means without alteration. The right to freedom of expression encompasses the right to choose the means by which one wants to express one's thoughts. Therefore Brennan J correctly concluded that "the lesson that the government may not prohibit expression simply because it disagrees with its message is not dependent on the particular mode in which one chooses to express an idea."¹¹⁹

In the consideration of the competing values, the individual's right to freedom of expression has to prevail over the state's admittedly legitimate interest in preserving the flag as a symbol of nationhood. The right to freedom of expression is one of the most important rights in a free and democratic society, due to the fact that the democratic process otherwise would not work properly. The principal reason for protecting free expression is the notion that in a democracy people must be informed to govern themselves and that freedom of expression is essential to this informing function.¹²⁰ The free flow of discussion and criticism of the performance of those in power serves as a check on abuses of governmental power.¹²¹ Free speech is also protected in spite of democracy, which means that it is granted to protect the minority from the wishes of the majority. If one would let the state's interest prevail, this would amount to undermining the protection of minorities, since it is the majority view that flag burning should be banned.

Given that the clear political content of flag burning is at the core of the First Amendment, and that the very act of burning directly harms no one – assuming that the flag is property of the protester – prohibition of flag burning is plainly untenable.

¹¹⁸ Krüdewagen, *supra* n 24, 691.

¹¹⁹ Brennan J (delivering majority opinion) in *Johnson*, *supra* n 19, 416.

¹²⁰ See Alexander Meiklejohn *Free Speech and its Relation to Self-Government* (The Lawbook Exchange, LTD, New Jersey, 2000).

¹²¹ See Vincent Blasi *The Checking Power of First Amendment Theory* (1977) Am B Found Res J, 521.

Furthermore, one must be aware that the state's interest in prohibiting flag burning is not to preserve the social values, like liberty, equality, and tolerance¹²² themselves. It is *solely* to protect the flag as a transmitter of these values, which is an interest of much less importance. But even if the values themselves had been in the scale, the consideration would nevertheless have turned out in favour of freedom of expression, since every other decision would be converse to these values. It is simply not possible to cherish tolerance and prohibit flag burning when the flag itself symbolizes tolerance. Who should believe in tolerance when expressive conduct involving the very symbol of tolerance is not tolerated? To think otherwise is hypocritical.¹²³ The state must set a good example by not penalizing this conduct. Therefore Brennan J declared in *Johnson* that one does not “consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.”¹²⁴

The emotional and patriotic way that the dissenting Judges presented their opinion in *Johnson* and *Eichman*, together with a lengthy comment on the flag's role in American history, and the lack of profound legal arguments, leads one to the assumption that they wanted to distract from the fact that the prohibition of flag burning is plainly not consistent with freedom of expression. To put flag burning on a par with murder – as Rehnquist CJ did in his *Johnson* dissent¹²⁵ – is not only an exaggeration, but appears odd.

The dissenters avoided one obvious interest the state has in protecting the flag, that is, the state's interest in protecting itself and its political structure from contemptuous and potentially debilitating political attack; that is, that attacking the flag amounts to attacking and weakening the government.¹²⁶ But this interest cannot justify limits on free expression for obvious reasons. The very purpose of free speech is to allow critical political speech as an essential part of the democratic process. If one authorises government to prohibit political criticism merely because the government decides that it is debilitating and contemptuous, freedom of speech would become meaningless. For this reason the Court developed a doctrine to deal with problems of “sedition” and determined that a “clear and present danger” of violent attempts to overthrow the government is required before seditious speech could be penalized.¹²⁷ Nothing that approaches violent overthrow is evident in any of the flag-burning cases.

¹²² Stevens J in *Eichman*, supra n 26, 321.

¹²³ One might argue that the flag denotes tolerance with the exception of flag burning. However, this is an arbitrary distinction.

¹²⁴ Brennan J (delivering majority opinion) in *Johnson*, supra n 19, 420.

¹²⁵ Rehnquist CJ in *Johnson*, supra n 19, 435: “Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people – whether it be murder, embezzlement, pollution, or flag burning.”

¹²⁶ Albert M Rosenblatt “Flag Desecration Statutes: History and Analysis” (1972) Wash U LQ 193, 208-211.

¹²⁷ Quint, supra n 110, 626.

As Kennedy J put it, “[t]he hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.”¹²⁸

2 *New Zealand*

Unlike the American counterpart, s 5 NZBORA explicitly allows restrictions on the rights and freedoms affirmed by the Bill of Rights, and sets out the extent to which a limitation is possible. As a minimum standard, limits must be “prescribed by law”, “reasonable”, and “demonstrably justified in a free and democratic society”.¹²⁹

(a) *The level of scrutiny*

When it comes to conduct, the restriction on a right or freedom will usually be considered reasonable and demonstrably justified in the circumstances. As in the United States, the government is free to regulate conduct as long as it does so without regard to the content of the expression in question.¹³⁰

(b) *Applying s 5 NZBORA*

Having determined that flag burning is within the scope of s 14 of the NZBORA France J, delivering the opinion of the High Court in *Hopkinson*, had no doubt that prohibition of this conduct was *prima facie* a breach of the right to freedom of expression.¹³¹ Therefore, the issue turned on whether prohibition of flag burning was a justified limit on the freedom of expression in terms of s 5 NZBORA. In determining this, the Court of Appeal in *Moonen (No 1)* established that “it is desirable first to identify the objective which the legislature was endeavouring to achieve by the provision in question.”¹³²

(i) *Legitimacy of objective of s 11(1)(b) FENPA*

According to the Long Title of the FENPA, the avowed purpose of the Act is,

to declare the New Zealand Ensign to be the New Zealand flag and to make provision relating to its use...and to make better provision for the protection of certain names and emblems of Royal, national, international, commercial, or other significance.

¹²⁸ Kennedy J in *Johnson*, supra n 19, 420-421.

¹²⁹ Bill of Rights Act 1990 (NZ), s 5.

¹³⁰ Rishworth et al, supra n 73, 313.

¹³¹ *Hopkinson*, supra n 41, [41].

¹³² *Moonen (No 1)*, supra n 74, [18].

To achieve that purpose, s 5 of the FENPA declares the New Zealand ensign as the New Zealand flag and s 5(2) FENPA provides that the New Zealand flag shall be the symbol of the realm, Government, and people of New Zealand. Under the terms of s 5(3)(a) FENPA, the New Zealand flag “shall be the national flag of New Zealand for general use on land within New Zealand and, where appropriate for international purposes, overseas.”

In the second reading debate on the Bill the Responsible Minister noticed that the motive for the inclusion of the offence provisions in s 11 FENPA was “the flag’s intrinsic importance to almost every New Zealander”.¹³³

Against this legislative background, France J designated the purpose of s 11(1)(b) FENPA as being to “protect and preserve the flag as an emblem of national significance.”¹³⁴ The respondent in *Hopkinson* submitted that the provision also sought to protect those members of the public who may be offended by the physical use or actions towards the flag resulting from a person’s intention to dishonour it. Since there was no evidence of others being offended by the flag burning in the very case before the Court, France J did not amplify this objective, except for the statement that the legislative scheme suggested a “focus more on preservation of the flag per se”.¹³⁵

France J reached the conclusion that the state’s interest in preserving the flag as an “emblem of national significance” is legitimate. It seems remarkable, however, that she did not argue in support of her conclusion, instead referring to the decision of the United States Supreme Court in *Johnson* and the fact “that other democratic countries have found it necessary to legislate in this area.”¹³⁶ This latter reference, in particular, gives little, if any, support. That other countries have legislated in this area proves only that the majority in a democratic society believe that it is important to protect the flag. But the mere fact that the majority finds something useful leads not necessarily to the conclusion that it is legitimate. Without a Court directly addressing the issue, there can be no basis of legitimacy.

The Court’s reference to the decision in *Johnson* is more persuasive, since the Supreme Court had to rule on a similar case with similar interests involved.

The High Court did not comprehensively discuss the legitimacy of the interest in preserving the national flag as an “emblem of national significance” possibly because of its obvious nature. There is no sensible reason apparent to assume that the interest is illegitimate. The more significant point is to assess the importance of the interest and to weigh it against the right of the protester to express his thoughts by the means he chooses.

¹³³ (1981) 441 NZPD 3990 (Hon D A Highet).

¹³⁴ *Hopkinson*, supra n 41, [49].

¹³⁵ *Ibid.*

¹³⁶ *Ibid* [50]-[51].

(ii) *Importance of the competing interests*

According to the Court of Appeal in *Moonen (No 1)* the next step is to assess the importance and significance of such an objective.¹³⁷

France J persuasively rejected Hopkinson's argument that the government's interest "is of relatively little importance in New Zealand's contemporary, multicultural and pluralistic society."¹³⁸ As a symbol of the country and their citizens, the national flag plays an important role at diverse national and international occasions. Its national significance lies in its ability to unite the people of one country. In times of national crisis, it encourages and motivates the average citizen to make personal sacrifices in order to achieve public goals of significance.¹³⁹ It appeals to feelings of unity and arouses in citizens the desire to help one another. Its international importance is demonstrated by the fact that the flag is flown on political occasions, such as state visits, as well as at sporting competitions and events, such as the Olympics and world championships. The flag thereby serves as a means of identification for a particular country, as a person's name serves to identify that person. Accordingly, the state has a similar interest in maintaining the flag's honour just as a person has an interest in preserving the dignity of his or her name. Unlike an individual, however, the state cannot invoke a personal right to preserve its interest since basic rights are only granted to citizens and not the state.

The fact that New Zealand has a multicultural and pluralistic society does not diminish or exclude this state interest. It makes no difference if the society of a country is multicultural and pluralistic or not since, in either case, citizens are citizens of that particular country and thus feel an affinity towards each other and towards their country.

(iii) *Proportionality*

In carrying out the proportionality test suggested in *Moonen*, first¹⁴⁰ it must be established that there is a rational connection between s 11(1)(b) FENPA and the objective in the sense that the means used – the prohibition of flag burning – is capable of achieving the purpose of "preserving the flag as an emblem of national significance". That is, that the limitations must be "carefully designed" to achieve

¹³⁷ *Moonen (No1)*, supra n 74, [18].

¹³⁸ *Hopkinson*, supra n 41, [50].

¹³⁹ Stevens J in *Eichman*, supra n 26, 319.

¹⁴⁰ The High Court stated that the five-step approach outlined in *Moonen* is not prescriptive. *Hopkinson*, supra n 41, [27]. Therefore, I put the criteria in an order that seems more convenient to me.

the relevant objective, and not be “arbitrary, unfair or based on irrational considerations”.¹⁴¹

At first glance, it might seem obvious that prohibiting conduct which is inimical to the flag promotes the preservation of the flag as an emblem and is therefore appropriate. This is deceptive. It depends mainly on the question of whether flag burning harms the flag as a symbol of nationhood and unity. As Brennan J in *Johnson* noted, “one gesture of an unknown man” will not change the Nation’s attitude towards the flag.¹⁴² Citizens will still feel united under the flag and stand by each other in times of crisis. Nor will flag burning diminish the international role of the flag; the flag as an emblem is still able to identify a nation, despite being burned. Accordingly, if flag burning has little, if any, effect on the value of a flag as a symbol, it is difficult to see how prohibiting this conduct would foster the objective of “preserving the flag as an emblem of national significance”.

Furthermore, punishing flag burning might promote this conduct rather than prevent it, as can be seen from *Eichman*, where protesters burned the flag to protest against the FPA. If the state did not punish flag burning, few would probably care about such conduct.

Even if one assumed that the prohibition of flag burning could occasionally achieve its primary objective, it would fail the next step, which is “that there must be as little infringement as possible with the right or freedom affected.”¹⁴³ Since it is always possible to imagine means which are less drastic on the right in question, it would be impossible to draft a law which does not fail at this point. Therefore, it should be required “that rights are limited as little as *reasonably* possible in the circumstances.”¹⁴⁴ That is, there must not be means available that are *as effective as* prohibition of flag burning, but abridge the right to freedom of expression less. There are indeed other means available to foster the state’s interest just as effectively.¹⁴⁵ For example, the flag could be promoted as such, together with the values it stands for on every possible occasion.

Finally, the way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective, or, to borrow the metaphor used in *Moonen*, “A sledge hammer should not be used to crack a nut.”¹⁴⁶ The Court of Appeal in *Moonen (No1)* suggested an additional step of examination by making the statement that “[f]urthermore, the limitations involved must be justifiable in

¹⁴¹ *R v Oakes* [1986] 1 SCR 103, 139 (*Oakes*); cited in Rishworth et al, supra n 73, 176. Although this definition was established by a Canadian Court, it has an extensive influence on the interpretation of the NZBORA. See Rishworth et al, supra n 73, 182.

¹⁴² See n 105 supra and accompanying text.

¹⁴³ *Moonen (No1)*, supra n 74, [18].

¹⁴⁴ Rishworth et al, supra n 73, 185.

¹⁴⁵ As I am of the opinion that prohibition flag burning is a totally ineffective means, every other method is necessarily more effective.

¹⁴⁶ *Moonen (No1)*, supra n 74, [18].

light of the objective.”¹⁴⁷ According to the Court, this is a “matter of judgment...after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.”¹⁴⁸

But it is difficult to see what this adds to the analysis.¹⁴⁹ Nothing, at least, that cannot be considered in the proportionality test. Thus it might be understood as a confirmation of the fact that every conceivable interest has to be considered in the value judgment that is required to be made at this stage of the analysis.

In the present case, one of these interests has to be the nature of freedom of speech as well as the extent of the violation and the degree to which the prohibition of flag burning undermines the integral principles of a free and democratic society. The more severe the effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.¹⁵⁰

In exercising this value judgment, France J in *Hopkinson* first referred to the United States Supreme Court decisions in *Johnson* and *Eichman*, and then reviewed a decision of the Court of Final Appeal in Hong Kong.¹⁵¹ However, France J did not follow the Hong Kong decision for good reason.¹⁵²

In reaching her conclusion, the judge considered, on the one hand, that the limitation is a confined one, since other forms of speech relating to the flag are not affected. On the other hand, it is of importance that the “ban in relation to destruction is a blanket one.”¹⁵³

The respondent in *Hopkinson* tried to support the punishment of flag burning by reference to the fact that successive Parliaments have not sought to amend the prohibition. This is a weak argument, however, since there are many conceivable reasons for Parliament’s inactivity. First, there was no need to reassess this provision, since no one in New Zealand had ever burned a flag until *Hopkinson*. Furthermore, there might have been more urgent issues to legislate on. One also has

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Rishworth et al, supra n 73, 185.

¹⁵⁰ *Oakes*, supra n 141, 139-140, as cited in Rishworth et al, supra n 73, 180.

¹⁵¹ *HKSAR v Ng Kung Siu & Anor* (1999) 8 BHRC 244, as cited in *Hopkinson*, supra n 41, [67]-[72]. The Court of Final Appeal upheld an offence provision similar to the one at issue here. The Court found that in the circumstances, where Hong Kong has a new constitutional order, it was necessary to protect the societal interests by means of criminal sanction. In reaching that conclusion the Court analysed the concept of public order, which is an exception to free speech, and thereby stated that “the relevant concept is wider than the common law notion of law and order.”

¹⁵² First, New Zealand does not have a new constitutional order but is rather mature and stable. Second, the concept of “public order” in the way the Hong Kong Court sees it, is untenable, since the concept would be “imprecise and elusive” and therefore too vague to justify a limit on such an important right as free speech.

¹⁵³ *Hopkinson*, supra n 41, [74]-[75].

to bear in mind that Parliament represents the majority and it might be the majority's view that flag burning should be prohibited. This does not mean, however, that such a prohibition is consistent with freedom of speech, which has been granted to protect the minority against the majority. Finally, it might be possible that Parliament avoided this issue for political reasons.

France J mentioned that "New Zealand has reached a level of maturity in which staunch criticism is regarded as acceptable."¹⁵⁴ Moreover, she gives weight to the fact that "even in the United States where the flag is such a dominant symbol," the Supreme Court decided that "its protection did not warrant the interference of the criminal law."¹⁵⁵ Ultimately, the proportionality test is not met in the case of flag burning. While, France J drew this conclusion only with regard to the particular manner in which Hopkinson burned the flag,¹⁵⁶ this is true of flag burning in general whenever freedom of expression is involved.

Although New Zealand's political system is monarchical, organised around a separate and divisible Crown,¹⁵⁷ the Court of Appeal has observed that the underlying principle is that of democracy.¹⁵⁸ Thus freedom of speech has the same essential role in New Zealand as it has in every democracy and therefore is unquestionably one of the most important rights in the NZBORA.¹⁵⁹ Accordingly, the fact that s 11(1)(b) FENPA deprives the individual only of one medium to communicate critical thoughts – the flag – cannot count for too much. Emphasis has to be put on the harmful effect this has on democracy itself. If government starts to cut off "small" freedoms here and others there, there may be none left for democracy to work properly. One has to bear in mind that it is *political* speech we are dealing with. This is at the core of freedom of speech and thus has to be subjected to the highest scrutiny. Therefore, prohibition of flag burning as such can never be justified in a free and democratic society.

IV BILL OF RIGHTS INCONSISTENCY OF FLAG PROTECTION ACTS

C United States

1 Consequence of inconsistency

If the United States Supreme Court declares a statute law facially unconstitutional, the law is invalid from that moment on and no further statute is necessary. It simply

¹⁵⁴ Ibid.

¹⁵⁵ Ibid [76].

¹⁵⁶ Ibid [77].

¹⁵⁷ Philip A Joseph "Constitutional and Administrative Law in New Zealand" (2nd ed, Brookers, Wellington, 2001) 11-12.

¹⁵⁸ *Lange v Atkinson* [1998] 3 NZLR 424, 463.

¹⁵⁹ Rishworth et al, *supra* n 73, 308.

has no force and effect. Of course, Congress can try and re-write the law to deal with the constitutional problems pointed out by the Supreme Court. If they do that, and the law passes again in a new form, the process of constitutional challenge can again continue. In other words, no matter how hard Congress tries, there are some laws that just may never be constitutional.

2 *Can legislation prohibiting flag burning be consistent with the First Amendment?*

Since the Court in *Johnson* as well as in *Eichman* only held that the specific flag desecration statute before it was an unconstitutional means of regulating expressive conduct, there remains the question of whether it is possible to draft constitutional legislation prohibiting flag burning. In examining this issue, the focus has to be on the governmental interest and if there is one conceivable that is unrelated to “suppression of free expression”.¹⁶⁰ If so, it has to be measured against the *O’Brien* test.

Consider the following hypothetical provision: “No person may knowingly impair the physical integrity of the American flag.” This clause does not refer to “desecration” or turn on whether the conduct “will seriously offend” others. Indeed, it applies regardless of whether the burning of the flag occurs in public or in private, regardless of whether it communicates ideas or is undertaken for other purposes, and irrespective of the particular message the burner may seek to convey. It is superficially content-neutral. But this cannot obscure the fact that it is nevertheless content-based. It is a social reality that diverse physical treatment will carry diverse meaning. And since the hypothetical provision does not prohibit flag waving, it is not content-neutral upon closer examination. Any Act which distinguishes among various physical uses of the flag, favouring a flag waver over a flag burner, violates *Johnson’s* ruling that the government cannot require “designated symbols to be used to communicate only a limited set of messages.”¹⁶¹ Moreover, it is apparent that the sole purpose of such a statute would be to circumvent “strict scrutiny”, since the state has no comprehensible interest in preserving the physical integrity of a privately owned flag. As a mass-produced article, the tangible cloth is neither unique nor is it expensive. Hence, it is rather plain that the real interest behind the neutral language lies in preserving the symbolic value of the flag. But such a circumvention would be an impermissible legislative motivation and therefore unconstitutional.¹⁶²

One might suggest, then, that the only theoretically viewpoint-neutral manner in which a statute could prevent flag burning would be by prohibiting all uses of the flag. But even this would not be unrelated to expression, as its purpose would be to remove from the realm of open debate a certain category of speech. That is,

¹⁶⁰ Warren CJ in *O’Brien*, supra n 56, 381.

¹⁶¹ Herbert, supra n 103, 613.

¹⁶² Stone, supra n 70, 118.

messages in favour of or against what the flag represents.¹⁶³ Therefore, it seems that the idea of content neutrality is ultimately meaningless, at least in terms of drafting Flag Protection Acts.

3 *The idea of a constitutional amendment*

A constitutional amendment is the only way to ensure punishment for those who burn the American flag. But such an amendment is highly undesirable and would weaken the Constitution rather than strengthen it by carving out an exception to the “bedrock principle” that government should not “prohibit the expression of an ideal simply because society finds the idea itself offensive.”¹⁶⁴ The Constitution is the fundamental charter of government and it is placed above all other law and out of reach of the legislature for good reason. It should not be tampered with just to accommodate matters of only secondary importance. Processes of constitutional amendment should not be invoked to override decisions of the Supreme Court just because it offends a substantial majority. Such a practice would trivialize and denigrate the Constitution.¹⁶⁵ It would have an unhealthy effect on respect for free speech and respect for the Supreme Court, and it would set a dangerous precedent.¹⁶⁶

D *New Zealand*

1 *Consequence of inconsistency*

Unlike the situation in the United States, legislation must be enforced according to its proper meaning, notwithstanding any inconsistency with the Bill of Rights. Section 6 NZBORA provides that “[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.” However, if this is not possible, and the legislation is not a reasonable limit under s 5 NZBORA, the Court may declare this to be so, even though it is bound to give effect to the limitation envisaged by the legislation, because of s 4 NZBORA.¹⁶⁷ Given the fact that the Court, despite the inconsistency, must enforce a statutory provision, the declaration of inconsistency seems to be of no use at all. But it is indeed not senseless. The value of such a judicial indication might become apparent should the matter come to be

¹⁶³ Herbert, *supra* n 106, 613.

¹⁶⁴ Brennan J in *Johnson*, *supra* n 19, 414.

¹⁶⁵ Stone, *supra* n 70, 124.

¹⁶⁶ Greenawalt, *supra* n 59, 947.

¹⁶⁷ Bill of Rights Act 1990 (NZ), s 4.

examined by the Human Rights Committee. Moreover, it may be of assistance to Parliament if the subject arises in that forum.¹⁶⁸

2 *Can legislation prohibiting flag burning be consistent with the Bill of Rights?*

(a) *Can s 11(1)(b) FENPA be read consistently with the Bill of Rights?*

(i) *The Court's decision in Hopkinson*

Since s 11(1)(b) FENPA prohibits conduct regarding the flag only when it is undertaken “with the intention of dishonouring it”. the vital question is whether or not the provision is capable of a narrower definition so that the act of flag burning does not fall within this meaning.¹⁶⁹ In answering this question, France J held – without detailed reasoning – that it is “the better view... that the statute does allow of the narrower meaning of ‘vilify’.”¹⁷⁰ She continued by saying that Hopkinson’s conduct would have required some additional action beyond a symbolic burning of a flag to fall within this narrower definition. Therefore, according to France J, the statute can be read consistently with the Bill of Rights.

Although s 6 NZBORA requires a court to interpret a statute in a way that is consistent with the Bill of Rights “wherever an enactment can be given”¹⁷¹ such a meaning, it does not provide any guidance as to the circumstances in which such an interpretation is possible. Lord Nicholls of Birkenhead addressed this issue regarding s 3 of the Human Rights Act 1998 (UK) – the English equivalent to s 6 NZBORA – in *Ghaidan*,¹⁷² stating that “[i]t is now generally accepted that the application of s 3 does not depend upon the presence of ambiguity in the legislation being interpreted.”¹⁷³ According to him, “the interpretative obligation... is of an unusual and far-reaching character [and] may require a court to depart from the unambiguous meaning the legislation would otherwise bear.”¹⁷⁴ Consistent with this, France J interpreted s 11 FENPA in a narrower sense despite the fact that the language of the provision is not ambiguous since it clearly requires the intention of “dishonouring”.

¹⁶⁸ *Moonen (No1)*, supra n 74, [20].

¹⁶⁹ Earlier in his judgment France J affirmed the District Court Judge’s inference that Hopkinson burned the flag with the intention of dishonouring it, giving dishonour its natural meaning, that is – according to the definition in the Concise Oxford Dictionary – “a state of shame or disgrace; discredit”; “to treat without honour or respect”. See *Hopkinson*, supra n 41, [35]-[40].

¹⁷⁰ *Ibid* [81].

¹⁷¹ Bill of Rights Act 1990 (NZ), s 6.

¹⁷² *Ghaidan v Godin-Mendoza* (UKHL 2004) [2004] 3 All ER 411 (*Ghaidan*).

¹⁷³ *Ibid* [29].

¹⁷⁴ *Ibid* [39].

(ii) *Can s 11(1)(b) FENPA really be read consistently with the Bill of Rights?*

France J explicitly declined to suggest what other conduct may come within this narrower interpretation of “dishonour”, as this “is a matter for a different case”.¹⁷⁵ Thus, we do not know what kind of actions she had in mind as she stated that “additional action” would be required to bring the symbolic burning of a flag within the narrower definition of “dishonour”. It is possible that she meant such conduct as urinating on the ashes of the flag or knowingly blowing one’s nose on it – as Hopkinson proposed in his submission.¹⁷⁶ But for the purpose of determining whether the narrower meaning of “dishonour” is consistent with the Bill of Rights, it is of secondary importance to decide which particular conduct can be regarded as vilifying and which not. The crucial question is whether punishing vilifying conduct in relation to the flag would be consistent with freedom of expression. That is, would it put a “reasonable” limit on free speech in this case?

At this stage there is room for different views. One may argue that the application of s 11(1)(b) FENPA to vilifying conduct would actually not amount to prohibiting the symbolic act of flag burning itself but rather the additional act of urinating or nose-blowing, and hence not interfere with freedom of speech. However, this argument cannot stand against the backdrop of *Johnson, Eichman* and *Hopkinson*. The vilifying act of urinating upon the ashes of the flag is inseparably bound up with the act of burning the flag and thus constitutes an aspect of the thoughts communicated by the burning itself. It adds emphasis to the emotion of the protester and shows a stronger disagreement with the political issue in question. Harlan J of the United States Supreme Court in *Cohen*¹⁷⁷ acknowledged that expression matters not only because of the message it conveys but also – and sometimes even more – because of the emotion that underlies it. Although this conduct might be far more offensive than flag burning alone, it still does not harm anyone. It solely conveys a strongly disparaging opinion. As the High Court has asserted, freedom of expression guarantees the right “to express ... thoughts, opinions and beliefs however unpopular, distasteful or contrary to the general opinion or to the particular opinion of others”.¹⁷⁸

Even if one tries to read “dishonour” as narrowly as imaginable, it cannot obscure the fact that the state’s real desire is still as ever related to the suppression of free expression. Therefore, all arguments made in support of freedom of speech earlier in this text hold for these potential cases as well.¹⁷⁹

¹⁷⁵ Ibid.

¹⁷⁶ Ibid [23].

¹⁷⁷ *Cohen v California* 403 US 15, 26 (USSC 1971) (Blackmun, Black JJ and Burger CJ dissenting; White J joined in part) (*Cohen*).

¹⁷⁸ *Solicitor-General v Radio NZ Ltd* [1994] 1 NZLR 48, 59.

¹⁷⁹ See text at IIIB1(c) & IIIB2(b) *supra*.

One may say that there is no need to express ideas in such a vilifying way and that freedom of speech has been sufficiently observed by allowing the act of burning the flag. However, at a time when we are confronted with, and desensitised to crime, terrorism and all sorts of catastrophes every day, drastic methods are not necessarily inappropriate to draw attention. It is well settled that freedom of expression does not only encompass the right to express particular thoughts but also to do so effectively. Surely, New Zealand is mature enough to tolerate such kinds of criticism? As long as there is neither harm nor seditious protest, flag burning cannot be prohibited without infringing freedom of speech.

However, this is not to say that every conceivable form of conduct is permissible as long as it is connected with communicating ideas via the national flag. Indeed, to engage publicly in obscene actions, for instance, is prohibited for obvious reasons. Certainly, such conduct cannot become permissible just because one connects it with the use of the national flag and calls for freedom of speech.¹⁸⁰ But this is another issue and a question for another consideration with different rights and interests involved.

In interpreting s 11(1)(b) FENPA one could consider ignoring the word “dishonour” in the provision, but this would be neither helpful nor appropriate. Courts must interpret and apply the statute, but are not allowed to rewrite it. Therefore, the issue is: how far can statutory words be pushed towards “consistency” with the Bill of Rights under s 6 NZBORA without contravening s 4 NZBORA by denying them their apparently intended effect?¹⁸¹ Courts are not encouraged by s 6 NZBORA to adopt unintentional meanings. Avoiding a plainly intended meaning is not interpretation but amendment.¹⁸²

The District Court judge in *Hopkinson* was correct when he stated that “if the legislature had intended there should be deemed to be no intention to dishonour...where the act of flag burning constituted symbolic political speech, then it would have said so in plain terms.”¹⁸³ Hence, to disregard the requirement of the “intention of dishonouring” would amount to amending the provision, which would be to fall foul of s 4 NZBORA.

But even if such an interpretation were possible, this would not alter the fact that the provision would still be inconsistent with the Bill of Rights. Like the Flag Protection Act 1989 (USA), the provision would be facially neutral but would nevertheless prohibit conduct because of the message it conveys. The state’s interest in punishing such conduct is still the same as analysed in *Hopkinson*,¹⁸⁴ and thus

¹⁸⁰ Such conduct can still be punished under general provisions.

¹⁸¹ Rishworth et al, *supra* n 73, 118, 121.

¹⁸² *Ibid* 133.

¹⁸³ Cited in *Hopkinson*, *supra* n 41, [78].

¹⁸⁴ See text at IIIB2(b)(i) & IIIB2(b)(ii) *supra*.

would inevitably lead to the same result in terms of the proportionality test.¹⁸⁵ The very purpose of the provision is still to compel respect for a political symbol, which cannot be justified in a free and democratic society, since freedom of expression encompasses the freedom not to communicate a particular message at all.

Therefore, it is concluded that s 11(1)(b) FENPA cannot be read consistently with freedom of expression.¹⁸⁶ The way France J interpreted “dishonour” in the narrower sense of “vilify” was useful in the particular case of *Hopkinson* (since his conduct was not regarded as being vilifying) but nevertheless inconsistent with the NZBORA, though “less inconsistent” than the broader natural meaning of “dishonour”.

(b) *Should s 11(1)(b) FENPA be retained?*

Given the conclusion above, it is plain that there is no area left in which s 11(1)(b) FENPA could be applied in a manner that is consistent with the Bill of Rights. Depending on the particular case, courts will either come to the result that the particular conduct does not fall within the scope of s 11(1)(b) FENPA, and therefore not apply the provision at all. Or they will have to apply it, interpreting “dishonour” in the narrower sense of “vilify”, since this constitutes the smallest limitation on freedom of expression and thus is required by the operation of s 5 and s 6 NZBORA.¹⁸⁷ Consequently, this would infringe the right of potential protesters to freedom of expression. Against this backdrop, s 11(1)(b) FENPA seems senseless and worth a declaration of inconsistency.

To strengthen the case in favour of abolishing s 11(1)(b) FENPA, one may consider that conduct which needs to be prohibited in public (such as obscene conduct) can be governed under the Summary Offence Act 1981, s 4(1)(a). This provides, that “every person is liable...who, in or within view of any public place, behaves in an offensive or disorderly manner.” However, one has to bear in mind that this provision must also be applied in a manner that is consistent with the Bill of Rights as well.

Nevertheless, the Court in *Hopkinson* did not make a declaration of inconsistency for the plain reason that it had not been expressly addressed in the “Notice of Appeal” and thus was not necessary.¹⁸⁸ Unless Parliament revokes this provision, the Court will sooner or later have to consider this issue seriously.

¹⁸⁵ See text at IIIB2(b)(iii) supra.

¹⁸⁶ This does not mean that the Court in *Hopkinson* was erroneous, as it was possible to give “dishonour” the meaning of “vilify” and thereby applying s 11(1)(b) FENPA consistently with the Bill of Rights in the particular case it had to decide.

¹⁸⁷ *Moonen (No 1)*, supra n 74, [17].

¹⁸⁸ *Hopkinson*, supra n 41, [83].

3 *The idea of an amendment*

Since New Zealand has no formal written constitution, the crucial question in the United States of whether a constitutional amendment should be made is not an issue here. Although the NZBORA may be amended or repealed by a simple majority in the House of Representatives,¹⁸⁹ there is no need to do so. Due to s 4 NZBORA, the state can punish flag burning without such an amendment, although it should not. But given the fact that efforts to amend the Constitution in the United States fell only a few votes short of the required two-thirds majority, one might assume that the Court's decision in *Hopkinson* would lead to a successful amendment of the Bill of Rights. Interestingly, there has never been an attempt to amend the NZBORA in this regard. The *Hopkinson* decision triggered not nearly as much public indignation as the decisions in *Johnson* and *Eichman* did in the United States.

This might be due to the fact that New Zealand does not have as long a history as the United States. They are not as patriotic as Americans and do not have such strong feelings towards their flag. The New Zealand flag plays rather a minor role for most New Zealanders. It identifies the nation-state, but there is no "Flag Day", no pledge of allegiance to the flag, and little significant private display of the flag. In addition, New Zealanders have high expectations of freedom of expression and any attempt to curb that freedom through legislation would be strongly resisted.¹⁹⁰

IV OTHER PROTESTS REGARDING THE FLAG

One can imagine innumerable ways to show protest by using the national flag. To name only a few, one can destroy the flag by ripping or defacing it with faecal matter or dirt. One can also spit on it or hang it upside down. However, considering what has been stated above, it is clear that this conduct can neither be constitutionally prohibited in the United States nor in New Zealand. In all these cases, the person undertaking the action engages in communication and therefore receives the protection of freedom of expression. The only conduct that is worth being discussed more closely at this point is obscene conduct such as the extreme case of masturbation upon the national flag to show political protest.

A *United States*

The crucial question is whether this conduct is within the scope of freedom of expression, since obscenity is excluded from the First Amendment protection in the United States. First of all, "obscenity" has to be defined, which is one of the most

¹⁸⁹ Jim Tully, "New Zealand" in Robert Martin *Speaking Freely* (Irwin Law, Toronto, 1999) 421, 426.

¹⁹⁰ *Ibid* 427.

difficult issues. Courts cannot seem to come up with a workable definition.¹⁹¹ According to the current test applied, a book, magazine or film will be considered obscene if:¹⁹²

- (1) the “average person, applying contemporary community standards,” would find that the work as a whole, “appeals to the prurient interest” in sex;
- (2) the work depicts “in a patently offensive way” sexual conduct specifically defined by the applicable state law; and
- (3) the work, taken as a whole, “lacks serious literary, artistic, political, or scientific “value”.

Besides the vagueness and subjectivity, this definition faces several other difficulties.¹⁹³ Shortly after the establishment of this test, the Supreme Court denied obscenity, where “there was no exhibition of the actors’ genitals” in a particular film.¹⁹⁴

Although cases such as this were concerned with literature or films, the standards applied must all the more apply to physical conduct in public. Against this backdrop, masturbating on a national flag in public must be considered obscene, particularly because the protester shows his genitals and the act itself cannot be regarded as of any serious political value. Thus, such a person cannot rely on First Amendment protection. This leads to the result that the state can prohibit such conduct on the basis of its interest to protect the flag as a symbol of nationhood and unity. Since the protester cannot provide any legitimate interest in supporting his conduct, the state’s interest would clearly prevail in a consideration of the interests.

B New Zealand

Despite the United States Supreme Court’s decision that “obscenity” is not within the protection of the First Amendment, the depiction of sexual activity enjoys substantial protection under the right to freedom of speech in New Zealand. As mentioned before, the right is “as wide as human thought and imagination”,¹⁹⁵ and thus includes masturbating on the national flag in order to protest against political issues. Hence, the question is whether a prohibition can be justified in terms of s 5 NZBORA on the basis of preserving the flag as a symbol of national significance. This is unlikely.

¹⁹¹ William Burnham *Introduction to the Law and Legal System of the United States* (2ed ed, West Group, St Paul 1999) ch 4, 346.

¹⁹² *Miller v California* 413 US 15, 24 (USSC 1973) (Douglas, Brennan, Stewart and Marshall JJ dissenting) (*Miller*).

¹⁹³ Burnham, *supra* n 191, 347.

¹⁹⁴ See *Jenkins v Georgia* 418 US 153 (USSC 1974) (*Jenkins*).

¹⁹⁵ *Moonen No 1*, *supra* n 74, 15.

Certainly, the exposition of genitals in public can be prohibited in New Zealand as well, but on the basis that it causes harm or is offensive to others. One has to be aware that the state's interest in prohibiting flag burning is different from its interest in banning pornography and indecency.

The vital issue is that the “rational connection” between the prohibition of flag desecration and the state's interest in preserving the flag as a symbol of national significance is not met in this case either, for broadly the same arguments made in the analysis of the *Hopkinson* decision.¹⁹⁶ The conduct of one “unknown man” – even if it is masturbation on the national flag – will not endanger the function of the flag to serve as symbol of national significance because it will not change the nation's attitude towards the flag. Few will take seriously a person who feels compelled to express his thoughts in such a disgusting and sordid manner. Thus, the prohibition of such conduct cannot be justified on the basis of the state's interest in preserving the flag. In addition, there is no need to insist on prohibiting it on this ground, since it can be banned far more suitably on account of other statutes where other state interests are involved. However, since the interest behind s 11 FENPA, as analysed in *Hopkinson*,¹⁹⁷ is preserving the flag as a symbol of national significance, the different state interest in banning pornography and indecency cannot defend the existence of s 11 FENPA.

C A brief comment

Although both jurisdictions agree in principle that the state cannot preserve the national flag at the expense of the individual's right to freedom of expression, obscene conduct in relation to the flag in order to communicate would most probably be banned in the United States, but not in New Zealand.¹⁹⁸ This is due to the fact that “obscenity” is excluded from First Amendment protection and hence the protester has no valid interest countering the state's legitimate and important interest in preserving the flag as a symbol of nationhood. The reason for this exclusion is not so much that it presents a danger to society, but because historically the Framers of the First Amendment¹⁹⁹ did not consider it for protection.²⁰⁰ The fact that the First Amendment was passed in 1791 gave rise to analysis of what the Framers originally meant to protect. By contrast, the NZBORA came into force only 14 years ago and there is no reason to question whether “obscenity” was meant to be protected or not. If the legislature had meant to exclude it from the scope of

¹⁹⁶ See text at IIIB2(b)(iii) supra.

¹⁹⁷ See text at IIIB2(b)(i) & IIIB2(b)(ii) supra.

¹⁹⁸ This means that in New Zealand it cannot be banned on the basis of flag protection without infringing the right to freedom of speech. Certainly, it can be banned on other grounds, like protecting other people from harm. Nevertheless, it will be banned on the basis of s 11(1)(b) FENPA as long as this provision is in force.

¹⁹⁹ The First Amendment was established in 1791.

²⁰⁰ *Roth v United States* (USSC 1957) 354 US 476, 484-485.

freedom of speech, then it would have said so in plain terms. Moreover, the mere existence of s 5 NZBORA supports this view.

Therefore, the different outcomes of cases where obscene conduct is involved are solely based on historical interpretation and not on different attitudes towards the flag and the importance of the right to freedom of expression. However, these differences are theoretical in nature and do not lead to different results in practice, since in either way sex acts in public can be punished for what they are.

V CONCLUSION

There are several differences between the United States and New Zealand concerning their respective political systems as well as their historical backgrounds. Both jurisdictions protect the right to freedom of expression against the state's interest in preserving the flag as a symbol of nationhood and unity. In both jurisdictions symbolic conduct such as flag burning is protected under the right to freedom of speech and banning such action would place an unjustified limit on this fundamental right. The only but undesirable way of banning such desecrating conduct in the United States is to amend the Constitution and exclude any conduct regarding the flag from the First Amendment protection. Due to s 4 NZBORA, flag desecrating can be banned in New Zealand, despite the fact that it is inconsistent with the Bill of Rights. This distinction between the two countries stems from the legal status of freedom of expression. In the United States, freedom of speech is granted by the Constitution; whereas in New Zealand, free speech is "affirmed" in the NZBORA, which has not been enacted as supreme law. Unlike the distinction in the political system, this divergence affects the prohibition of flag desecration in practice. Though the punishment of flag desecration infringes freedom of speech in both jurisdictions, it can nevertheless be enforced in New Zealand. This is due to the fact that NZBORA is an ordinary statute and the Judiciary has not been granted the power to invalidate statutes enacted in contravention to the Bill of Rights.

The United States' concept of democracy is built on the spirit of popular sovereignty, whereas in New Zealand, the state system is that of a constitutional monarchy. The United States Supreme Court's flag decisions are based on the popular sovereignty notion, which grants people the authority to define national symbols. Any attempt to legally punish flag desecration would contradict the American concept of democracy. Since New Zealand is monarchical and organized around a separate and indivisible Crown, punishing flag desecration would not contradict its concept of the state. Nevertheless, freedom of speech is and should also be highly protected in New Zealand, due to the fact that the underlying principle of the constitutional monarchy is that of democracy.

With the exception that in the United States obscene conduct in relation to the flag can be banned on account of flag protection, the state cannot prohibit flag desecration without violating the right to freedom of speech in either country.