



Comparative Summary: Flag Desecration Under the Laws of Selected Foreign Nations

Argentina • Australia • Brazil • Canada • Chile
China • Cuba • Denmark • Egypt • France • Germany
Greece • Haiti • India • Iran • Iraq • Israel • Japan
Kuwait • Libya • Mexico • Netherlands • New Zealand
North Korea • Nicaragua • Nigeria • Norway • Philippines
Russian Federation • South Africa • Spain • Sudan
Sweden • Switzerland • Syria • Taiwan
Tanzania • United Kingdom

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UNDER THE LAWS OF SELECTED FOREIGN NATIONS

Executive Summary

This study surveys the laws of thirty-eight nations on offenses involving intentional infliction of damage, disrespect, or misuse of the national flag.

I. Introduction

National flags are often seen as having great symbolic value, and therefore their physical protection has been the subject of legislation in many nations. As Justice John Paul Stevens of the U.S. Supreme Court has said:

[A] country's flag is a symbol of more than "nationhood and national unity."... It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas...¹

The following comparative analysis examines the existence or absence of legislation regulating flag desecration, penalties, and enforcement in the following jurisdictions: Argentina, Australia, Brazil, Canada, Chile, China, Cuba, Denmark, Egypt, France, Germany, Greece, Haiti, India, Iran, Iraq, Israel, Japan, Kuwait, Libya, Mexico, the Netherlands, New Zealand, North Korea, Nicaragua, Nigeria, Norway, Philippines, the Russian Federation, South Africa, Spain, Sudan, Sweden, Switzerland, Syria, Taiwan, Tanzania, and the United Kingdom.²

II. Constitutional Provisions

None of the Constitutions of the thirty-eight surveyed countries has provisions on punishment for flag desecration, as was the case with the *former* Constitution of South Africa, which imposed such penalties.

III. Countries without Laws on National Flag Desecration

Eleven of the thirty-eight nations were found to have no statute specifically banning flag desecration. These were: Australia, Brazil, Canada, Great Britain, Iran, the Netherlands,³ Nigeria⁴ North

¹ Texas v. Johnson, 491 U.S. 397, 437 (1989) (Stevens, J., dissenting).

² Although reports dating from 1999 (Burma, the Czech Republic, Italy, Poland, Thailand, Turkey, and Vietnam) also have been bound with this report and are referenced in the Chart in Appendix A, this comparative analysis is limited to those thirty-eight country reports which were updated in 2004 and 2005.

³ The Netherlands is the only country discussed which has no statute specifically banning flag desecration, and also does not criminalize flag desecration under any other statute. Therefore, no country report on the Netherlands is included following this summary.

⁴ Nigeria punishes the displaying of defaced or tattered flags, rather than the act of flag desecration itself.

Korea, Norway, Tanzania,⁵ and South Africa. In some of these countries, a person who has committed flag desecration can be convicted on other grounds, such as disorderly conduct in Australia and Sweden, crimes against national security in Brazil, and mischief in Canada.

IV. Special Categories

Apart from countries that clearly do or do not have a national flag desecration statute, some countries have other types of legislation dealing with the flag. Brazil does not have a general statute on flag desecration, but it is punished as a crime in the Military Criminal Code, which only applies to military personnel.

In Denmark, article 132 of the Criminal Code refers to the intentional or negligent use only of the insignia or symbol which is reserved to persons and institutions such as the military, Danish or foreign authorities, and international organizations. It does not specifically mention flag desecration. However, because the Danish flag is a symbol of the country and because the word “insignia” can refer to a specific type of flag, article 132 is presumably applicable to an act of Danish flag desecration.

In Argentina, a provision of the Criminal Code banning the desecration of national symbols is included under the title of “Crimes Against the National Security.”

A. Countries Specifically Prohibiting Flag Desecration

In many countries, such as Argentina, Chile, China, Cuba, Egypt, France, Germany, Greece, Haiti, India, Iraq, Israel, Kuwait, Libya, Mexico, New Zealand, Nicaragua, Philippines, the Russian Federation, Spain, Sudan, Switzerland, Syria, and Taiwan, flag desecration constitutes a criminal offense either under the criminal code or under special statutes.

Switzerland prohibits desecration of the national flag only when officially displayed by a Swiss authority. Therefore, the desecration of a privately owned national flag at a public rally would not be brought to court.

The offenses listed in the legislation surveyed are variously described as: tearing, defacing, intentionally insulting, or desecrating the national flag; insulting, destroying, damaging or removing the flag; altering the flag by the placement thereon of any letter, emblem, or representation; physically attacking, removing, or destroying an officially displayed flag; using the flag in a disrespectful manner; offending, degrading, disfiguring, burning, mutilating, or otherwise bringing the national flag into contempt, whether by words or deeds, in any public place; vilifying, soiling, scribbling, injuring, or throwing the flag on the ground; publicly and willfully burning, staining, scrawling on, or trampling upon the flag; displaying a likeness of the flag upon any goods or merchandise; drawing, writing or printing letters, numerals, or images on the national flag; and displaying the national flag with letters, numerals, or images superimposed thereupon.

⁵ Zanzibar, which is one of the components of Tanzania, has recently adopted its own flag, for use on occasions that do not involve participation of sovereign nations. Any show of contempt of this new flag may be punished with a fine or a jail term of five years. The consent of the Director of Public Prosecutions is needed to prosecute this offense.

B. Countries Prohibiting Foreign Flag Desecration in Addition to Prohibiting Desecration of the National Flag

Eight countries provide for protection of *foreign* flags, emblems or national symbols, in addition to prohibiting desecration of their own national flag: Cuba, Denmark, Egypt, Germany, Greece, Kuwait, Sudan, and Switzerland. In Germany and Greece, these crimes are prosecuted only if there is reciprocity and the foreign government demands prosecution. Germany requires also the existence of diplomatic relations with the other country. In Sudan, the destruction or disparagement of the foreign flag is penalized only if such acts are punishable under the laws of the foreign countries. Switzerland prohibits attacks only of those foreign flags and other insignia which have been officially posted by the diplomatic or consular mission of the foreign states.

C. Countries Prohibiting Only *Foreign* Flag Desecration

Of the thirty-eight countries surveyed, only Japan falls into this category.

D. Countries Prohibiting Flag Desecration by the Military

Although the survey of the thirty-eight nations did not address this point, it was noted that several countries have specific provisions in their military legislation on flag desecration by military personnel, for instance Brazil, France, Greece, and Mexico. France and Greece impose as a penalty for flag desecration by the military the loss of military rank, in addition to imprisonment.

V. Penalties

A. Especially Severe Penalties

The most severe criminal sanction is found in a special statute of Haiti, which imposes lifetime forced labor for national flag desecration. This statute dates from 1929, and there is no information available as to its enforcement.

In Nicaragua, if the person who commits the crime of flag desecration is a foreigner, he or she will be expelled from the country after having served the imposed prison sentence and paid the fines.

B. Terms of Imprisonment

The next longest maximum term of imprisonment for desecration of the national flag or any other state's symbol is imposed by the Law on National Security of Chile. If the crime is committed in time of war, imprisonment may be up to twenty years (the lowest in war time is five years). Following Chile in decreased order of long-term prison sentences are Iraq, imposing up to ten years, and both Nicaragua and Chile (in peace time), up to five years. In Germany, penalties increase to up to five years of imprisonment if the perpetrator's intent is to support efforts directed against the existence of the Federal Republic or its constitutional principles.

The shortest minimum prison terms are imposed by Switzerland which can be as low as three days; China, which can be as high as fifteen days of administrative detention; Chile, which can be as low as sixty-one days in peace time; Cuba and Syria, which can be as low as three months; Denmark, which can be as low as four months in a case of a foreign flag desecration; Egypt and France, which can be as high as six months; Mexico which can be as low as six months; and Israel and Taiwan, one year.

The other jurisdictions fall in between the extremes represented by these two groups.

C. Imprisonment Plus Fines

Of the group surveyed, only Nicaragua was found to impose fines always as well as imprisonment.

D. Imprisonment or Fines, or Both.

Some countries, such as Cuba, Egypt, Germany, Switzerland, Taiwan, and, in the case of a *foreign* flag desecration, Denmark, impose *either* imprisonment *or* fines.

Greece imposes only imprisonment for desecration of the flag, but for inappropriate use of the flag it imposes a reduced term in prison and/or a fine, unless a more severe punishment is provided by another law.

Six jurisdictions impose imprisonment *or* fines *or both*. They are: France, India, Israel, Kuwait, Mexico, and Sudan.

E. Imprisonment or Other Forms of Confinement and/or Fines

In Russia, flag desecration is punishable under the Russian Federation Criminal Code by either limitation of freedom for a term of up to two years, or arrest for a term of from three to six months, or by imprisonment for up to a year.

In China, flag desecration is punishable with either imprisonment of not more than three years, criminal detention, public surveillance, or deprivation of political rights.

F. Countries Imposing Only Fines

Some countries impose only fines for flag desecration. Of the thirty-eight nations studied, these are Denmark, New Zealand, and Spain.

G. Large and Small fines (expressed here in US\$ equivalents)

The lowest fines are imposed in Cuba, China, India, and Nicaragua. In Cuba, a fine can be as low as US\$1.00 (but it can be as high as US\$5000). In China, fines can be equivalent to US\$6.00 or less, and they may not exceed US\$24.00. In India, fines may extend to US\$12.00; and in Nicaragua, fines range from a minimum of US\$18.71 to a maximum of US\$93.57.

The highest fines are imposed by Spain, where the maximum fine may be as high as US\$133,200; Switzerland has the next highest fines, with a rate of up to US\$31,500.

The remaining jurisdiction fall in between these two groups.

VI. Enforcement

It was not possible to obtain information readily on enforcement in each of the thirty-eight countries, but where information was available, it has been included.

Germany's criminal provision on flag desecration is enforced only to a limited extent due to the required consideration of the constitutional protection of free artistic expression. In 1990, the same year that the U.S. Supreme Court ruled that the Flag Protection Act of 1989 could not be constitutionally applied to a burning of the flag during a protest rally,⁶ the German Federal Constitutional Court remanded a conviction on flag desecration. The Constitutional Court found that the judgment had not balanced the need to protect the flag with the rights of artistic expression of the perpetrator. On the other hand, the Court also stated that a flag desecration may signify an attack on the free democratic order of Germany as guaranteed by the Constitution.

In Switzerland, flag desecration is viewed as a political offense and as such it is prosecuted only if the Federal Cabinet or the Swiss Justice Ministry approves.

The most recent case found in this multinational survey was decided by the Children's Court in Perth, Australia, on June 9, 2003. The Court dismissed charges against a seventeen-year old who burned an Australian flag to protest Australian participation in the invasion of Iraq. The Attorney-General of the state of Western Australia said that freedom of speech, even that involving such offensive behavior as burning the flag, was what distinguished Australia from such regimes as those of Saddam Hussein or the Taliban.⁷

A different decision was issued by the Supreme Court of the Northern Territory of Australia on October 3, 1997. The Court upheld a conviction involving desecration of a foreign flag on grounds that burning flags in the vicinity of others and setting fire on a public street were acts sufficiently serious to justify the conviction. Chief Justice Martin, who delivered the opinion of the court, stated, "Political protest of this type has a tendency to disturb the peace. Neither the protesters' view as to the righteousness of their case nor as to the appropriateness of their actions can make what is unlawful lawful."⁸

The 1997 Australian Court's opinion may be contrasted with the U.S. Supreme Court's reasoning in *Texas v. Johnson*.⁹ In this case, the Court did not accept Texas's claims that its interest in preventing breaches of the peace justified the defendant's conviction for flag desecration; the Court argued that no actual breach of peace occurred at the time Johnson burned the flag. Furthermore, the Court went on to say that it could not accept the State's argument that every flag burning necessarily possesses "the potential for a breach of peace."¹⁰

In Russia, cases of flag desecration are very rare today, and it appears that none has been brought to the court. In 2003, a State *Duma* staffer forcefully removed the flag of the Russian Federation and tore it down before he was apprehended by police. In 1996, a case of the desecration of the old Soviet flag, which has the status of a national historical symbol, occurred. Even though the Russian Federation Prosecutor General initiated criminal proceedings regarding these two cases at the State *Duma's* request, a court trial was not held.

⁶ U.S. v. Eichman, 496 U.S. 310 (1990).

⁷ *Boy Not Guilty of Burning Flag*, SYDNEY MORNING HERALD, June 10, 2003, available at <http://www.smh.com.au/>.

⁸ *Watson v. Trenerry & Ors*, JA 22 & 23 of 1997 (SCNT), available at <http://www.austli.edu.au/do/disp>.

⁹ *Texas v. Johnson*, 491 U.S. 397, 437 (1989).

¹⁰ *Id.* at 407-409.

Research on Israeli law uncovered only one court decision involving flag desecration prohibited by the Flag and Emblem Act. The decision of the Israeli Supreme Court on June 12, 1988, rejected the criminal appeal. However, the court did not discuss the flag issue, but reached its decision on the severity of another offense committed by the defendant, namely arson.

On February 7, 1990, the Supreme Court of Spain upheld a conviction of three persons who removed the national flag during a local festivity where all political parties had agreed on the exhibition of the flag in an official place. In this case, the court decided that the behavior in question was something more than a violation of the rules on the use of the flag, since it amounted to a unilateral and arbitrary action of taking down the flag put there by the competent authorities.

No appellate decisions relating to flag desecration cases in Argentina and Mexico were found in the research conducted in and out of the Law Library. Information was not readily available with respect to cases at the trial level.

In sum, among the above-mentioned court decisions on flag desecration, only in the German decision and in one of the two Australian decisions did the Court weigh the conflicting values of the Constitutional right of free expression with the need for protection of the State.

VII. Historic Development

This study included also the flag desecration laws of Nazi Germany, the former Soviet Union, and South Africa during the apartheid era.

A. Nazi Germany

Under the German laws during the National Socialist era, the desecration of national symbols and the desecration of National Socialist Party symbols were crimes that were punished by a fine or imprisonment not to exceed six months. A criminal provision on the display of the national flag was enacted in 1935. Section 4 of the Act Protecting German Blood and Honor forbade Jews, under penalty of imprisonment, to hoist the national flag or to display the national colors. These laws were repealed by the Allied Powers after World War II.

B. Soviet Union

Under Soviet laws, flag desecration was punished with limitation of freedom for a term of up to two years, as it is in the current Russian legislation. However, unlike the current Russian legislation, the Soviet law allowed substitution of a monetary fine for the imprisonment.

C. South Africa: Apartheid Era

The South African Constitution in force during the apartheid era banned the desecration of the national flag. Such a criminal offense was punished by imprisonment for a period not exceeding five years or by fines.