SUPREME COURT’S FORCED PATRIOTISM VERSUS CONSTITUTION’S FREEDOM OF EXPRESSION

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ABSTRACT

This paper is an attempt to study the irregularities in the Supreme Court’s National Anthem Order in comparison to the freedom of expression under Constitution. This study is substantiated by relevant case laws and constitutional provisions apart from our personal views and suggestions.

Patriotism is an internal emotion or rather a sentiment and an individual has all right to express it in his/her own way. Patriotism, in a sense, is love for his/her own country. It is a common saying and above all an established truth that ‘Love cannot be won forcefully, it has to be earned’. Similarly, Patriotism is something that has to be earned and not forced. In India’s case, there is no doubt that India has earned many Patriots through its glorious past and cultural heritage. In a country like India, a Supreme Court order mandating its people to rise up and sing national anthem at cinema halls is not only an interference into an individual’s freedom of expression guaranteed by the Constitution but also an act of judicial overreach.

It is true that the freedom of speech and expression under Art. 19 (1) (a) is not an absolute right. It is subject to the restrictions under Art. 19(2). But the freedom under Art. 19 (1) (a) can be curtailed only by an existing law or law made by the State. And a Supreme Court interference into this matter is nothing but judicial overreach. The Apex Court justifies its interference by resorting to the German concept of ‘Constitutional Patriotism’. The concept of Constitutional Patriotism aims at making the constitutional principles binding for all irrespective of their religion, culture etc.

The main objective of this study is to point out the judicial overreach of the Indian Courts in dealing with matters where the individuals have the freedom to exercise the freedom of speech and expression, especially in the case of National Anthem Order.

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INTRODUCTION

The Supreme Court of India, recently, gave an order that the national anthem will have to be played before feature films at cinema halls all over the country, and that those present in these halls are obliged to stand up to show respect.

This effectively reverses an earlier judgment of the Supreme Court, which ruled that not standing up for the anthem does not amount to disrespecting it, going by the Prevention of Insults to National Honour Act, 1971. The order has also triggered a debate among the intelligentsia of the country. Many have argued that people should not be forced to stand for the National Anthem in cinema halls.

“Sitting or standing” at the time of national anthem been played in cinema hall has become debatable subject in India. A video of people who were being allegedly asked to leave cinema hall in Mumbai when they refused to stand for national anthem got viral before certain days, however this issue is not limited only to India. The attitude of Colin Kaepernick who refused to stand prior to the start of play is also not unknown to the world. At that time he told to NFL media in August 2016 that he is not going to stand up to show pride in a flag for a country that oppresses black people. These two incidents are not completely similar first incident shows the negligence of people or lack of awareness in complying with the sacred duty to stand for national anthem and in second incident it shows the dissatisfaction about the country.

Supreme Court of India has given directions to play national anthem before playing feature film in cinema halls and citizen shall be mandatory duty bound to stand for it So, the question arises, Whether this decision/direction violate the right to freedom of speech and expression which has been embodied under Article 19 (1)(a) and the reason behind these directions given by Supreme Court.

CONSTITUTIONAL ISSUE

The main concern is that by taking the patriotism test into the cinema hall, by force feeding a notion of nationalism to people seeking entertainment, the court has not just offered an instance

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3 Prevention of Insults to National Honour Act, 1971. The Act, under Section 3 provides that, “Whoever intentionally prevents the singing of the Indian National Anthem or causes disturbances to any assembly engaged in such singing shall be punished with imprisonment for a term, which may extend to three years, or with fine, or with both.”

4 Article 19(1)(a) in The Constitution Of India 1949 (a) to freedom of speech and expression;
of striking judicial overreach. It has also let down all those who have come to look up to it as a custodian of constitutional freedoms. That the court is invoking the Constitution while moving against its spirit is even more disquieting.

India’s Constitution speaks of respect to the national flag and anthem as a fundamental duty in Part IV A — a non-justiciable part of the document. Article 51(A) says that “it shall be the duty of every citizen of India — (a) to abide by the Constitution and respect the ideals of the national flag and the national anthem”. The message of the founding fathers was clear: Respect to the nation and its symbols would not be enforced by state diktat or extracted through legal compulsion. These Duties are, perhaps not coincidentally, currently in vogue even outside the judiciary.

In *Shyam Narayan Chouksey v. Union of India* that “all the cinema halls in India shall play the national anthem before the feature film starts and all present in the hall are obliged to stand up to show respect to the national anthem as a part of their “sacred obligation”. A bench of Justice Dipak Misra and Amitava Roy added that movie screen shall have the image of the national flag when the anthem is being played and the doors of the halls will remain shut during the anthem so that no disturbance is caused. These directions were actually issued, for love and respect for the motherland is respected when one shows respect to national anthem as well as to national flag. This would instil the feeling of oneness and committed patriotism and nationalism; Section 3 of the prevention of insult to national honour Act, 1971 says “Whoever intentionally prevents the singing of the national anthem or causes disturbances to any assembly engaged in such singing shall be punished with imprisonment for a term, which may extend to three years, or with fine, or with both.”; however the directions are silent on “if people don’t stand”

Some people feel its violation of their right to freedom of speech and expression. So, the objective of this article is to discuss the constitutionality of this decision.

**CONSTITUTIONALITY OF THE DIRECTION BY SUPREME COURT**

Constitution of India is the longest constitution of the world. It includes Fundamental rights (Part III), Directive Principles (Part IV), Fundamental Duties (Part IV-A). Fundamental rights are enforceable by the court of law. Directive principles are nothing but the directions taken by

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5 AIR 2003 MP 233
the state while formulating policies or plan for the development of the state and thereby nation. Even though Directive Principles are not enforceable by the court of law they are equally significant for the development of citizens.

The fundamental rights described under Article 19 are inalienable and enforceable in the court of law. Article 19 (1)(a) guarantees all citizens the right to freedom of speech and expression; however Article 19(2) imposes reasonable restrictions in interest of sovereignty and integrity of nation, friendly relations of foreign state, public order, decency or morality, contempt of court and defamation on right to freedom of speech and expression. Article 19(3) gives power to state to make laws to impose reasonable restriction on the freedoms conferred by Article 19. In this scenario if the Supreme Court has given directions regarding playing the national anthem before starting the film and made mandatory on people who has come to watch movie, should stand in respect. It is fully constitutional and everybody should follow it.

It is our foremost important duty to respect motherland, national flag, and constitution of India. Fundamental duties were introduced by the 42nd Amendment Act, 1976. Fundamental duties have been incorporated under part IV-A of the constitution of India which consists only one Article, Article 51-A. This Article has casted total eleven duties on the citizens of India.

Some of the duties which spread nationality among the people are as follows:

Article 51- Fundamental Duties – It shall be the duty of every citizen of India-
(a) To abide by constitution and respect its ideal and institutions, the national flag and national anthem.
(b) To cherish and follow the noble ideals which inspired our national struggle for freedom.
(c) To uphold and protect the sovereignty, unity and integrity of India

Rights and duties are intended to serve as a constant reminder to every citizen that while the constitution specially conferred on them fundamental rights, it also requires citizens to observe certain basic norms of democratic conduct and democratic behaviour. Even the Universal Declaration of Human Rights recognizes this duty.⁶

⁶ Article 29(1) of the Universal Declaration of Human Rights reads, “Everyone has duties to the community in which alone the free and full development of personality is possible”.
Since the time immemorial the emphasis in Indian Society in accordance with the dictates of the ancient scriptures has been on Individual’s “Kartavya”. This is performance of one’s duties towards society, the country and also towards one’s parents. Bhagavat Gita under Chapter “Karma Yoga” has given importance of performing duties. Prophet Hazrat Mohammad has said, “Love your country” it is a part of your faith. Even George Benard Shaw has said, “Patriotism is your conviction, that this country is superior to all others because you were born in it.

JUDICIAL APPROACH

The view of Hon’ble Supreme Court is significant on the issue of national anthem which was shown thirty years ago. Hon’ble Supreme Court has said in 1986, “No provision of law obliging anyone to sing the national anthem our tradition teaches us tolerance, our constitution practices tolerance. Let us not dilute it”

In August 1986, Hon’ble Supreme Court bench of Justice O.Chinnappa Reddy and M.M. Dutt had in Bijoe Emmanuel & Others v. State of Kerala & Ors, granted protection to three children of Jehovas witness Sect, who didn’t join in singing of national anthem but stand respectfully at their school. The court held that forcing the children to sing national anthem is violation of their fundamental right to religion.

In Shyam Narayan Chouksey case a Public Interest Litigation was filed by Bhopal based activist on 24th July 2003. Mr. Shyam Narayan Chouksey had gone to watch the film “Kabhi Khushi Kabhi Gham” in the year 2003. When the national anthem was played in the movie, he stood up respectfully but he was the only one person, who stood up. Those behind him said he was obstructing their view, instead of standing up. They asked him to sit down. Hegot offended by this experience as also the “commercial use of the national anthem” in the film. Mr. Chouksey filed a PIL in Madhya Pradesh High Court in Jabalpur. A division bench agreed with his contention and banned screening of the film across India. This order was later stayed. Supreme Court (Coram of Hon’ble Justice Dipak Misra and Amitava Roy) gave the following directions to be scrupulously followed:

7 1987 AIR 748, 1986 SCR (3) 518
8 AIR 2003 MP 233
1. There shall be no commercial exploitation to give financial advantage or any kind of benefit. To elaborate, the national anthem should not be utilized by which the persons involved in it either directly or indirectly shall have any commercial benefit or any other benefit.

2. There shall not be dramatization of the national anthem, and it should not be included as a part of any variety show. It is because when the national anthem is sung or played it is imperative on the part of everyone present to show a due respect and honour. To think of a dramatized exhibition of the national anthem is absolutely inconceivable.

3. National anthem or a part of it shall not be printed on any object and never be displayed in such a manner at such places which may be disgraceful to its status and tantamount to disrespect. It is because when the national anthem is sung, the concept of protocol associated with it has its inherent roots in national identity, national integrity and constitutional patriotism.

4. All the cinema halls in India shall play the national anthem before the feature film starts and all present are obliged to stand up to show respect to the national anthem.

5. Prior to national anthem is played or sung in the cinema hall on the screen. The entry and exit doors shall remain closed so that no one can create any kind of disturbance which will amount to disrespect to the national anthem. After the national anthem is played or sung, the door can be opened.

6. When the national anthem shall be played in the cinema Halls, It shall be with the National Flag on the screen.

7. The abridge version of the national anthem made by one for whatever reason shall not be played or displayed.

Hon’ble Supreme Court has further stated that, it is the sacred obligation of every citizen to abide by the ideals engrafted in the constitution. And one such ideal is to show respect for the national anthem and National Flag. The citizens of this country must realize that they live in a nation and duty bound to show respect to national anthem which is the symbol of the constitutional patriotism and inherent national equality.

**ISSUES ASSOCIATED WITH THIS MOVE**

**Mandatory screening:** There is no objection to cinemas choosing to screen the anthem if they want to. Nor is there an objection to the anthem being sung in sports stadiums or elsewhere by
anyone who wants to sing it. But there is absolutely no legal basis to compel cinemas or any other private entity to screen the anthem. Forcing private institutions to play the anthem is a clear violation of their freedoms of free speech and trade.

**Compelled standing:** In 1986, the Supreme Court made it clear that “no provision of law obliges anyone to sing the anthem.” Mandatory singing violated the constitutionally-guaranteed right to free speech, the court said, but there was a duty to stand when the anthem was sung. That position remains the law today. But, for many, standing need not be necessary to demonstrate respect; and for some, being forced to participate in arbitrary exhibitions of nationalism is undemocratic. The point of a free society is to allow everybody in it to peacefully express themselves. When the state compels people to stand for the anthem, it takes away some of that freedom.

**Ban on dramatization:** The Supreme Court’s 1986 judgment on respecting the anthem was delivered in the context of school assemblies. The court said nothing about the anthem being sung by actors in a movie.

**No constitutional mandate:** The constitution does not mandate that one must stand in attention when the national anthem is being played or when the flag is raised. Constitutionally and legally, one is only obliged not to show disrespect to the anthem.

**Prevention of Insult to National Honour Act:** The act to which the court referred to, deals with “preventing the singing” of the National Anthem or causing disturbance to any assembly “engaged in singing” of the Anthem but makes no provision enforcing the actual singing of the National Anthem.

The impugned directions however seem to be devoid of any statutory or Constitutional backing. There is no law which is being implemented, nor are any fundamental rights being violated in the absence of such a law. Furthermore, what cannot be lost sight-of is that: the violation of the Court’s order may entail contempt proceedings against the contemnor. Since there are penal consequences (jail/fine, or both) attached to this, the court order has to be clear and unambiguous and lay down with precision, the exact conduct that is sought to be forbidden. As demonstrated, the import and meaning of the words ‘dramatization’ and ‘financial advantage’ is far from specific and may expose a filmmaker/theatre owner to liability, without setting out a clear code of conduct. A provision of penal nature ought to be specific.
This renders the impugned directions unsustainable as the same are ‘vague’ ‘omnibus’ ‘all-encompassing’ which makes serious in-roads into the ‘Freedom of Speech and Expression’ of a citizen. There are no manageable and objective standards on which liability of a citizen for violation of the court order can be adjudicated. There should be a clear line demarcating the allowed and the forbidden speech for the guidance of the citizens, film makers, theatre owners etc. When a judgment uses ‘vague expressions’ capable of misuse, abuse without providing notice to persons of common intelligence to guess their meaning, it leaves them in a boundless sea of uncertainty, conferring wide and unfettered power on a busybody to prosecute the citizen, filmmaker, theatre owner. Such an order and potential mischief will not qualify as ‘just, fair and reasonable’ procedure and fail the tests of due process, being arbitrary.9

As regards the duty to stand up, we can argue that it there is should never be any compulsion on us. Since we have seen S. 3 of the Prevention of Insults to National Honour Act, 1971 only penalises ‘wilful prevention’ ‘causing disturbance’ during the singing of the National Anthem. Even sitting peacefully while the National Anthem is being sung/played will not amount to disturbance or prevention.

Every judgment has to be read secundum subjectum materiam, that is to say, in context of its peculiar facts. In Bijoe Emmanuel case 10 the court was concerned with a School Assembly, where not standing may have caused disruption and there is a general duty to stand. As opposed to this, the present case concerns Cinema halls where there is no essential duty to stand. Infact, the narrow aisle between seats are not conducive to standing either. This can be fortified by the MHA order which affirms that standing in the movie might cause disturbance, rather than adding to the dignity or solemnity of the anthem.

Besides this, it is a well-established rule that penal statutes have to be construed strictly; According to the principle of lenity, any ambiguity (if there is any) is always to be resolved in favour of the defendant. Now the question that arises is: Whether the SC could enlarge the meaning of the offence u/s 3 of the 1971 Act by super adding the duty to stand up or did it even intend to do so. The fundamental duty of respect to National Anthem is not justiciable by itself, but sought to be enforced by legislations such as 1971 Act, supplemented by the MHA orders.

The decision leaves a lot to be desired as far as legality and constitutionality is concerned. It misses the point when it equates standing with respect. Respect for the National Anthem and

9 Shreya Singhal v. Union of India, (2015) 5 SCC 1
10 1987 AIR 748, 1986 SCR (3) 518
Symbols has to be inculcated and not enforced by sanction. With all respect, the decision appears to be incongruent with earlier precedent and freedom of speech and expression.

However the Supreme Court itself has noticed it in the case of Karan Johar v. Union of India\textsuperscript{11}, where it has stated that, “We are satisfied that in view of the instructions issued by the Government of India that the national anthem which is exhibited in the course of exhibition of newsreel or documentary or in a film, the audience is not expected to stand as the same interrupts the exhibition of the film and would create disorder and confusion, rather than add to the dignity of the national anthem.” The standing orders take this into consideration and mention that there is no obligation to stand if the national anthem is played, “in the course of exhibition”.

\textbf{SUGGESTION}

The tenor of the order of the Indian Supreme Court implies forced patriotism, while such mandated displays of patriotism go against the very grain of freedom of expression. The Court in Excel Wear Etc. v. Union of India\textsuperscript{12} held that the fundamental right under Article 19 has reciprocal rights i.e. the “right to freedom of speech includes the right not to speak and the right not to form an association is inherent in the right to form associations”. Correspondingly, the right to expression under Article 19 should also encompass within it a right not to express. The expression of patriotism should be left to an individual’s personal choice and ought not to be dictated through a decree or any other means like a government order or law. Furthermore, in this context, it is extremely pertinent to highlight Justice Jackson’s Barnette opinion on making ‘patriotic ceremonies’ a ‘compulsory routine’. He emphasizes that patriotic ceremonies should be voluntary and spontaneous instead of being a compulsory routine. To do so would be underestimating the institutions of free minds.

In the present order, the Court seems to have sacrificed ‘individual rights’ at the altar of ‘constitutional patriotism’ when it held, “It does not allow any different notion or the perception of individual rights that have individually thought of have no space. The idea is constitutionally impermissible.” While curtailing individual rights, the Court has used terms like ‘constitutional patriotism’, ‘nationalism’ and ‘patriotism’ liberally throughout the order without enunciating the variance in their import.

\textsuperscript{11} (2004) 5 SCC 127
\textsuperscript{12} 1979 AIR 25, 1979 SCR (1)1009
It has been argued that free speech and expression can be curtailed under Article 19(2) only by an existing law or a law made by the State and no other mechanism. In the absence of any law or constitutional provision to justify its actions, the Court has resorted to ‘constitutional patriotism’ as a justification to encroach upon the freedom of speech and expression of people.

There is no question that judicial independence is of paramount importance. Whatever scheme of selecting judges we adopt should ensure that. But equally, it is important for the judges to demonstrate that independence does not become an excuse to create a judiciary that is poor in quality, undiscerning in its judgment, not aware of basic moral distinctions, populist rather than legal, sentimental rather than reasoned, casual in its understanding of when rights are being violated, impractical in its orders, but most of all, imperious in the way it usurps all powers for judges.

The critics of the decision say that feeling of love and respect for the country should come to a citizen from within and something as sacred as the National Anthem should be played or sung only on special occasions. There have been instances of vigilantism in movie halls and other public spaces targeting people for their unwillingness or inability to wear their patriotism on their sleeve. That the highest court of the land could join in this growing, dreadful clamour is a disturbing prospect.

CONCLUSION

The Court has taken refuge of Article 51A of the Indian Constitution to direct individuals to compulsorily stand up during the national anthem as a ‘sacred obligation’. Article 51A(a) of the Constitution only casts a duty on the citizens to ‘abide by the Constitution and respect its ideals and institutions, the national flag and the national anthem’ and does not prescribe specific standards such as being required to sing and/or stand to show respect. The Court has failed to note that though there is an inherent compulsion to comply with the fundamental duties, there is no legal sanction provided for the violation or non-compliance of such duties.

Moreover, the Prevention of Insults to National Honour Act, 1971 (‘Act’) which has been referred to in the order does not mandate that a person must necessarily sing and/or stand during the national anthem. Section 3 of the Act merely criminalizes any act done intentionally to prevent the singing of, or causing disturbance during, the national anthem. By issuing the present order, the Court has effectively deemed this fundamental duty enforceable, non-compliance of which may attract contempt of Court proceedings. Furthermore, in the absence
of any law prescribing punishment for not standing and/or singing the national anthem, the present order is a clear case of encroachment into the legislative domain.

This order could spell disastrous consequences by giving teeth to self-appointed vigilantes looking to uphold the nation’s honour. There have already been several instances of such jingoism in the recent past which cause serious apprehensions regarding the enforcement and outcome of the Court order.

Respect for one’s country depends entirely on the way we think; it’s a way of life. It cannot be taught. Neither can it be enforced or imposed upon us. And it definitely should not be neatly wrapped in a bow and presented to us as “committed patriotism and nationalism”, because then we begin to tread a complicated territory. Rabindranath Tagore, the author of Jana Gana Mana, fiercely voiced against the “bondage of nationalism”. He wrote in the Modern Review, a respected Calcutta journal that the time, that he hoped to “achieve the unity of man by destroying the bondage of nationalism”.