

THE PERMISSIBLE LIMITS OF USING NATIONAL SYMBOLS DURING PROTESTS IN INDIA

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Abstract

The present paper deals with an important aspect of protest demonstrations- the use of national symbols. The incorporation of these symbols in protest activities raises various legal and moral dilemmas. The paper has been divided into four parts. Part I starts with a brief introduction to the topic. Part II will look into the significance of these symbols to understand why these signs become a good tool for political dissent. Part III will elaborate upon various provisions relating to the protection of national symbols. Part IV looks into the fine lines between the 'respect' and 'disrespect' element in the context of the present discussion, and advocates that limiting the use of the symbolic expression is a curtailment of 'freedom of speech and expression'. Decisions of other jurisdictions have also been highlighted, especially the USA, where the Courts have very well settled the matter on these issues.

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I. INTRODUCTION

In August 2016, a National Football League (“NFL”) player ignited a whole new debate on patriotism, nationalism, and protests in the United States of America (“USA”). Colin Kaepernick, an American football quarterback, sat on the bench while the national anthem played during a preseason game for the San Francisco 49ers.¹ Kaepernick told the media he acted so in order to protest against the oppression of people of colour in the USA and ongoing issues with police brutality.² Other NFL players also followed suit. This protest then also got morphed into an act of direct resistance against Donald Trump after the President weighed in on the issue.³ While some actively supported Kaepernick’s acts, there also came criticism from some citing that the act espouses disrespect to the American nation.⁴ This controversy has several angles to it, but one important question that arises is, what if such an act took place in India? The first question that would have to be determined therein would be concerning the legality of using national symbols in protests against actions of the Government. Unlike the USA, India has witnessed very few protests where the national flag, the national anthem or any other national symbol has been the central point. Also, no flag desecration case has been expressly dealt with by the highest Court in India. Therefore, the present paper will dwell upon the question of the

¹Adam Stites, Everything you need to know about NFL protests during the national anthem, SB NATION (Feb. 5, 2020), <https://www.sbnation.com/2017/9/29/16380080/donald-trump-nfl-colin-kaepernick-protests-national-anthem/>.

²*Id.*

³Clark Mindock, Taking a knee: Why are NFL players protesting and when did they start to kneel?, INDEPENDENT (Feb. 5, 2020), <https://www.independent.co.uk/news/world/americas/us-politics/taking-a-knee-national-anthem-nfl-trump-why-meaning-origins-racism-us-colin-kaepernick-a8521741.html>.

⁴*Id.*

constitutionality of such protests especially those using the national flag and the national anthem.

II. THE SIGNIFICANCE OF NATIONAL SYMBOLS

National attachment, a feeling of close personal attachment to one's nation or state, is a powerful organising force that has been a facet of all successful human societies.⁵ National symbols, particularly national anthems and flags provide the strongest, clearest statement of national identity.⁶ In essence, they serve as modern totems signs that bear a special relationship to the nations they represent, distinguishing them from one another and reaffirming their identity boundaries.⁷ They also convey the nation's history, myths and ideals and help evoke emotional attachment to the nation, crystallise its identity and help people feel connected to something outside of their own immediate family and community.⁸ These symbols have also been an important medium of patriotism training in societies through ages. A particularly explicit strategy in this connection can be found in a statement published by the Central Propaganda Department of the Chinese Communist Party in 1996 entitled 'Teach the General Public and Especially the Young to Love the National Flag and the National Anthem'. Here it is explained that '*the national flag and national anthem are symbols of a nation's sovereignty and dignity and concentrated expressions of its patriotic spirit*'.⁹ Another vivid

⁵David A. Butz, National Symbols as Agents of Psychological and Social Change, 30 POLITICAL PSYCHOLOGY 779 (2009).

⁶Karen A. Cerulo, Symbols and the World System: National Anthems and Flags, 8 SOCIOLOGICAL FORUM, 2 243 (1993).

⁷*Id.*

⁸Cynthia Miller-Idriss, The Emotional Attachment of National Symbols, NY TIMES (Feb. 5, 2020), <https://www.nytimes.com/roomfordebate/2016/09/01/americans-and-their-flag/the-emotional-attachment-of-national-symbols>.

⁹Pal Kolst, National symbols as signs of unity and division, 29:4 Ethnic and Racial Studies, 676, 677 (2006).

example of such identity learning is the Pledge of Allegiance to the Flag that is carried out in schools all over the USA every morning throughout the entire school year.¹⁰

In *Halter v. Nebraska*,¹¹ Supreme Court of the USA eloquently expressed the importance of the national flag- *“to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression.”*

To an American, it is the single embodiment of all the dreams, ideals and goals of the American people.¹²

*“If the flag says anything at all, . . . we think it says everything and is big enough to symbolize the variant viewpoints of a Doctor Spock and a General Westmoreland. With fine impartiality the flag may head up a peace parade and at the same time and place fly over a platoon of soldiers assigned to guard it ... Sometimes the flag represents government. Sometimes it may represent opposition to government. Always it represents America in all its marvelous diversity.”*¹³

The Indian nationalism too, witnesses something similar. The attachment with national symbols is deeply enrooted in the Indian psyche.¹⁴ The Courts, in few instances, have been confronted with the

¹⁰*Id.*

¹¹*Halter v. Nebraska*, 205 U.S. 34, 43 (1907).

¹²Marilyn Archbold Young, Flag Desecration: A Constitutionally Protected Activity, 7 U.S.F. L. REV. 149, 153 (1972).

¹³*Parker v. Morgan*, 322 F. Supp. 585, 588 (D. N.C. 1971).

¹⁴Naveen Jindal, A symbol of unity in diversity, it's time India has a National Flag Day, THE INDIAN EXPRESS (Feb. 5, 2020), <https://indianexpress.com/article/opinion/a-symbol-of-unity-in-diversity-its-time-india-has-a-national-flag-day-5035190/>; <https://indianexpress.com/article/express-sunday-eye/the-symbol-of-freedom-indian-flag-emoji-6233551/> Nishant Shah, Indian flag emoji as an icon of resistance, THE INDIAN EXPRESS (Feb. 5, 2020),

issues of nationalism, national symbols, etc. and have upheld the importance of veneration of national symbols.

In *Karan Singh v. Jamuna Singh*,¹⁵ while deciding upon the question of whether the portrait of Gandhi would qualify as a national symbol, the Supreme Court of India distinguished between a symbol and an emblem.

*“An emblem has some natural fitness to suggest that for which it stands; a symbol has been chosen or agreed upon to suggest something also, with or without natural fitness.... This explanation of the distinction between the words ‘emblem’ and ‘symbol’ would indicate that an emblem will always be a symbol. In the case of a symbol, it may represent or suggest something else with or without natural fitness.”*¹⁶

The question was answered in the negative by the Court. But the Court made certain pertinent observations which are important in light of the present discussion. The Court envisaged four possibilities by which a symbol may become a national symbol.

*“They are (1) by law passed by the Parliament, (2) a declaration by the Government of India either, under the powers granted by law or in exercise of their executive powers, (3) by international recognition and (4) by recognition by the nation as a whole, the recognition being either express or implied. No law of the Parliament has been brought to our notice under which any symbol has been given to the Government of India to declare a symbol as a national symbol. The only law, which was brought to our notice, was the Emblems and Names (Prevention of Improper Use) Act, 1950.”*¹⁷

<https://indianexpress.com/article/express-sunday-eye/the-symbol-of-freedom-indian-flag-emoji-6233551/>.

¹⁵AIR 1959 All 427.

¹⁶*Id.*

¹⁷*Id.*

It was also said here that the character of being the national symbol has been acquired only by the national flag and the national anthem by way of resolutions of the Constituent Assembly. Since the judgment, the Parliament has passed certain acts which have recognised certain other symbols of national significance, which will be dealt with below.

In *Naveen Jindal v. Union of India*,¹⁸ the Court inquired into whether the right to fly the national flag by an Indian citizen is a fundamental right within the meaning of Article 19(1)(a) of the Constitution of India. The Court here made certain observations regarding the symbolic significance of the national flag- “*national anthem, national flag and national song are secular symbols of the nationhood. They represent the supreme collective expression of commitment and loyalty to the nation as well as patriotism for the country. They are necessary adjunct of sovereignty being symbols and actions associated therewith.*”¹⁹

Similarly, in *Surendra Khandelwal v. State of Rajasthan*,²⁰ the Rajasthan High Court observed:

“*There is no doubt that the national flag, the Constitution and the national map are the matters of great sanctity and any act of any individual whosoever - citizen or non-citizen - ought not to cause any type of injury or any kind of negative imports towards these symbols of the country's honour, so as to maintain the sovereignty and integrity of the country.*”²¹

A study analysing what individuals associate with their national flag in 11 diverse nations found positive emotions and democratic

¹⁸Naveen Jindal v. Union of India, (2004) 2 SCC 510.

¹⁹*Id.*

²⁰Criminal (Misc.) Petition No. 3006/2018.

²¹*Id.*

concepts were associated with almost all examined national flags.²² National symbols are indeed much more than symbols. In this context, it is not very hard to understand why the flag or anthem remain a very popular choice for protestors around the world.

III. THE INDIAN LEGAL FRAMEWORK

The Emblems and Names (Prevention of Improper Use) Act, 1950 prevents the improper use of certain emblems and names for professional and commercial purposes.²³ The Indian national flag is protected under the same, given in the schedule to this Act. The Prevention of Insults to National Honour Act, 1971 is the most important legislation with regard to the present topic. The Act prescribes punishment of imprisonment, which may extend to three years or with fine, or both for insulting the Indian national flag and the Constitution of India.²⁴ Burning, trampling upon, defacing or any other act of desecration along with the acts of condemnation of the flag and anthem by words or acts are covered under the ambit of insult. However, Explanation 1 to the section provides that comments which express criticism of the flag or the Constitution or of any measures of the Government to obtain the amendment of the Constitution or alteration of the Indian national flag by lawful means will not be an offence under the section. Prevention of singing of the Indian national anthem will also attract the same punishment as is

²²Becker, J.C., Butz, D.A., Sibley, C.G., Barlow, F., Bitacola, L., Christ, O., Khan, S., Leong, C., Pehrson, S., Srinivasan, N., Sulz, A., Tausch, N., Urbanska, K., & Wright, S., What do national flags stand for? An exploration of associations across 11 countries, 48 JOURNAL OF CROSS-CULTURAL PSYCHOLOGY 335 (2017).

²³The Emblems and Names (Prevention of Improper Use) Act, 1950 § 3, No. 12 Acts of Parliament, 1950 (India).

²⁴The Prevention of Insults to National Honour Act, 1971 § 2, No. 69, Acts of Parliament, 1971 (India).

given for the above-mentioned section.²⁵ Besides these Acts, the Flag Code of India, 2002 brings together the various laws, conventions, practices and instructions with regard to the national flag.²⁶

The use of the national symbols in a protest activity will be guarded under Article 19 (1) of The Constitution of India, “*All citizens shall have the right: (a) to freedom of speech and expression.*” This right is subject to certain ‘reasonable restrictions.’ There are six broad categories under which these reasonable restrictions fall- a. interests of the sovereignty and integrity of India, b. security of the State, c. friendly relations with foreign States, d. public order, decency or morality or in relation to contempt of Court, e. defamation and f. incitement to an offence.

The grounds are quite wide, which is in stark opposition to the First Amendment of the Constitution of the USA which provides for absolute right of freedom of speech and expression. Also, as per Article 13 of the Constitution of India, any law which is in contravention of Part III (Fundamental Rights including Article 19), to the extent of the contravention will be void. The right to peacefully and lawfully assemble together and to freely express oneself coupled with the right to know about such expression is guaranteed under Article 19 of the Constitution.²⁷ This right cannot be taken away by an arbitrary executive or legislative action.²⁸ It is to be kept in mind that only peaceful protests are constitutionally protected.

Besides these, the right to freedom of speech and expression find place in International Law. Article 19 of the Universal Declaration of Human Rights, 1948 (“**UDHR**”) states,

²⁵*Id.*

²⁶National Flag, MHA (Feb. 5, 2020), <http://mha.nic.in/nationalflag2002.htm>.

²⁷*Re-Ramlila Maidan Incident v. Home Secretary*, (2012) 5 SCC 1.

²⁸*Id.*

*“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*²⁹

There is silence, however, on the modes of expression here. There are other instruments as well. There is Article 19 of the International Covenant on Civil and Political Rights (“**ICCPR**”): providing for the right to hold opinions without interference, through practically all modes³⁰; Article 9(2) of the African (Banjul) Charter on Human and Peoples’ Rights,³¹ Paragraph 2 of the Sana’a Declaration by the Arab League of 2005,³² Article 10 of the European Convention on Human Rights (Freedom of expression).³³

It is important to observe that all these instruments do not recognise the freedom of expression as an absolute right and allow States to place restrictions, within certain parameters.³⁴ This is an outcome of the fact that the freedom of expression carries with it an equal responsibility; a principle embodied in the ICCPR.³⁵

²⁹Universal Declaration of Human Rights, UN (Feb. 5, 2020), https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf.

³⁰International Covenant on Civil and Political Rights, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Feb. 5, 2020), <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

³¹African Charter on Human and People Rights’, HUMAN RIGHTS (Feb. 5, 2020), <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>.

³²REFWORLD (Feb. 5, 2020), <https://www.refworld.org/docid/530483644.html>.

³³European Convention on Human Rights, ECHR (Feb. 5, 2020), https://www.echr.coe.int/Documents/Convention_ENG.pdf.

³⁴Kabir Duggal & Shreyas Sridhar, Reconciling Freedom of Expression and Flag Desecration: A Comparative Study, 2 HANSE L. REV. 141, 144 (2006).

³⁵*Id.*

IV. THE UNPATRIOTIC ACTS AND FREEDOM OF SPEECH AND EXPRESSION

*“When it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme.”- Shreya Singhal v. Union of India.*³⁶

In the United States, flag desecration as a means of protest is protected as symbolic speech. Between the two ends of the continuum- pure speech and action- is the area of symbolic speech.³⁷ It is the communication of an idea through the use of a symbol.³⁸ Mr. Justice Harlan explained the significance of this form of communication in *Cohen v. California*³⁹:

*“[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for the emotive function, which, practically speaking, may often be the more important element of the overall message sought to be communicated.”*⁴⁰

There has been no express enunciation of the protection of symbolic expression under Article 19(1)(a) of the Constitution of India.⁴¹ Nonetheless, there are cases which have helped in clarifying the Indian stance on the topic. The Court in *NALSA v. Union of India*

³⁶Shreya Singhal v. Union of India, (2015) 5 SCC 1.

³⁷Young, *supra* note 12.

³⁸*Id.*

³⁹Cohen v. California, 403 U.S. 15 (1971).

⁴⁰*Id.*

⁴¹Tarun Krishnakumar, From flags to Facebook: Symbolic expression in the United States and India, 31 COMPUTER LAW AND SECURITY REVIEW 365 (2015).

(“*NALSA*”),⁴² held that a form of protected speech/ expression, namely gender identity, could be expressed both verbally and through conduct. This recognition of conduct as a means of expression would therefore extend to other forms of protected speech including political dissent.⁴³

Another important enumeration of the protected status of symbolic conduct can be found in the case of *Kameshwar Prasad v. State of Bihar Ush* (“*Kameshwar Prasad*”).⁴⁴ Here, the Supreme Court was confronted with a Bihar Government service rule that banned all forms of demonstrations and strikes by Government servants.

*“It might be broadly stated that a demonstration is a visible manifestation of the feelings or sentiments of an individual or group. It is thus, a communication of one's ideas to others to whom it is intended to be conveyed. It is in effect therefore a form of speech or of expression, because speech need not be vocal.”*⁴⁵

In *Usha Uthup v. State of West Bengal*,⁴⁶ the apex Court held that the act of singing and dancing, being “*an important media of expression and is an integral part of the freedom of speech and expression*”,⁴⁷ would also attract protection of Article 19(1)(a). A similar protection was extended to dramatic performances, which are a combination of verbal and non-verbal forms of communication, in *Charan Singh v. Union of India*.⁴⁸

It was in the landmark case of *Stromberg v. State of California*,⁴⁹ the Supreme Court of USA substantially widened the scope of the term

⁴²*NALSA v. Union of India*, AIR 2014 SC 1863.

⁴³*Supra* note 25.

⁴⁴*Kameshwar Prasad v. State of Bihar*, AIR 1962 SC 1166.

⁴⁵*Id.*

⁴⁶*Usha Uthup v. State of West Bengal*, AIR 1984 Cal 268.

⁴⁷*Id.*

⁴⁸*Charan Singh v. Union of India*, AIR 1961 Punj 272.

⁴⁹*Stromberg v. State of California*, 283 U.S. 359 (1931).

‘speech’ in the First Amendment and held it to include ‘pure speech’ as well as ‘symbolic speech’.

Because of the essentially symbolic character of the flag itself to the American people, its use in protest activities is most effective in vividly conveying dissatisfaction with governmental action and policies.⁵⁰ In *West Virginia State Board of Education v. Barnette*,⁵¹ the Court held that a state statute requiring schoolchildren to salute the flag violated their right of free expression.

The first case expressly dealing with flag desecration in the USA was that of *Street v. New York*.⁵² A person was charged on the ground of publicly burning an American flag in protest against the killing of a civil rights activist. The New York legislation criminalising the act was held unconstitutional by the Supreme Court on the ground that it violated the First Amendment.⁵³

After some more cases of this nature, the issue was settled in the landmark *Texas v. Johnson*,⁵⁴ in which the defendant was charged for burning a flag as part of an important demonstration against the policies of the then Reagan Government. On a conviction by the

Texas Court, the statute prohibiting flag desecration was struck down by the Supreme Court as violative of the First Amendment.⁵⁵

Banning flag desecration or making it punishable has been argued to be unjust because it would amount to taking penal action against people for merely expressing their thoughts or ideas.⁵⁶ Further, the

⁵⁰Young, *supra* note 12.

⁵¹*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁵²*Street v. New York*, 394 U.S. 576 (1969).

⁵³*Id.*

⁵⁴*Texas v. Johnson*, 491 U.S. 397.

⁵⁵*Id.*

⁵⁶Dhruv Arora, Redefining Freedom of Expression vis-a-vis the National Flag, 1 NALSAR STUDENT LAW REV. 67 (2005).

fact that people resort to desecration of the national flag implies that, at some level, there is dissatisfaction with the Government, and non-allowance of such expression is undemocratic.⁵⁷

In *United States v. O' Brien*,⁵⁸ the Supreme Court of the USA laid down four criteria in order to ascertain the situations in which the Government can regulate/suppress symbolic expression. "*It can be done when:*

- i. it is within the constitutional power of the Government;*
- ii. it furthers an important or substantial Governmental interest;*
- iii. the Governmental interest is unrelated to the suppression of free expression;*
- iv. the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."*⁵⁹

In *Percy v. Director of Public Prosecutions*,⁶⁰ the claimant, while protesting against American military activity, stood on an American flag and scribbled on it. The High Court accepted her submission that flag denigration was a form of protest activity renowned world over, and quashed her conviction by a Norfolk district judge.⁶¹

In Hong Kong, the legality of flag desecration and the validity of the anti-desecration legislation were tested in the highest Court in the case of *HKSAR v. Ng Kung Siu & Anor*.⁶² Herein, the respondents, while participating in a peaceful demonstration, waved a defaced flag.

⁵⁷*Id.*

⁵⁸*United States v. O' Brien*, 391 U.S. 367 (1968).

⁵⁹*Id.*

⁶⁰*Percy v. Director of Public Prosecutions*, (2001) EWHC 1125 (Admin).

⁶¹*Id.*

⁶²*HKSAR v. Ng Kung Siu & Anor*, (2000) 1 HKC 117, Final Appeal (Criminal) No 4 of 1999, Court of Final Appeal.

The national legislations in the country prohibit flag desecration. The respondents then questioned the statutes, namely the National Flag and National Emblem Bill and the Regional Flag and Regional Emblem Bill, of violating the freedom of expression granted by various international statutes and conventions. They argued that the two statutes were a clear contravention of Article 19 of the ICCPR, along with Section 39 of the Basic Law (it talks about the application of ICCPR, international labour conditions, etc., to the special administrative region of Hong Kong). The Court of Final Appeal upheld the conviction on the ground that the two ordinances under which the respondents were convicted were justifiable restrictions placed on the freedom of speech and expression and were integral for the protection of public order.⁶³ The Court went on to justify that such restrictions are not disproportionate to the aims sought to be achieved.⁶⁴

In Australia, there is no illegality imposed upon flag desecration.⁶⁵ In *Coleman v. Kinbacher*,⁶⁶ though there was successful prosecution for flag burning, the reason for the same had nothing to do with unpatriotic conduct of the accused:

*“The objectionable feature of the conduct had very little to do with its political significance. It related to the lighting of a large piece of synthetic material to which petrol had been added in close proximity to larger numbers of people including young children. The circumstances were such as to arouse the apprehension of parents for the safety of their children.”*⁶⁷

⁶³*Id.*

⁶⁴*Id.*

⁶⁵Caroline Henckels, Dishonouring the Australian Flag, 44 MONASH U. L. REV. 384 (2018).

⁶⁶*Coleman v. Kinbacher*, (2003) QCA 575.

⁶⁷*Id.*

While the burning of flag is legal in Australia, it should be done safely, otherwise the act can be punished for ‘disorderly conduct’ or destruction of property.⁶⁸

In India, it was only in the year 2004 that the national flag could be flown by private citizens while observing certain restrictions. In *Naveen Jindal*, the apex Court held that:

*“The right to fly the national flag is a fundamental right but subject to restrictions. The right is not an unfettered, unsubscribed, unrestricted and unchanneled one. Even assertion of the right to respectfully fly the flag vis- a-vis the mere right to fly the flag is regulated and controlled by two significant parliamentary enactments, namely, the Emblems and Names (Prevention of Improper Use) Act, 1950 and the Prevention of Insults to National Honour Act, 1971.”*⁶⁹

At the same time, the Court curtailed this right by stating,

*“The right to fly the national flag is not an absolute right. The freedom of expression for the purpose of giving a feeling of nationalism and for that purpose all that is required to be done is that the duty to respect the flag must be strictly obeyed. The pride of a person involved in flying the flag is the pride to be an Indian and that, thus, in all respects to it must be shown. The State may not tolerate even the slightest disrespect. The extreme proposition of law taken in the American decisions that burning of the flag is an expression of anger cannot be accepted in India as it would amount to disrespect of the national flag.”*⁷⁰

⁶⁸Rhys McKay, Flag Burning Laws In Australia: When Is It Considered A Crime?, WHO (Feb. 5, 2020), <https://www.who.com.au/is-it-illegal-to-burn-the-australian-flag>.

⁶⁹*Supra* note 17.

⁷⁰*Id.*

The Rajasthan High Court in *Surendra Khandelwal*,⁷¹ also reiterated the above proposition.

*“Although, the precedent law of Texas v. Johnson has been taken into consideration, despite the fact that neither the same is an authoritative or a binding precedent, nor has any direct bearing on the case in hand, however, the same has been considered being a facet of the judicial verdict passed in respect of the progressive society. This Court is also aware of the fact that there is much difference between the maturity level and social conditions, which were prevailing there, and the one prevailing in the present society.”*⁷²

Reading in the light of *NALSA* and *Kameshwar Prasad*, which have recognised protection of symbolic speech along with the 1971 Act (Section 2, as amended in 2005), it has been made clear national flag can be worn as a dress above the waist.⁷³ Therefore, protest by wearing the national flag is permitted subject to Explanation 4 of Section 2 of the 1971 Act.⁷⁴

In *Bijoel Emmanuel v. State of Kerala*,⁷⁵ the main issue was whether the dismissal of three children from school for their refusal to sing the national anthem of India was consistent with the constitutional rights to freedom of expression and freedom of religion. The Court answered in the affirmative and held that the fundamental rights of the appellants under Articles 19(1)(a) and 25(1) have been infringed and they are entitled to be protected. It was also a violation of the fundamental right to freedom of conscience and freely to profess,

⁷¹*Supra* note 19.

⁷²*Id.*

⁷³Aamna Nabeeha Naqvi, Freedom of Expression Through the National Flag, RMLNLU LAW REVIEW (Feb. 5, 2020), <https://rmlnlulawreview.com/2019/01/30/freedom-of-expression-through-the-national-flag/>.

⁷⁴*Supra* note 23.

⁷⁵*Bijoel Emmanuel v. State of Kerala*, AIR 1963 SC 1295.

practice and propagate religion (the children belonged to a religious sect which forbade the singing of national anthem).

*“There is no provision of law which obliges anyone to sing the national anthem nor is it disrespectful to the national anthem if a person who stands up respectfully when the national anthem is sung does not join the singing. Proper respect is shown to the national anthem by standing up when the national anthem is sung. It will not be right to say that disrespect is shown by not joining in the singing. Standing up respectfully when the national anthem is sung but not singing oneself clearly does not either prevent the singing of the national anthem or cause disturbance to an assembly engaged in such singing so as to constitute the offence mentioned in Section 3 of the Prevention of Insults to National Honour Act.”*⁷⁶

Additionally, Article 51-A(a) of the Constitution of India makes it every citizen’s duty to *“abide by the Constitution and respect its ideals and institutions, the national flag and the national anthem”*. But none of the legislations or the Constitution expressly prescribe the proper way to show such respect, nor do they talk about sitting or standing while the national anthem plays.⁷⁷

In *Shyam Narayan Chouksey v. Union of India*,⁷⁸ the Supreme Court modified its earlier order which had made playing of the national anthem mandatory prior to the screening of a film and made it optional or directory.

“We have no shadow of doubt that one is compelled to show respect whenever and wherever the national anthem is played. It is the elan vital of the nation and fundamental grammar of belonging to a nation

⁷⁶*Id.*

⁷⁷Apoorva Mandhani, Is it a crime not to stand for the national anthem?, THE PRINT (Feb. 5, 2020), <https://theprint.in/theprint-essential/is-it-a-crime-not-to-stand-for-the-national-anthem-law-is-silent-supreme-court-ambiguous/313557/>.

⁷⁸*Shyam Narayan Chouksey v. Union of India*, (2018) 2 SCC 574.

*state. However, the prescription of the place or occasion has to be made by the executive keeping in view the concept of fundamental duties provided under the Constitution and the law.”*⁷⁹

In *In Re: N.V. Natarajan v. Unknown*,⁸⁰ the Madras High Court dealt with the constitutional validity of the Prevention of Insults to National Honour Act, Madras Act XIV of 1957. The Court reasoned that the act is not in violation of Article 19(1)(f) of the Constitution. It also held the willful burning of the Constitution as not included in the fundamental right to acquire, hold and dispose of property.

Looking at the judgments recognising the right to protest and symbolic speech, it can be said that there is no bar on the use of national symbols in protest activities in India but the scope is very narrow. There is a greater duty to respect the national symbols which leads to the inference that the use of national symbols during protests in India is permitted up to the extent that there is no disrespect shown towards these symbols. Again, what acts would be deemed ‘respectful’ or ‘disrespectful’ have to be understood from the

Prevention of Insults to National Honour Act, 1971. Given the Courts’ stance of supporting reverence to national symbols, the same being prescribed in the statutes, and the wide exceptions under Article 19 of the Constitution of India, it can be safely assumed that instances of burning, or, scribbling on the flag or the Constitution or not standing up for the national anthem will not be protected as acts of symbolic speech by the Courts. These actions might be an effective tool of political dissent, but this can be resorted to only when the disapproval of any act is done to seek an amendment in the Constitution or the national flag as per the Explanation to section 2 of the 1971 Act.

⁷⁹*Id.*

⁸⁰*In Re: N.V. Natarajan v. Unknown*, 1965 CriLJ 49.

V. CONCLUSION

A combined reading of the last two parts of the article suggests that protesting using national symbols by desecration is generally not permitted in the Indian scenario. In this age, where nationalism as a force, is gaining new ground, it becomes important to acquaint oneself with these issues and challenges. In the recent rounds of the protest against the Citizenship Amendment Act, 2019 (“CAA”) and the National Register of Citizens (“NRC”), several protestors have started using national symbols. They are waving Indian flags, singing the national anthem and carrying placards quoting from the Constitution of India.⁸¹ The reason cited behind this is that the CAA rejects the secular, multicultural principles upon which India was founded and which are embodied in the flag, the anthem and, most explicitly, the Constitution.⁸² By invoking these symbols, the protesters in India are drawing on this historic, inclusive vision of their country.⁸³ This is actually a good example of innovative protests. Nonetheless, the author is of the view that with the ever-expanding realm of the freedom of speech and expression, it is necessary that certain acts, even though they might not align with the majoritarian views be protected. As Justice Robert H. Jackson pronounced in the *Barnette* case,⁸⁴ “*freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.*”

⁸¹Perna Singh, In India, protesters are singing the national anthem and waving the flag. Here’s why that matters, WASHINGTON POST (Feb. 5, 2020) <https://www.washingtonpost.com/politics/2020/01/20/india-protesters-are-singing-national-anthem-waving-flag-heres-why-that-matters/>.

⁸²*Id.*

⁸³*Id.*

⁸⁴Krishnakumar, *supra* note 41.

If there is no imminent threat to public order, there seems to be no reason why certain limited conducts of improper use of national symbols cannot be incorporated in protest activities in India. This is highly unlikely, given the stringent statutes and the availability of the exceptions of reasonable restrictions under Article 19 of the Constitution of India. Until and unless the constitutionality of the acts pertaining to national symbols is challenged, the scope of desecration of national symbols in the protests will continue to be highly limited in this country.