

# THE SUPREME COURT'S NATIONAL ANTHEM MANDATE: A MISUNDERSTANDING OF HABERMASIAN CONSTITUTIONAL PATRIOTISM

## I. INTRODUCTION

In December 2016, the Supreme Court passed its judgment in the controversial case, *Shyam Narayan Chouksey v. Union of India*.<sup>1</sup> The Supreme Court ruled that all cinema halls in India have to play the National Anthem before the screening of a feature film.<sup>2</sup> The Court also stated that all viewers present in the cinema hall would be obliged to stand up for the National Anthem as a sign of respect.<sup>3</sup> This judgment has created a stir amongst Indians. Proponents of the judgment argue that the judgment is a positive step towards inculcating a culture of patriotic cohesion in the Indian masses. On the other hand, critics of the judgment seemingly adopt either one, or sometimes both, of the following lines of argument. *First*, they argue that the singling out of the cinema halls is arbitrary as an imposition of a duty to sing the national anthem in a space meant for entertainment lacks justifiable basis.<sup>4</sup> *Second*, and more importantly, critics argue that the mandatory enforcement of patriotic values is indicative of a worrying trend towards aggressive nationalism in the Supreme Court.

However, the debate on the judgment must travel beyond the specifics of the judicial order. As mentioned in the order, the Supreme Court has justified this mandate by stating that they are furthering a culture of “constitutional patriotism”.<sup>5</sup> In this note, we examine this claim, by demonstrating

<sup>1</sup> *Shyam Narayan Chouksey v. Union of India*, (2017) 1 SCC 421.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See Aman Lekhi, *SC's National Anthem Order Offends Principles it wants to Uphold*, December 3, 2016, THE QUINT, available at <https://www.thequint.com/india/2016/12/03/supreme-court-national-anthem-order-offends-principles-it-wants-to-uphold-nationalism-patriotism-flag-constitution> (Last visited on March 24, 2017).

<sup>5</sup> See Harsh Mander, *SC Order on National Anthem in Cinema Halls Mirrors Aggressive Hyper-Nationalism*, HT, December 2, 2016, available at <http://www.hindustantimes.com/opinion/sc-order-on-national-anthem-in-cinema-halls-mirrors-aggressive-hyper-nationalism/>

that the court misunderstands the idea of “constitutional patriotism” and rather than furthering this idea, the Court contradicts the basic idea of adherence to constitutional principles and discursive consensus that are crucial to hold any democracy together. We divide this note into two sections – *first*, we examine the theory of “constitutional patriotism” as propounded by legal and political theorist, Jurgen Habermas. We argue that the orders passed by the court oppose the basic principles of constitutional patriotism and discursive reasoning that lead to coherence and justice in democratic paradigms; *second*, we apply the doctrine of constitutional patriotism to demonstrate that the judgment of the Supreme Court lacks constitutional basis or justification. In the next Part, we analyse the legal issues and the string of judicial precedent before the Supreme Court, to arrive at this decision and attempt to critically engage with the reasoning adopted by the Court in arriving at this decision.

## II. ON CONSTITUTIONAL PATRIOTISM: EXAMINING THE HABERMASIAN THEORETICAL FOUNDATION

In the words of the Supreme Court, the citizens of the country “are duty bound to show respect to National Anthem” as the anthem is a “symbol of constitutional patriotism”.<sup>6</sup> The Court uses the terms “national identity” and “national integrity” along with “constitutional patriotism” without analysing the meaning and import of any of these terms.<sup>7</sup> However, the specific reference to the term “constitutional patriotism” is seemingly a direct reference, to a doctrine that has informed legal and political philosophy for several years – the doctrine of constitutional patriotism developed by Jurgen Habermas.<sup>8</sup>

Within philosophy, it is difficult to attribute an idea singularly to the works of one philosopher. Ideas find themselves growing from one philosopher to another, finally being developed into a cogent theoretical conception. In light of this, the concept of constitutional patriotism has been traced to the works of Karl Jaspers, an iconic political and legal philosopher, who theorised on ‘collective responsibility’ as a way to politically handle the guilt of the German community after the Third Reich.<sup>9</sup>olf Sternberger, his student, explicitly propounded the idea of constitutional patriotism as well by developing on

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<sup>6</sup> Shyam Narayan Chouksey v. Union of India, (2017) 1 SCC 421 (“The citizens of the country must realize that they live in a nation and are duty bound to show respect to National Anthem which is the symbol of the Constitutional Patriotism and inherent national quality.”).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> KARL JASPERS, *THE QUESTION OF GERMAN GUILT* (1946).

the work of Jaspers.<sup>10</sup> Hannah Arendt, as well, draws on the idea of collective responsibility in her landmark work on totalitarian regimes and the philosophy of conflict between the universal and particular aspects of identity.<sup>11</sup> However, the detailed theoretical doctrine of constitutional patriotism, as we know it today, is strongly associated with the German philosopher Jurgen Habermas, who developed raw ideas on the nature of collective identity into a theory of constitutional patriotism.

Jurgen Habermas is one of the most influential political and legal philosophers of recent times- engaging on a vast variety of philosophical themes.<sup>12</sup> Of these, one of the most important theoretical ideas within Habermasian thought is the conception of constitutional patriotism. On the outset, constitutional patriotism implies an allegiance or adherence to a specific constitutional framework, which embodies universalistic values.<sup>13</sup> This idea of constitutional patriotism is rooted in a crucial distinction that Habermas relies on – the distinction between ethical and political concerns<sup>14</sup> that together lead to the fulfilment of goals of justice.<sup>15</sup> Ethical concerns deal with the substantive contents of a good life, as opposed to the political concerns of procedural inclusion into the decision-making process on the contents of what leads to a good life.<sup>16</sup> Habermas focusses on the latter and roots his conception of “patriotism” within adherence to political and procedural norms of inclusion. In interpretations of his work subsequently, scholars have noted that the import of the Habermasian theory was that it significantly blurred the distinction between procedural and legal norms of public deliberation and substantive norms and values on the nature of a good life.<sup>17</sup> A procedural adherence to a constitutional framework and the principles of a constitutional democracy were crucial to Habermas, as opposed to a morally ambiguous and risky determination on the substantive contents of value and norm that lead to a good life.

<sup>10</sup> Jan-Werner Müller, *On the Origins of Constitutional Patriotism*, 5 CONTEMPORARY POLITICAL THEORY 278 – 296 (2006).

<sup>11</sup> See generally HANNAH ARENDT, ORIGINS OF TOTALITARIANISM (1951).

<sup>12</sup> THOMAS MCCARTHY, THE CRITICAL THEORY OF JURGEN HABERMAS (1981). (Habermas locates his work between continental and Anglo-American traditions of thought. His work and contributions range from work in social-political theory to aesthetics, metaphysical thought, and philosophy of language and critiques of religion. His ideas have had far-reaching impacts for not only philosophy but also sociology, political-legal thought, communication studies rhetoric, developmental psychology, argumentation theory and theology.)

<sup>13</sup> *Id.*

<sup>14</sup> JURGEN HABERMAS, BETWEEN FACTS AND NORMS 104 – 118 (1992); JURGEN HABERMAS, THE INCLUSION OF THE OTHER (1996); Lasse Thomassen, *The Inclusion of the Other? Habermas and the Paradox of Tolerance*, 34(4) POLITICAL THEORY 439 – 462 (2006).

<sup>15</sup> Thomassen, *supra* note 14 (The ethical or moral concerns referred to are the substantive contents of the law and the political or procedural concerns are concerns of political inclusion within the public sphere).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

In ‘The Structural Transformation of the Public Sphere’, Habermas details the importance of a substantive notion of a public life via deliberations in a discursive public sphere.<sup>18</sup> Actors within a state deliberate together on the nature and contents of a good life and the values that lead to them.<sup>19</sup> However, Habermas focuses not on the contents of this deliberation, but on the procedure of this deliberation itself.<sup>20</sup> The constitution, under such a conception, provides a referent for public discussion by laying down a set of procedural norms to organise such discussion and orient it towards the ends of the society within the public sphere.<sup>21</sup> Therefore, for Habermas, the principles of the constitution lay down a method for carrying out public debate and arriving at consensus. The specific contents of any conception of the good life may vary, then, and constitutional patriotism does not prioritise any one substantive conception over another. Hence, constitutional patriotism refers solely to commitment to a mode of public deliberation in a discursive public sphere. In light of this, Habermas importantly writes:

“Reciprocal religious toleration called for by everyone must rest on universally acceptable limits of tolerance. This consensual delimitation can arise only through the mode of deliberation in which those involved are obliged to engage in mutual perspective-taking.”<sup>22</sup>

The above passage reflects the Habermasian tension of the particular values of religion and nation and the universal values of tolerance that form the web of basic human rights. One question that his work was confronted with was whether patriotism can ever be reconciled with universal human rights.<sup>23</sup> Similar to the works of Arendt, Habermas’s argument identifies a tension in the relation between patriotism or the particular and human rights or the universal.<sup>24</sup> It is this tension that Habermas tries to resolve in his attempt at arriving at a theory of political and procedural justice. His resolution to this tension is the layered doctrine of constitutional patriotism – the doctrine that “the law, as embedded in the constitution, needs to be recognised as intrinsically

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<sup>18</sup> JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (1991). (Habermas explains his theory of ‘communicative rationality’ as the form of coordination through language wherein speakers adopt a practical stance oriented toward “reaching understanding,” which he regards as the “inherent telos” of speech. When actors engage in this kind of discussion with each other, they are engaging in ‘communicative action’. The reasoning developed through this communicative action is grounded on ideas of rationality that leads to a productive conversation in the public sphere.)

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Jürgen Habermas, *Intolerance and Discrimination*, 1(1) INT. J. CONST. LAW 5 – 6 (2003).

<sup>23</sup> Andrew Vincent, *Patriotism and Human Rights: An Argument for Unpatriotic Patriotism*, 13 (4) THE J. OF ETHICS 347 – 364 (2009).

<sup>24</sup> *Id.*

right.”<sup>25</sup> This adherence to the constitutional principles resolves the dichotomy of universal and particular by locating the constitutional framework and its rules on deliberation in the public sphere as supreme. Hence, the particulars of patriotism are arrived at by the universal process of just deliberation – deeming the substantive contents of this deliberation as “right”. This adherence to constitutional values, as conceptualised by representatives of the people, is seen as the crux of Habermasian patriotism.

However, if taken in isolation, the term “patriotism” can be misleading. Patriotism, in popular parlance, has been used to refer to modalities of a breed of beliefs in national solidarity, unity or cohesion that is characterised by membership to a nation.<sup>26</sup> Patriotic sentiments, cultures or behaviours, emphasise the membership of the collective above the agency of the individual. Value ridden notions of loyalty, betrayal and greater public good inform the popular narrative on patriotism. These are all strongly value-based norms or ethical suggestions on justice and the good life. Habermas would see these suggestions, hence, as substantive values that actors within the public sphere would arrive at after deliberation. However, as elaborated upon earlier, constitutional patriotism relates to making the procedure of deliberation as inclusive and fair as possible- irrespective of the substantive outcomes of such deliberation. While popular conceptions of patriotism rest on an ambiguous suggestion of ethical and substantive norms, the philosophical doctrine of constitutional patriotism focuses on regulating the procedural frame of deliberation by strict adherence to constitutional principles. Therefore, it is important to distinguish the philosophical theory of constitutional patriotism from popular understandings of patriotism. In the subsequent Part of the note, we demonstrate that the Supreme Court errs in this area by misunderstanding constitutional patriotism and confusing it with the understandings of patriotism, or nationalism, of the popular imagination.

It is telling to note that, in fact, Habermas himself, cautioned against such popular interpretations of the doctrine of constitutional patriotism. Habermas noted that although constitutional unity required a certain kind of citizen solidarity, its source need not be nationalism.<sup>27</sup> He regarded nationalism as a pre-pathological claim, in fact.<sup>28</sup> Nationalism and the mere

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (“Thus, “patriotism” is commonly considered to be one of a large class of words which are linked to the virtues of membership. To become a member, or to participate in relations of, for example, friendship, community, nationhood, citizenship or marriage, commonly implies certain particular normative conventions. In other words, there are particular value expectations built into any notion of membership. One important dimension of any membership relation is an expectation of some degree of loyalty. Fidelity or loyalty to a nation, community, friendship, citizenship, marriage or patria, is implied in the actual practice.”)

<sup>27</sup> Craig Calhoun, *Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere*, 14.1 PUBLIC CULTURE 147 – 171 (2002).

<sup>28</sup> *Id.*

claim for national unity, according to Habermas, diminished the identity of the individual and diluted the importance of individual and universal human rights.<sup>29</sup> Individuals have the right to define themselves as “other, according to the Habermasian idea of constitutional patriotism. He notes the importance of “a non-levelling and non-appropriating inclusion of the other in his otherness,” because “[citizens who share a common political life also are others to one another, and each is entitled to remain an “other”].”<sup>30</sup> Therefore, Habermas sees basic attempts at cohesive nationalism as against the doctrine of constitutional patriotism, rather than furthering it.

Cumulatively, the doctrine of constitutional patriotism emphasises adherence to a unique procedural framework – the idea of deliberation in the public sphere based on adherence to the constitution. It does not specify any particular norms or values as substantive contents. In fact, it cautions against the use of values such as nationalism, cohesiveness and *otherising* in the doctrine of constitutional patriotism. Habermasian constitutional patriotism emphatically characterizes itself as opposing and challenging fervours of nationalism and patriotic, cultural cohesion. In light of this, it is imperative to expose the inconsistencies of courts when they apply this doctrine in ways in which Habermas cautioned against. We point out such inconsistencies in the note – arguing that when legal philosophy is used by courts, it must be used with respect and caution. If the basis of the theoretical norm itself is diluted in its application by courts, we argue, that the application is of no merit in itself.

### III. ERRORS OF THE COURT: ANALYSING THE CONSTITUTION AND PRECEDENT

Within this theoretical backdrop, it is clear that Habermas’ idea is based on a strong allegiance to a particular constitutional frame as the only legitimate basis from which moral consensus can be arrived at. Therefore, certain questions become crucial. Is the mandatory playing and singing of the national anthem derivable from the Indian constitution? Further, to what extent has this particular judgment actually engaged with the constitutional discourse? In light of this, we criticize the judgment on two grounds – *first*, the court does not derive its decision from the Indian Constitutional framework and *second*, the court creates a positive duty to respect, unlike the codified negative duty against disrespect, thereby, indulging in a judicial overreach that Habermas would see as fundamentally problematic. The judgment has the opposite effect from that which it desires – contradicting the idea of constitutional patriotism, rather than furthering it.

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<sup>29</sup> *Id.*

<sup>30</sup> Vincent, *supra* note 23.

The Court relied extensively on Article 51A in its judgment. Article 51A(a) states that it shall be the duty of every citizen of India to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem.<sup>31</sup> Article 51 forms a part of Part IVA of the Constitution of India.<sup>32</sup> As a fundamental duty, this is an unenforceable, broadly constructed duty.<sup>33</sup> Through the evolution of case law in Indian courts, it is clear that there is an obligation upon courts to balance the fundamental duties against the enforceable fundamental rights of Part III of the Constitution.<sup>34</sup> The absolute primacy to one over the other would disturb the harmony of the Constitution, and that this harmony and balance between the two is an essential feature and a basic structure of the Constitution. Only this balance, or an attempt at arriving at it, can be considered as a true expression of the constitutional principles.

In the National Anthem debate, the Court has balanced the duty under Article 51A with fundamental rights – Article 19, the freedom of speech and expression, and Article 25, the right to freedom of religion. A perfect example of such an attempt at a constitutional balance is seen in the position of the Supreme Court in the landmark case of *Bijoe Emmanuel v. State of Kerala*.<sup>35</sup> In this case, three children were members of the religious group, Jehovah's Witnesses. At school morning Assembly, when the National Anthem was sung, they would choose not to sing.<sup>36</sup> This was labelled as “unpatriotic” by certain pressure groups, and hence, the principal of the school expelled the children.<sup>37</sup> The Supreme Court held the expulsion to be unconstitutional. Balancing duties with rights, it held that although Article 51A of the constitution enjoins a duty on every citizen of India “to abide by the constitution and respect its ideals and institutions, the national flag and the national anthem”, it will not be right to say that disrespect is shown by not joining in the singing in the national anthem.<sup>38</sup> Thus, the court stated that the right to freedom of speech and expression included the right to remain silent.<sup>39</sup> Furthermore, the right to remain silent and the right of no active respect were distinguished by the court from the duty against disrespect.

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<sup>31</sup> The Constitution of India, 1950, Art. 51A(a) (“Fundamental Duties – It shall be the duty of every citizen of India (a) to abide by the Constitution and respect its ideals and institutions, the national Flag and the National Anthem”).

<sup>32</sup> The Constitution of India, 1950, Part IVA.

<sup>33</sup> Mohd. Hanif Qureshi v. State of Bihar, AIR 1958 SC 731; 1959 SCR 629; AIIMS Students' Union v. AIIMS, (2002) 1 SCC 428.

<sup>34</sup> *Bijoe Emmanuel v. State of Kerala*, (1986) 3 SCC 615. (In this case, the court held that fundamental rights of the appellants under Arts. 19(1) (a) and 25(1) have been infringed and they are entitled to be protected.)

<sup>35</sup> *Bijoe Emmanuel v. State of Kerala*, (1986) 3 SCC 615.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Lawrence Liang, *Jana Gana Mana and the Danger of Passing Sentiment as Law*, THE WIRE December 1, 2016, available at <https://thewire.in/83606/jana-gana-mana-dangers-passing-sentiment-law/> (Last visited on March 24, 2017).

The Court in the present case relies on The Prevention of Insults to National Honour Act, 1971 to support its decision.<sup>40</sup> However, Section 3 of the Act that deals with the National Anthem states that whoever intentionally prevents the singing of the national anthem or causes disturbance to any assembly engaged in such singing shall be punished with imprisonment for a term which extend to three years or with fine, or with both.<sup>41</sup> This, again, is the clear codification of a prohibitive or negative duty – the duty against disturbance, prevention of singing and certain codified forms of disrespect. However, the legislature has not codified any positive duties of respect and there is no mention of the same anywhere in the constitutional scheme.<sup>42</sup> Therefore, it is clear that the court is drawing its idea of patriotism from someplace outside the constitutional framework, rather than from within it. The Court, clearly contradicts the position taken in the past in *Bijoe Emmanuel* case<sup>43</sup> and most troublingly, does not even weigh the duty under Article 51A against the constitutional scheme of rights. Furthermore, by codifying a positive duty to play the anthem and stand up as a particular form of respect, the court clearly creates law. Hence, in the absence of this discourse surrounding the constitutional scheme, the “patriotism” advocated by the court lacks the crucial discursive element that Habermas envisages.

A cumulative appraisal of the ideas above, demonstrates a gaping dissonance between the Court’s position and Habermas’ theoretical project. *First*, in balancing the long-standing tension in political philosophy of the general and the particular, Habermas offers an imaginative resolution by arguing that the law, as embedded in the constitution, needs to be recognized as intrinsically right. This is by virtue of the procedural method of discussion in a vibrant public sphere that the Constitution is a product – a procedural framework that Habermas argues, makes the substantive result, in itself intrinsically “right”. In *Shyam Narayan Chouksey v. Union of India*,<sup>44</sup> the Supreme Court creates a positive duty in an arbitrary manner by mandating the playing of the national anthem in cinema halls and standing up for it. This mode of judicial overreach and the creation of positive duties in the absence of legislative instructions has been criticised several times. In fact, the Supreme Court itself has routinely emphasised the importance of judicial restraint in decision-making. The Court has held that the restraint of the judiciary, the humility of the judicial function should be a constant theme of judges.<sup>45</sup> This quality of restraint in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary.<sup>46</sup> In this case, the Court clearly ignores the

<sup>40</sup> The Prevention of Insults to National Honour Act, 1971.

<sup>41</sup> The Prevention of Insults to National Honour Act, 1971, §3.

<sup>42</sup> For the difference between a positive and negative duty, see David P. Currie, *Positive and Negative Constitutional Rights*, 53(3) THE UNIVERSITY OF CHICAGO LAW REV. 864 – 890 (1986).

<sup>43</sup> *Bijoe Emmanuel v. State of Kerala*, (1986) 3 SCC 615.

<sup>44</sup> *Shyam Narayan Chouksey v. Union of India*, (2017) 1 SCC 421.

<sup>45</sup> *A.M. Mathur v. Pramod Kumar Gupta*, (1990) 2 SCC 533.

<sup>46</sup> *Id.*



importance of judicial restraint. The duty as enshrined in the Constitution does not provide a particular positive duty with a codified mode of respect for the national anthem. Here, the Court steps in and fails to exercise its restraint in balancing duties with crucial rights in the constitutional framework. The judge here is seen creating an obligation without any element of discussion within the public sphere that Habermas, as well, sees as integral. In the absence of this procedural framework rooted in a discursive element, the substantive conclusion, in itself, according to Habermas, would be entirely invalid.

*Second*, Habermas' constitutional patriotism is rooted against aggressive cultures of nationalism, but in a specific idea of constitutional patriotism.<sup>47</sup> Although Habermas accepts that constitutional unity does require a certain kind of citizen solidarity, he firmly argues that its source need not be nationalism, which is viewed by Habermas as a pre-political pathological claim – one that must be discarded for an evolution of democratic discourse. This is a crucial distinction. If the procedural element is lacking, and the value of patriotism is not so derivable from the constitutional frame, the substantive result is a product of the “nationalism” that Habermas staunchly opposes, rather than his delicate theoretical framework on constitutional patriotism. Therefore, the judgment of the Court seems directly opposed to Habermas's version of patriotism, and instead, codifies its own version of arbitrary nationalism into hard law.

In light of this, Habermas' work becomes a crucial caution against such unilateral codifications of substantive value by the courts and acts as a reminder of the importance of dialogue and discussion in a vibrant, dissenting and discursive public sphere. If the Court is citing theoretical doctrines as justifications and rationales behind its decisions, analysis of the doctrines is a must. The incorrect attribution of ideas of nationalism and aggressive jingoism to Habermas completely vitiates his position and the work he did within legal theory. More worrying, however, it allows the Court to get away with judgments lacking adequate explanation that further cultures of nationalism without a respect for individual rights and dignity. It is crucial for the Court to take steps to avoid such decisions in the future and adhere to the constitutional framework of the country.

#### IV. CONCLUSION

In the course of this note, we have addressed the recent national anthem mandate of the Supreme Court in India and argued that the Court has misunderstood the doctrine of constitutional patriotism that it directly relies on in the course of its judgment. Incorrect interpretations of this doctrine are problematic as such interpretations tilt the delicate balance developed by Habermas towards patriotic duty and obligations of membership, thus arbitrarily diluting

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<sup>47</sup> Vincent, *supra* note 23.

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the importance of individual rights. Furthermore, the judgment is also legally problematic as it deviates from precedent by failing to recognise the importance of the fundamental rights in the constitutional framework. It creates a positive duty of compliance and respect, unlike the negative duty specified in the statutory framework that prohibits disrespect, but does not codify a particular form or mode of demonstrating respect. In light of this, it is crucial for the Court to re-examine its reliance on the idea of constitutional patriotism in the future. The Court cannot forget the importance of adhering to the basic mandate of the Constitution. In a patriotic fervour, the Court runs the risk of disregarding the importance of individual rights and liberties that form the backbone of the Indian democracy.