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## Case Comment: Kaushal Kishor vs The State of Uttar Pradesh

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### INTRODUCTION

How galling and heart-wrenching it is that the makers of the Constitution of India guaranteed the 'Freedom of speech and expression' but the keepers of the same said constitution while exercising it are violating others' 'Right to life'. Keepers of the Constitution does include the judiciary but also the bureaucracy. It is equally the responsibility of public officials to maintain harmony all around. A wise man once said, well said! "speak only when your words are better than the silence". The former minister of the state of Uttar Pradesh proved through his derogatory remark when he referred to an incident of gang rape as a political conspiracy that he certainly does not believe in the above-said quote.

The key purpose of the right to free speech and expression and all the parliamentary privileges were to only make a rightful exercise of democracy. But the right to free speech is probably misconstrued as the right to offend the sentiments of others and further infringe on the right to life. Undoubtedly there exist certain 'reasonable' restrictions under Article 19(2)<sup>1</sup> to prevent the

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<sup>1</sup> Constitution of India 1950, art 19(2)

wrongful exercise of the Article 19(1)(a)<sup>2</sup>- Freedom of speech and expression but the question placed was -is that list of reasonable restrictions exhaustive? If yes, then how will the system go about protecting the 'Right to life' of those who are on the receiving end of such infringement? In addition to that, how the right to free speech can be exercised in the right direction, for the right purpose, and in the least damaging way? Moreover, can the state be vicariously liable for the acts and statements of a public official? and finally, how about equally appreciating and solemnly committing to the Fundamental Duties, as we are for the fundamental rights?

In light of the above questions, authors are aiming to skim through different aspects of the case, lightly discussing the difference of opinion of the jurists delivering the judgement and further elucidating the role of the judiciary and bureaucracy as well in ensuring faith in the overall system. Further discussing how the privileges provided to the public officials are to be used for the welfare of the citizens rather than to offend or damage them.

## FACTS OF THE CASE

The Constitution bench, in this<sup>3</sup> case, decided the outcome of the controversial remarks made by two men holding the ministerial post in two different states exercising their right to freedom of speech and expression but at the same time infringing the right to life and personal liberty of the victims. The petitioner filed a writ petition under Article 32<sup>4</sup> for seeking relief against Azam Khan, Minister for Urban Development of the Government of Uttar Pradesh for calling the Bulandshahr rape incident a political conspiracy by opposition parties to defame his government. According to the writ petitioner, he and his family on national highway 91 were attacked by highway robbers that took away money and cash in the possession of the petitioner and brutally gang-raped his wife and 13-year-old minor daughter. Media has reported this heinous offence that had been committed in the state of Uttar Pradesh and Azam Khan in the press conference called this incident a political conspiracy.

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<sup>2</sup> Constitution of India 1950, art 19(1)(a)

<sup>3</sup> *Kaushal Kishore v The state of Uttar Pradesh* Writ Petition (Crim) No 113/2016

<sup>4</sup> Constitution of India 1950, art 32

After his controversial remarks, the petitioner feared a fair investigation won't be conducted, and hence he was compelled to file a writ petition against the minister for his irresponsible remarks against the modesty of the women and for infringing the fundamental rights of the victims. Later on, Azam Khan issued an unconditional apology after the Supreme Court order.

At this juncture, a special writ petition<sup>5</sup> has been tagged with this case as both involve similar sorts of questions before the constitutional bench of the Supreme Court. The division bench of the Kerala High Court dismissed two public writ petitions filed by the petitioner against the Minister for Electricity in the State of Kerala for saying highly derogatory remarks against women and no action was officially taken against the minister. The petitioner prayed in one petition to issue directions to the chief minister to take action against ministers who failed to live up to the constitutional oath and in the second petition prayed to take action against the minister for his derogatory remarks against women. But both petitions were dismissed by a division bench of the Kerala High Court citing that framing the code of conduct for ministers in the cabinet is not within the court and cannot issue directions for the same.

## LEGAL ISSUES

The five major legal issues were decided by the court after taking the arguments from both the petitioner and defendant sides. These issues were:

- Are the grounds under Article 19(2) exhaustive reasonable restrictions on freedom of speech and expression or can the other fundamental rights restrict the freedom of speech and expression?
- Can fundamental rights Article 19 and 21 be actionable against non-state entities for infringing it?
- Does the state have an obligation to protect Article 21 of the citizen against acts and omissions of private entities?
- Can a government be vicariously liable for a statement made by a minister related to affairs of the state considering the principle of collective responsibility?

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<sup>5</sup> *Kaushal Kishore v The state of Uttar Pradesh* Special Leave Petition No 34629/2017

- Is it actionable under constitutional torts if the statement by a minister infringes on the fundamental rights of the citizens?

## COURT OBSERVATION

The learned Senior Counsel, Sri Kaleeswaram Raj, appeared on behalf of the petitioners, and on behalf of the respondent, attorney general Sri R. Venkataramani put forward the arguments on the legal issues.

## ARGUMENTS

On the legal issues, the petitioner argued that in respect of the freedom of speech and expression of the ministers, efforts should be made to draft a voluntary code of conduct for public officials like ministers to exercise their Article 19<sup>6</sup> but the respondent argued that no further restrictions can be placed on Article 19. The reasonable restrictions placed under Article 19(2)<sup>7</sup> are exhaustive and further restrictions can be added through only the legislative process. On the other issue, the respondent argued that if non-state entities are actionable for infringing the fundamental rights of the person then that would amount to a fundamental change to the constitutional principles. Such a change would open a gate for litigation on non-state entities. The petitioner argued that fundamental rights impose duties on the states for non-infringement of such rights but the absence of a provision to regulate the speech of individual ministers makes the speech non-actionable for violation of fundamental rights in a court of law.

Hence, a voluntary code of conduct is a mandate. The respondent further submitted that for protection of article 21<sup>8</sup>, the constitution has given sufficient legal remedies to the citizens for infringement of article 21 under articles 32<sup>9</sup> and 226<sup>10</sup> and hence no additional duty can be placed on the state to protect such rights. On the collective responsibility of the government, the petitioner relied on Article 75(3)<sup>11</sup> of the Constitution to show ministers have a collective

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<sup>6</sup> Constitution of India 1950, art 19

<sup>7</sup> Constitution of India 1950, art 19(2)

<sup>8</sup> Constitution of India 1950, art 21

<sup>9</sup> Constitution of India 1950, art 32

<sup>10</sup> Constitution of India 1950, art 226

<sup>11</sup> Constitution of India 1950, art 75(3)

responsibility towards the legislative government because every utterance by the minister impacts the public in general hence the government should be collectively responsible for the minister's remarks. Petitioner pointed out common cause<sup>12</sup> judgement for the elaborate meaning of collective responsibility. In contrast, the respondent argued that minister remarks which are not related to state and public duty, such misconduct remarks cannot be linked to the principle of collective responsibility.

## COURT DECISION

The five-judge constitution bench consists of Adbul Nazeer J, B.R. Gavai J, A.S. Bopanna J, V Ramasubramanian J, and B.V. Nagarathna J gave a sound opinion on the five questions listed in legal issues to examine the misuse of free speech. The bench decided that the grounds listed in Article 19(2) for exercising freedom of speech and expression are an exhaustive list. No additional restrictions can be placed even if two fundamental rights are competing against each other. It also decides that Article 19 and 21 is enforceable against non-state entities though Justice B.V. Nagarathna differed on this point by saying that a sufficient remedy to file a habeas corpus writ petition in case of violation of Article 21 against a private entity is already given. Hence, Articles 19 and 21 are not enforceable against non-state entities which do not fall under the definition of Article 12.

The bench placed an affirmative duty on the state to protect the life and liberty of the citizens from private entities as well. But article 21 places a kind of negative duty on the state to not deprive any person of life and personal liberty except by the procedure of the law. Justice BV Nagarathna with this view opined that such interference by the state to protect Article 21 from private actors will infringe on the negative duty that casts upon the state. On the principle of collective responsibility, the majority bench decided that a statement made by a minister related to affairs of the state cannot make the government vicariously liable for it. But Justice B.V. Nagarathna, with a different opinion from the majority, contended that a statement made by the minister related to the affairs of the government makes the state vicariously liable for it and if

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<sup>12</sup> *Common Cause, A Registered Society v Union of India* (1999) 6 SCC 667

the statement is not consistent with the view of the government then there is no vicarious liability on the state.

Moreover, the bench decided that if a statement made by the minister infringes on the fundamental rights of the citizen then it may not be actionable under the constitutional tort unless such remarks resulted in harm or loss to the citizen/person. The appropriate remedy can be sought before the court by invoking the principle of collective responsibility in such remarks. The unanimous decision on these five legal issues and the different points of view of Justice B.V. Nagarathana were of great constitutional importance.

### **FREEDOM OF SPEECH, NOT THE LICENSE TO ABUSE**

Being the 'Parents Patriae' (parents of the nation), the top tier of the Indian judiciary i.e., the Supreme Court rightfully refused to extend the list of 'reasonable restrictions' and declared the already existing list provided under Article 19(2) to be exhaustive. Since it is the judiciary that is expected to be rescued from the arbitrariness of the state. It is the judiciary that is expected to defend the civil liberties of mankind. It is the judiciary that has time and again stood for the welfare of its citizens and choosing not to curtail further the freedom of speech and expression is one of those stands. Think it the other way, if Article 21 would have been considered as one of the reasonable restrictions then liberty would have taken a nap. The horizon of Article 21 is so broad that the system would have collapsed if the reverse was done. Moreover, In the upcoming times, Article 21 may get even wider then the liberty to express oneself would barely exist.<sup>13</sup>

If curtailing the right to free speech is not an option then what are the other ways to be opted for protecting the people from such humiliation especially when it comes from an authority? The matter in question for holding the state vicariously liable for the acts of the public official was well-raised but if the answer is negative,<sup>14</sup> then how is this humiliation that comes

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<sup>13</sup> Editorial, 'Freedom in authority: On the right to free speech' (*The Hindu*, 6 January 2023)

<<https://www.thehindu.com/opinion/editorial/freedom-in-authority-the-hindu-editorial-on-the-right-to-free-speech/article66343456.ece>> accessed 10 January 2023

<sup>14</sup> *Ibid*

complimentary with free speech can be curbed? Someone has to take charge of the public officials who are misusing their position and the parliamentary privilege and who better than the state itself to take such cases into custody? Also, the parliamentary privileges of free speech and not getting sued for it preferably be limited to the floor of the assembly only.

Being the age of social media when people are interacting with each other more than ever, it is the call of the hour to acknowledge concepts like hate speech. Judicial officers have to recognize the fine line between Free Speech and Hate Speech. Hate speech is a speech or statement which has no meaning other than hatred towards a particular community or group of people. The impact of Hate Speech is adverse when taken into account. Liberty though is fundamental in a democracy but it must not come out being barbaric and uncivilized and constitutional values must prevail.

## CONCLUSION

On our way forward in tackling such mishaps, the blame game certainly must cease to exist. This incident is a failure of society as a whole. Thus, collective responsibility along with collective action by all three organs - The Judiciary, The Legislative as well as The Executive is the most efficient choice for betterment. All those who are aware of what happened that night on NH 91 and further Mr. Azam Khan's remark on that, firmly acknowledge his statement to be cruel, inhumane, and insensitive. Yet, we are unable to frame any law that can prevent such acts from taking place. Another unwelcomed reminder for the Parliament to come to its toes to avert citizens (public officials in particular) from misusing the precious rights provided to them for their fundamental development. Liberty must come by the Law.

The tussle between Article 19(1)(a) right to speech and expression and other constitutional, legal rights and subjects is no more breaking news. If it is so frequent in the system, why not specific acts be carried out against those spreading the toxicity all around? Any citizen- be it the masses or the public officials attacking the individuals verbally or creating any hate speech towards any

particular person, group, or class must be caught under criminal as well as civil laws. Justice must be accessible and not farfetched.<sup>15</sup>

Moreover, provisions of decency, morality, and contempt of court are already mentioned under reasonable restrictions under Article 19(2) even then we are unable to catch those making chaos without a second thought. This raises an obvious question on the stand of the judiciary. Finally, while we are constantly adhering to Fundamental Rights, our Fundamental duties are getting embarrassed. A sense of harmony and brotherhood is well-quoted in our fundamental duties to which we must show some inclination. Calling off with a reminder preached by Edmund Burke<sup>16</sup>- "Liberty does not exist with the absence of morality". Free from all the shackles- the literal meaning of Liberty may be the same but the legal meaning differs. Liberty does come with reasonable restrictions and one must abide by them.

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<sup>15</sup> V Ramasubramanian, 'Judgment' (*Supreme Court of India*, 2023)  
<[https://main.sci.gov.in/supremecourt/2016/27156/27156\\_2016\\_3\\_1501\\_40744\\_Judgement\\_03-Jan-2023.pdf](https://main.sci.gov.in/supremecourt/2016/27156/27156_2016_3_1501_40744_Judgement_03-Jan-2023.pdf)>  
accessed 10 January 2023

<sup>16</sup> Rich Brooks, 'WRITE TEAM: Edmund Burke was right' (*Shaw Local News Network*, 20 March 2020)  
<<https://www.shawlocal.com/2020/03/01/write-team-edmund-burke-was-right/a4mqlcq/>> accessed 10 January 2023