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CASE COMMENT: KAUSHAL KISHORE v. STATE OF UTTAR PRADESH & ORS. (2023)

~ *Sreya Shah*

INTRODUCTION

The concept of hate speech in India has escalated infinitely over the past few years. The case of *Kaushal Kishore v. State of Uttar Pradesh & Ors (2023)*¹ has addressed several significant constitutional questions revolving around hate speech. The Constitutional Bench, while addressing this case, has made landmark rulings on the grounds of restrictions on speech, ministerial accountability, limitations on collective responsibility, and the horizontal scope of fundamental rights.

FACTS OF THE CASE:

The Supreme Court has passed a landmark judgement in the case of *Kaushal Kishore v. State of Uttar Pradesh & Ors (2023)*, wherein it has combined two unrelated cases arising from the comments passed by Ministers from two different states on two different situations. A Minister from the State Government of Uttar Pradesh called the sexual assault against two rape victim survivors a “political controversy.” The second case involved a State Minister from the Government of Kerala passing derogatory remarks on women. This case raised questions similar to those in the UP case and was therefore considered along with it. The Apex court delivered the landmark judgement in January 2023.

¹ *Kaushal Kishor v. State of U.P.*, (2023) 4 SCC 1

ISSUES OF THE CASE:

The Constitutional Bench in 2019 framed five major issues for both cases:

1. The first issue questioned whether the grounds stated in Article 19 (2)² of the Constitution are exhaustive, or can there be additions made to the grounds restricting the freedom of speech?
2. The second issue questioned whether a fundamental right guaranteed under Articles 19 and 21 can be enforced horizontally, that is, against persons or entities other than the state and its instrumentalities?
3. The third issue questioned whether it is the state's duty to protect the rights of citizens under Article 21³, even if it is claimed against a private individual or a non-state actor?
4. The fourth issue was whether a minister's public statement regarding or connected to state affairs should be vicariously attributed to the government, subject to the principle of collective responsibility?
5. The fifth issue was whether a statement passed by a minister, that is, prima facie inconsistent with the fundamental rights of a citizen, should be treated as a violation of a constitutional wrong, and if such an act should be treated as a constitutional tort?

The Constitutional Bench addressed these five issues of constitutional significance in detail. However, while not undermining the significance of the other issues, this commentary strictly confines itself to issues on the exhaustiveness of Article 19 (2), the vicarious governmental liability of such statements passed by ministers, and the actionability of statements passed by ministers as a constitutional tort.

JUDGEMENT

A five-judge Constitutional bench of the Supreme Court of India, comprising Justice S. Abdul Nazeer, Justice B.R. Gavai, Justice A.S. Bopanna, and Justice V. Ramasubramanian, delivered the majority judgment authored by Justice V. Ramasubramanian, with Justice B. V. Nagarathna delivering a separate opinion on certain questions.

² Article 19(2): India Const. art. 19, cl. 2.

³ Article 21: India Const. art. 21.

I. THE EXHAUSTIVENESS OF ARTICLE 19 (2):

The Constitutional bench addressing Issue 1 ruled that the grounds of restrictions under Article 19 (2) are exhaustive, and by invoking other fundamental rights, additional grounds to Article 19 (2) cannot be included. The court drew up on this conclusion after considering the intentions of the framers of the Constitution, observing that such enumeration was conscious and deliberate. Further, the Court mainly relied on precedents such as *Shreya Singhal v. Union of India (2015)*, where the court struck down provisions from the IT Act because it imposed restrictions beyond the grounds specified under Article 19 (2).⁴ The most important argument addressed by the bench was of one fundamental right being used to restrict another. The Bench is strictly opposed to this argument; it held that every fundamental right has its own constitutional space, and they do not compete or override each other. The Bench observed that such competition would lead to uncertainty and unpredictability in law.

Justice Nagarathna agreed with the judgment of the majority bench in this matter, while adding a significant opinion that Article 19 (2) should be read expansively to cover hate speech situations.

ANALYSIS:

While the majority's opinion on the exhaustiveness of Article 19 (2) seems doctrinally consistent, the major question of hate speech still goes unanswered. The limitation on the grounds specified under Article 19 (2) hampers the justice to be given to the victims of hate speech who have suffered real harm. The Bench's reasoning is essentially originalist, considering the intent of the framers of the list; however, the fact that the list was framed in 1950, the framers could not have anticipated the scale at which hate speech operates today. Justice Nagarathna's insistence on an expansive interpretation of grounds specified under Article 19 (2) is far more consistent with the evolving nature and rapid escalation of hate speech.

II. MINISTERIAL ACCOUNTABILITY AND LIMITATIONS OF COLLECTIVE RESPONSIBILITY

The Bench in the 4th issue held that a minister's statement, even if traceable to State affairs, cannot be vicariously attributed to the government by invoking the principle of collective responsibility. The Bench observed that a minister speaking in their personal capacity, even on

⁴ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1 (India)

matters related to their official position, does not bind the government, hence drawing a clear distinction between official and personal capacity of ministers. The Court clearly specified that Article 75 (3)⁵, which talks about collective responsibility, doesn't mean that every public statement of ministers automatically becomes a government statement. However, Justice Nagarathna's views significantly diverged from the majority's views. She held that a statement made by a minister that can be attributed to state affairs and their office cannot be treated merely as a personal opinion. Further, she held that there must be a closer scrutiny of whether the statement was made in a personal or official capacity.

ANALYSIS

The bench has drawn an extremely narrow reading of collective responsibility, although it is technically defensible, it creates a shield for ministers and the government. The distinction between a minister's official and personal capacity seems clean conceptually, but it does not seem practical. When ministers make derogatory public statements concerning matters within their official roles, it becomes almost impossible for the public to distinguish between the two capacities. Justice Nagarathna's take on this issue seems far more aligned with constitutional morality, and the approach of the majority deeply undermines government accountability.

III. CONSTITUTIONAL TORT AND THE THRESHOLD OF MINISTERIAL SPEECH

The Bench in this issue delivered a remarkable judgment, emphasising the key elements of a constitutional tort arising from a statement made by a minister. The Majority of 4:1 ruled that a statement by a minister can be considered as a constitutional wrong only if it was followed by an act or an omission of an act performed by any public officer, causing harm to a citizen, establishing a two-step causation requirement. Hence, dismissing the question of violation of any rights of a citizen under Part III of the Constitution because of such a statement. The Court, while drawing upon the line of precedents on constitutional tort cases, held that mere speech cannot constitute a constitutional tort since all the previous cases involved a physical act committed by the state officials. Justice Nagarathna majorly agreed with the views of the majority bench, while pressing on the need for a proper legal framework that defined what

⁵ Article 75(3): India Const. art. 75, cl. 3.

constitutes a constitutional tort and what does not. She elaborated that ministers should be held personally liable if their statements are inconsistent with the views of the government, and the government should be held vicariously liable if any derogatory statement made by the ministers aligns with the views of the government.

ANALYSIS

The two-step causation requirement for a statement to be considered a constitutional tort sets an evidentiary standard that is nearly impossible for the hate speech victims to meet. When hate speech comes from a public figure, it causes immense harm to the victim, and such difficult standards for attaining justice not just demean the dignity of the victims but also embolden the individuals making such statements, normalising discrimination. The Court, by limiting Constitutional Tort to physical harm, diminished the importance of the evolution of dignity under Indian Jurisprudence post *Puttuswamy*⁶. This action made Constitutional tort a toothless remedy.

CONCLUSION

The Constitutional Bench of the Supreme Court passed a remarkable, landmark judgement under *Kaushal Kishore v. State of Uttar Pradesh & Ors (2023)* that answered several significant constitutional questions on hate speech and ministerial accountability. The judgment passed by the 4:1 majority aligned perfectly with formal doctrines; however left the concept of substantive justice untouched. On the other hand, Justice Nagarathna's views on the issues placed significant emphasis on dignity, fraternity, and constitutional morality, making her judgment slightly distinguished from the majority. The case answered several questions while leaving behind major gaps about justice and constitutional morality. As hate speech escalates rapidly in Indian public life, the dignity promised by the Constitution demands that the courts move ahead of doctrinal principles, centralising substantive justice.

⁶ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1