

RE-EVALUATING FREE SPEECH PROTECTIONS OF ELECTED REPRESENTATIVES: ADDRESSING RESPONSIBILITY CONCERNS VIS-À-VIS INDIVIDUAL DIGNITY

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In July 2016, when a 13-year-old girl and her mother filed an FIR alleging that they had been gang-raped by a group of criminals on NH-91 in Bulandsheher, Uttar Pradesh, the then Cabinet Minister of the State, Azam Khan made a statement terming it a 'political conspiracy against the State Government'. In August 2016, the victims approached the Supreme Court and filed a writ petition, seeking action against the minister for making such remarks about the incident. While the Court framed a wide range of issues in the petition ranging from collective responsibility of Ministers to the concept of Constitutional Torts, the scope of the present paper is only restricted to the conflict between the speech of elected representatives and individual dignity. Through the course of this paper, we try to determine the idea of individual dignity and use it to argue that the speech-acts of elected representatives should be restricted when they violate the two fundamental parameters of individual dignity embedded in the Constitution. It has been argued by the petitioners and the Amicus Curiae that Article 19(1)(a) rights can be restricted beyond Article 19(2) by Article 21 if they violate individual dignity. Contrastingly, through this paper, we shall be arguing that not only can the fundamental parameters of individual dignity be read into Article 19(2) of the Constitution of India, but they can withstand the rigorous standard of Constitutional scrutiny as well.

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I. INTRODUCTION

On July 29, 2016, a young girl and her mother were gang-raped on a National Highway passing through Bulandshahr, Uttar Pradesh.¹ When the victims of the gang-rape filed a First Information Report ('FIR') with the police, an elected representative and cabinet minister of the State termed the complaint as a political conspiracy against the Uttar Pradesh Government.² He went on to suggest that the gang-rape complaint could have been orchestrated to gain political mileage.³ Subsequently, the victims filed a writ petition against the speech-acts of the cabinet minister.⁴ In August, 2019, new questions of law were framed by the Attorney General in the matter.⁵ This was done because the Court felt that it was constitutionally obligated to evolve new tools in order to determine the extent to which the protected speech of certain individuals could be transgressed.⁶ While the proceedings of the case, so far, have indicated that the Court is inclined

¹ Peeyush Khandelwal & S. Raju, *Noida Woman, Daughter Raped Near Bulandshahr Highway, 15 Detained*, HINDUSTAN TIMES, July 31, 2016, available at <https://www.hindustantimes.com/india-news/noida-woman-daughter-gangraped-near-bulandshahr-highway-15-detained/story-MSD-1pXA4bAlhiV6caVsb9N.html> (Last visited on September 13, 2021).

² Press Trust of India, *Bulandshahr Gang Rape could be Political Conspiracy: Azam Khan*, THE ECONOMIC TIMES, August 2, 2016, available at <https://economictimes.indiatimes.com/news/politics-and-nation/bulandshahr-gang-rape-could-be-political-conspiracy-azam-khan/article-show/53501373.cms?from=mdr> (Last visited on September 13, 2021).

³ *Id.*

⁴ *Kaushal Kishor v. State of U.P.*, (2017) 1 SCC 406.

⁵ Gautum Bhatia, *A Very Strange Constitution Bench*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG, October 27, 2019, available at <https://indconlawphil.wordpress.com/2019/10/27/a-very-strange-constitution-bench/> (Last visited on September 13, 2021).

⁶ *Kaushal Kishor v. State of U.*, 2019 SCC OnLine SC 2254.

towards reviewing the protections accorded to free speech under the Constitution by exploring the idea of restricting it beyond the grounds mentioned in Article 19(2),⁷ we believe that this approach may prove to be fundamentally detrimental to the guarantee of free speech under the Constitution in light of the Supreme Court's earlier judgments in *Sakal Papers v. Union of India* and *Shreya Singhal v. Union of India*. However, at the same time we believe that the idea of individual dignity would lose its significance if its most fundamental parameters are not protected from speech-acts which constantly threaten to undermine them.

While the issues in the petition range from the collective responsibility of Ministers to the concept of Constitutional Torts,⁸ the scope of the present paper is only restricted to analysing the conflict between the speech-acts of elected representatives and idea of individual dignity. Essentially, we use the issues framed in *Kaushal Kishor v. State of U.P.* ('Kaushal Kishor') as a springboard to address the larger concerns of the threat posed by speech-acts of elected representatives to the idea of individual dignity.

Against the backdrop of this scope, throughout the course of this paper, we attempt to apprise the reader of how the speech-acts of elected representatives violate the fundamental parameters which build the idea of individual dignity, and therefore why such speech-acts should not be given constitutional protection. More specifically, we attempt to apprise the reader of a higher degree of responsibility which exists for elected representatives under the Constitution, which is why there is a need to restrict their speech-acts violating the idea of individual dignity using the grounds mentioned in Article 19(2) of the Constitution of India.

In order to do so, we begin in Part II by arguing that the Constitution recognises the existence of a higher degree of responsibility for elected representatives. As such, this higher degree of responsibility, at the very least, necessarily includes an obligation not to violate the dignity of the individual. We make this argument against the backdrop of the inextricable causal link that exists between the obligation of elected representatives to uphold the integrity of the nation and the individual dignity of the constituents they represent. Having argued how the notions of individual dignity lie at the heart of the Indian Constitution, and how elected representatives are constitutionally obligated to ensure that their actions do not end up violating the same, we move on, in Part III to apprise the reader of the constitutive reasons which enable speech-acts of such elected representatives to undermine the dignity of individuals as opposed to speech-acts of others. We essentially trace these constitutive reasons to a skewed power spectrum of the society which impedes such individuals from even attempting to respond to their humiliation by the elected representatives. Part III essentially forms the base for our arguments in Part IV by apprising the reader why the speech of an elected

⁷ *Id.*

⁸ *Kaushal Kishor v. State of U.P.*, 2019 SCC OnLine SC 2254.

representative has the potential of undermining the idea of individual dignity in the first place.

Having done so, in Part IV, we view the idea of dignity under the Constitution from an expressive and consequentialist perspective to determine the two fundamental and related parameters of individual dignity – the assurance of inclusiveness and the entitlement to be regarded as a social equal in the society – which are damaged by speech-acts of elected representatives. Part IV essentially argues that when speech-acts threaten an individual’s assurance of inclusiveness and her entitlement to be regarded as a social equal in the society, they strike at those fundamental parameters of an individual’s dignity that should be upheld everywhere regardless of how expansively or restrictively the idea of dignity has been defined. Drawing from the two fundamental parameters mentioned in Part IV, Part V, against the backdrop of constitutional provisions and case laws, argues that the principles of anti-exclusion and equal social standing (the fundamental factors underpinning the idea of individual dignity) form a part of constitutional morality under the Constitution. By reading the two fundamental parameters of dignity into constitutional morality, we make a case for restricting the speech of elected representatives using the ‘morality’ ground of Article 19(2).

In light of the fact that the idea of dignity is still such an expansive notion, in Part VI, we suggest a normative approach through which Courts can consciously divorce subjective feelings of hurt, anger and shock (protected speech) from threats to an individual’s basic entitlement to be regarded as a member of the society in good standing (unprotected speech). Having apprised the reader of the manner in which speech-acts which violate the idea of dignity under the Constitution may be divorced from protected speech-acts, in Part VII, we argue that a legislation restricting the speech-acts of the former kind would wholly withstand the rigours of Constitutional scrutiny in the times to come.

Part VIII concludes the piece by emphasising that the Constitution was predicated on the idea of an individual and her dignity. It reminds the reader of our constitutional goal, the achievement of which would only be complete when speech-acts of the powerful no longer undermine the dignity of the individuals or when the speech of the victims are given an equal weightage and they are allowed to lay their claims to the same authoritative discourse that had been given to those speech-acts which had denigrated them.

II. DETERMINING THE RESPONSIBILITY OF ELECTED REPRESENTATIVES UNDER THE CONSTITUTION (THE ‘WHAT’ QUESTIONS)

“[Elected Representatives] need to be conscious of the fact that they are altogether just 790 members in both Houses of

Parliament representing more than one billion people outside, and so occupy the highest positions both of power and privilege – and a position of responsibility as well” (emphasis added).

—Fali S. Nariman⁹

When Fali S. Nariman said that elected representatives need to be conscious of the power they wield, it was a reminder to them that the institutions created by the Constitution, such as a deliberative democracy like ours, will always remain greater than the men and women who are in-charge of them for the time-being.¹⁰ His reasoning was against the backdrop of the oath taken by an elected representative enshrined in Schedule III of the Constitution of India.¹¹ The oath is an affirmation by her that she would bear true faith and allegiance to the Constitution of India and faithfully discharge the duty upon which she is about to enter.¹²

A. ENLIVENING THE OATHS UNDER SCHEDULE III OF THE CONSTITUTION

While the forms of oaths and affirmations in Schedule III may appear to be merely ceremonial, they lie at the heart of the relationship between a representative and her constituents.¹³ This significance was illustrated for the first time when Parliament passed the Constitution (Sixteenth Amendment) Bill, 1963 as a response to the DMK’s demands for secession from India.¹⁴ Amongst other amendments, the Bill amended the oaths in Schedule III of the Constitution which required all elected representatives and candidates nominated for contesting elections to swear that they would *inter alia*, “uphold the sovereignty and integrity of India”.¹⁵ This amendment was essentially an assertion of the fact that the constitutional right to contest an election and become an elected representative also creates a corresponding duty to bear allegiance to the Constitution and uphold the sovereignty and integrity of India. More specifically, through the passing of the Sixteenth Amendment, the Constitution recognised the heightened responsibilities that exists for elected representatives and constitutionally restricted them from

⁹ FALI S. NARIMAN, GOD SAVE THE HON’BLE SUPREME COURT, 104, (Hay House Publishers India, 2018).

¹⁰ *Id.*, 15.

¹¹ The Constitution of India, 1950, Sch. III, Form II. In his book, GOD SAVE THE HON’BLE SUPREME COURT, Nariman emphasises upon the oaths in for Members of Parliament in the Third Schedule in order to drive home the point that the Constitution requires them to be responsible to the ultimate sovereign, i.e The People of India at all times.

¹² *Id.*

¹³ Haridasan Palayil v. Speaker of 11th Kerala Legislative Assembly, 2003 SCC OnLine Ker 97; Ram Pal Singh v. State of U.P., (2018) 6 SCC 692, ¶35, 53; Virjiram Sutaria v. Nathalal Premji Bhavadia (1969) 1 SCC 77.

¹⁴ The Constitution (Sixteenth) Amendment Act, 1963.

¹⁵ Granville Austin, WORKING A DEMOCRATIC CONSTITUTION, 52, (Oxford University Press, 1999); The Constitution (Sixteenth) Amendment Act, 1963; The Constitution of India, 1950, Sch. III, Form III.

propagating anything which threatens the sovereignty and integrity of India. The amendment also represented a marked shift in the attitude of the legislature which now sought to practically implement those aspects of our Constitution which had been considered as mere abstractions until now.¹⁶

By the time the hourglass ran to 2014, this sentiment had been echoed by the Supreme Court and various High Courts on multiple occasions. In 1996, speaking through Justices Ramaswamy and Hansaria, JJ, the Supreme Court, in the case of *Jaipur Development Authority v. Daulat Mal Jain*,¹⁷ held that the notions of ministerial responsibility were grounded in the assumption that the actions taken by ministers are intended to further the goals (as prescribed by their oaths) laid down in our Constitution. In 2003, the Kerala High Court, in the case of *Haridasan Palayil v. The Speaker*,¹⁸ while deciding whether the oath taken by the respondent conformed to the Constitutional provisions or not, held that the obvious purpose of the oaths in Schedule III is to ensure that the person concerned makes a commitment to the people that she will live by the constitutional process.

B. THE RESPONSIBILITY TO SAFEGUARD THE CONSTITUTIONAL GUARANTEE OF INDIVIDUAL DIGNITY

From 1963 to 2014, over the course of fifty-one years, the faith reposed in elected representatives by the people has been sustained because of an assumption which guarantees them that their representatives shall do nothing which threatens their sovereignty or integrity. This emotion was emphatically echoed by the Supreme Court in 2014, when a Constitution Bench in the case of *Manoj Narula v. Union of India*,¹⁹ was called upon to decide whether persons having a criminal background may be appointed as Ministers of the Union. In its judgement, the Court held that the faith and trust reposed by the people of India in their elected representatives and manifested through their oaths of office is rooted in the assumption and the legitimate expectation that such representatives would use

¹⁶ See *Manoj Narula v. Union of India*, (2014) 9 SCC 77; *Kaushal Kishor v. State of U.P.*, (2016) 10 SCC 295. In the Constituent Assembly Debates, when the language of the oaths of office was being debated upon, Dr. B.R. Ambedkar had suggested that the words 'solemnly affirm' and 'swear in the name of God' may be used as alternatives by an elected representative while taking the oath of office. At the same time, he nudged giving priority to the words 'solemnly affirm' and consequently positioned them above the line as opposed to the words 'swear in the name of God' which he positioned below the line. This was vociferously opposed by Mahavir Tyagi from the United Provinces. He asserted that the majority of the Indian people still repose their trust in God, and if elected representatives truly want to truly commit to upholding the Constitution, their oaths should be something more than mere affirmations. When elected representatives swear in the name of God, they assure the masses they represent that in representing the causes of such masses, they will not merely do what is expedient, but will honour the highest degree of faith that has been placed in them by their constituents. Dr. Ambedkar subsequently agreed to this objection, and the words 'swear in the name of God' were positioned above the line subsequently.

¹⁷ *Jaipur Development Authority v. Daulat Mal Jain*, (1997) 1 SCC 35.

¹⁸ *Haridasan Palayil v. Speaker of 11th Kerala Legislative Assembly*, 2003 SCC OnLine Ker 97.

¹⁹ *Manoj Narula (3) v. Union of India*, (2005) 7 SCC 53.

their position to respect and enliven all those Fundamental Rights and ideas of individual liberty and dignity which the Constitution of India stands for.²⁰ At the heart of preserving the integrity of the People of India lies the duty to safeguard their basic constitutional guarantees of individual dignity and equal citizenship.²¹ This assumption that elected representatives will not be guided by mere expediency, and shall discharge their duties with the highest degree of responsibility exists due to the ‘oaths of office’ enshrined in Schedule III of the Constitution which create a heightened degree of responsibility for such individuals to uphold the sovereignty and integrity of the ‘People of India’. These oaths, in turn, over the course of five decades, have traversed from the realms of abstraction to become one of the most fundamental guiding principles in interpreting the minds of the framers of our Constitution.²²

Having apprised the reader that elected representatives are obligated to exercise their rights more responsibly than others, an important point of departure here would be to understand the extent of their duties and responsibilities flowing from Schedule III of the Constitution. In other words, what are the limitations that accompany a solemn affirmation by an elected representative to uphold, *inter-alia*, the sovereignty and integrity of India?

C. THE RESPONSIBILITY TO NOT IMPACT THE INDIVIDUAL'S ABILITY TO REPSOND

Although it may not be possible to objectively determine the extent of limitations that accompany the oath taken by an elected representative, it is important to understand that, at the heart of the Indian Constitution is the individual and her dignity.²³ This sentiment was emphatically endorsed by the Supreme Court in *K.S. Puttaswamy v. Union of India*,²⁴ where it said that the integrity of the nation and the dignity of its individuals are interdependent and intertwined expressions, inasmuch, as, one cannot survive without the other. The Court went on to say that it was inconceivable to think of a united and integrated nation without its individuals having the assurance that their individual dignity stands preserved.²⁵

²⁰ *Id.*

²¹ See *Ragunathrao Ganpatrao v. Union of India*, 1994 Supp (1) SCC 191, where the Court said that “In a country like ours with so many disruptive forces of regionalism, communalism and linguicism, it is necessary to emphasise and re-emphasise that the unity and integrity of India can be preserved only by a spirit of brotherhood. India has one common citizenship and every citizen should feel that he is Indian first irrespective of other basis”; See also, *infra*, Part IV-B(ii).

²² *Kaushal Kishor v. State of U.P.*, (2016) 10 SCC 295.

²³ The notions of individual dignity are admittedly expansive and overbroad. However, the latter parts of this piece have been dedicated towards apprising the reader of the fundamental parameters of individual dignity which invariably lie at the heart of the Indian Constitution. See, Gautam Bhatia, *OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION*, (Oxford University Press, 2016).

²⁴ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

²⁵ *Id.*

In other words, the Supreme Court in *Puttaswamy* reaffirmed that the Constitution of India was predicated on the idea of an individual and her dignity. This was no different from its earlier approach in *R. Rajagopal v. State of T.N.*,²⁶ where, following the case of *New York Times v. Sullivan*,²⁷ it raised the threshold for the defamation of public officials. It gave the individuals a ‘breathing space’ or a ‘qualified privilege’ to express their views (without recklessness or actual malice) against public officials without being subjected to SLAPP defamation lawsuits.²⁸ The Court’s reasoning was based upon the fact that SLAPP defamation lawsuits by public officials against individuals had the potential to chill their free expression. These suits would have essentially created an entry-barrier into the marketplace for such individuals and disproportionality affected their ability to respond to the ideas under debate.²⁹ In order to ensure that persons in public office do not prevent individuals from fully participating in our democracy, the Court unequivocally prioritised the individual right to free expression over the reputational and privacy rights of ‘public officials’. By doing so, the Court created a more speech-protective standard for expressions flowing from individual citizens towards public officials as compared to expressions flowing from public officials to individual citizens, or from public officials to public officials. This was essentially an acknowledgement by the Court that it was possible for such relationships to exist where the acts of a powerful group would be in a position to impede the equal enjoyment of rights of the less-powerful group. In such a case, it would be the responsibility of the former to ensure that they do nothing which creates a barrier for the latter to fully express their ideas in the democracy.³⁰

This acknowledgement was given formal shape by the Law Commission of India in 2017 its 267th Report where it said that the status of the authors and the victims of the speech was a necessary factor to be taken into account while regulating such speech.³¹ Relying on the landmark ruling of the European Court of Human Rights in *Incal v. Turkey*,³² the Law Commission went on to say that the limits of acceptable criticism were not the same for public officials and private persons.³³ The former, by virtue of their dominant position in a democratic setup, were required to display a greater degree of tolerance against public criticism and responsibly respond to the same.³⁴ The Law Commission thus, conceived that the existence of a vertical relationship between the author and the listener of the speech-act would be one of the many situations where the author would

²⁶ *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632.

²⁷ *New York Times Co. v. Sullivan*, 1964 SCC OnLine US SC 43 (United States Supreme Court).

²⁸ See, Gautam Bhatia, *OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION*, 110-113 (Oxford University Press, 2016).

²⁹ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC OnLine Can SC 6 (Supreme Court of Canada).

³⁰ *Id.*

³¹ Law Commission of India, *Hate Speech*, Report No. 267, 25, (March 2017), available at <https://lawcommissionofindia.nic.in/reports/Report267.pdf> (Last visited on September 18, 2021).

³² *Incal v. Turkey*, Application No. 41/1997/825/1031 (1998).

³³ Law Commission of India, *supra* note 31, at 34.

³⁴ *Id.*

have to ensure that the listener's ability to respond to such speech is not adversely impacted.³⁵

Within the next three years, this conception of the Law Commission of India was taken forward by the Supreme Court of India in its landmark ruling of *Amish Devgan v. Union of India*.³⁶ The Court, in *Amish Devgan*, extrapolated the power dynamics at play between public officials and private citizens to Persons of Influence ('POIs') as well.³⁷ This was essentially an addition by the Court to the list of relationships where power dynamics could be adversely affecting the weaker party's ability to respond. Acknowledging the direct causal link between influence in the society and the duty to be responsible, the Court held that POIs, by virtue of their reach, impact and authority they wield on the general public owed a duty to them and had to be more responsible in their speech-acts.³⁸ The Court also held that given their position in the society, it would be reasonable to hold POIs to an increased level of responsibility and expect them to be cautious in using their words to convey their intent.³⁹ However, the Court did not just stop there. It went a step further deconstruct the prevailing jurisprudence which had reduced the effects of speech-acts to their most violent and explicit forms. It acknowledged that a test such as the 'imminent lawless action' test failed to take into account the effects that inherently oppressive speech-acts have on the self-worth and autonomy of marginalised communities.⁴⁰ As such, the Court elevated the threshold of free speech protections to also include the protection of oppressed and marginalised discourses against the hegemony of the discourses of the powerful.⁴¹ By doing so, it rightly identified that speech-acts by POIs may create situations which might adversely affect the ability to respond of not only target groups but non-target groups as well.⁴²

The development of jurisprudence by the Court over the years, from *Rajagopal*⁴³ to *Amish Devgan*,⁴⁴ clearly indicates that the Court has created a framework of free-speech protections which views the usurpation of a group's narrative by the powerful, as a direct deprivation of their sense of self-worth and in turn, their dignity. Since individual dignity forms the interpretative scope through which all constitutional provisions are to be viewed and interpreted,⁴⁵ the free-speech protections of the powerful cannot be used to deprive the less-powerful of their self-worth and their dignity. This is especially true for elected representatives, who, in addition to being POIs, are also under a positive obligation to uphold

³⁵ Law Commission of India, *supra* note 31.

³⁶ *Amish Devgan v. Union of India*, (2021) 1 SCC 1.

³⁷ *Id.*, ¶75.

³⁸ *Id.*, ¶76.

³⁹ *Id.*

⁴⁰ *Id.*, ¶26.

⁴¹ *Id.*, ¶267.

⁴² *Id.*

⁴³ *Rajagopal*, *supra* note 26.

⁴⁴ *Amish Devgan*, *supra* note 36.

⁴⁵ K.S. Puttaswamy, *supra* note 24.

the integrity of the nation, which, in turn is premised upon the dignity of the individual.⁴⁶ Thus, with regard to elected representatives, when the Court's emphasis on the values of self-worth, autonomy and individual dignity is seen in light of the heightened responsibility endowed on them by the Constitution, it becomes clear that their responsibility to uphold the 'integrity' of India at the very least necessarily includes an obligation not to deprive the individuals that they represent of their self-worth and their dignity. This obligation, however, can only be fulfilled when the speech-acts of such representatives do not usurp the discourses and narratives of the individuals in the society.

Having established what the responsibility of elected representatives is and how it has been laid down, interpreted and developed as a part of our constitutional scheme, we now move on to apprise the reader of how speech-acts of elected representatives impact the dignity of the individual. However, before determining the 'how' questions, it is necessary to examine as to why speech-acts of select authors such as elected representatives possess the potential to impact the dignity of the individual in the first place. This would also consequently apprise the reader of why the freedom of elected representatives to make 'irresponsible statements' should yield to their obligation to not violate individual dignity.

III. THE CONSTITUTIVE REASONS THAT MAKE VIOLATION OF DIGNITY THROUGH SPEECH-ACTS A POSSIBILITY (THE 'WHY' QUESTIONS)

The dignity of an individual may be violated by an elected representative at two levels. Firstly, humiliating speech-acts by elected representatives may violate individual dignity as an expressive norm *per se* (i.e. the meaning such speech expresses irrespective of its consequences on the individuals).⁴⁷ Secondly, individual dignity may also stand violated when the speech of elected representatives adversely affects an individual or their group's ability to respond to the ideas being debated upon. This is essentially because when institutions of the State or elected representatives humiliate individuals, the skewed power dynamic in an elected representative-constituent relationship creates a fabric which only prioritises the discourses of such representatives at the cost of the discourses of the constituents.⁴⁸ This has a direct bearing on the equal moral membership and assurance of inclusiveness of the constituents.⁴⁹ This consequence of having one's narrative

⁴⁶ See *supra* Part II-B.

⁴⁷ Tarunabh Khaitan, *Dignity as an Expressive Norm: Neither Vacuous nor a Panacea*, Vol. 32(2) OXFORD JOURNAL OF LEGAL STUDIES, (2012). See, Part IV-A for an elaborate discussion on dignity as an expressive norm.

⁴⁸ *Id.*

⁴⁹ Jeremy Waldron, *THE HARM IN HATE SPEECH*, (Harvard University Press, 2012). A humiliating act may be any act which erodes the sense of self-worth, autonomy and self-respect of an individual and actively enables their alienation from the society. Humiliation may be perpetuated through any means ranging from signs, banners, to innuendoes and speeches. See, Part IV(B)(i) for an elaborate discussion on equal moral membership, and equal social standing.

usurped due to the power spectrum prevalent in the society deprives individuals of their very sense of identity.⁵⁰ The denial of such identity is essentially affront to their individual dignity.⁵¹

As such, this part serves to address the relationship which exists between the humiliating speech made by an elected representative and the distortion of speech of an individual. More specifically, it seeks to answer why the speech of an elected representative has the potential to distort an individual's speech, and threaten her assurance of inclusivity in the society. To understand this, it would be important to note the constitutive reasons which enable an elected representative to make humiliating speeches in the first place.

A. CONSTITUIVE REASON-I: A SKEWED POWER DYNAMIC IN AN ELECTED REPRESENTATIVE-CONSTITUENT RELATIONSHIP

Take the following example. A police official of an Indian state is accused of the murder of an individual. While the proceedings are ongoing, a popular elected representative in that State claims that the ongoing murder trial against the police officer in question is nothing but a conspiracy to discredit the local police, and this frame-up of the police officer has been arranged by the victim's family members for political motives. Now, the elected representative builds this claim up to a level where the society at large begins to believe his allegations to be true. Let us call these claims by the elected representative against this identifiable set of litigants as 'narratives'. Notwithstanding the veracity of the allegations and their effect on the right to a fair trial, the construction of this narrative will now create a scenario where the victim's family will not have the same opportunities as the elected representative to rebut the narrative so constructed by him. Let us call these rebuttal claims made by the victim's family as 'counter-narratives'.⁵²

⁵⁰ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶479 where the Supreme Court held that by not allowing LGBTQIA+ individuals to fully express themselves, and lay their claims to the society, §377 was devaluing their sense of identity. The Court went on to say that to deny homosexuality the same narrative that was given to heterosexuality, was to efface the identities of the LGBTQIA+ community. *See also*, <https://twitter.com/barandbench/status/1071286704806526976> (India's narrative is the narrative of plurality and diversity which is the essence of freedom which we visualise for the future. To deny narrative is to deny identity. - Chandrachud J.).

⁵¹ National Legal Services Authority of India v. Union of India, (2014) 5 SCC 438, ¶74.

⁵² Facts taken and modified from Gertz v. Robert Welch, Inc., 1974 SCC OnLine US SC 152 where the United States Supreme Court reversed the lower court decision which had applied the Sullivan standard to hold that the Petitioner had failed to show any reckless disregard on part of the respondent (New York Times) which could make them liable for defamation. The Supreme Court, however, held that the Sullivan standard could not be applied in the present case as this case concerned an individual who was neither a public official nor a public figure, and therefore the state interest in compensating for injury to the reputation such a private individual was greater. (See, <https://www.oyez.org/cases/1973/72-617>).

If we take the above premise to be true, a necessary assumption in order to sustain the same would be that the narrative constructed by the elected representative is necessarily affecting the perception of the audience and prejudicing them in some manner.⁵³

The question which then arises is that, why cannot the humiliated individual counter this narrative with the same aplomb? This question can be addressed by understanding the constitutive reasons which enable such humiliating speech-acts in the first place. The constitutive reason why elected representatives are able to humiliate an individual, without such speech being significantly countered by her is because the power dynamics of the society enables them to do so.⁵⁴ In other words, the power dynamics of an elected representative-constituent relationship provide authority only to the speech of the elected representative and not the individual.⁵⁵ Taking the example of an employer to explain constitutive reasons, Roy suggests that in a market where employment opportunities are severely limited, when an employer humiliates her employee, who, in turn feels helpless as she cannot counter the humiliating speech with the same aplomb, it is the skewed power dynamic in an employer-employee relationship which forms the constitutive reason for such humiliating speech by the employer.⁵⁶ Thus, the enablement of the humiliating speech-act is rooted in the power and status wielded by the employer and the lack thereof with the employee, who has no other alternatives or job opportunities to fall back upon.⁵⁷ Roy takes another example a landlord-tenant relationship operating in a difficult housing market where housing regulations confer substantial discretion to landlords to evict.⁵⁸ In such a scenario, there may be multiple aspects that inform a supposed humiliating speech-act of the landlord towards the tenant.⁵⁹ However, the constitutive reason that provides actual authority and enables such a speech-act would be the powers vested in the landlords by the housing market, and the lack thereof with the tenants.⁶⁰

Quite similarly, in an elected representative-constituent relationship, the status of the constituents is akin to the status of a tenant or an employee; one who has no other recourse than to suffer the humiliating speech because any narrative built by the humiliated constituent to counter the discourse of the elected representative would not have the same authority as the dominant discourse. This is quite simply because of the fact that in a public official/elected representative and private individual/constituent relationship, the counter-narratives of the latter

⁵³ WALDRON, *supra* note 49.

⁵⁴ Suryapratim Roy, *Constitutive Reasons and Consequences of Expressive Norm*, Vol. 34, INTERNATIONAL JOURNAL FOR THE SEMIOTICS OF LAW (2020).

⁵⁵ *Id.*, at 10.

⁵⁶ *Id.*, at 11.

⁵⁷ *Id.*, at 11.

⁵⁸ *Id.*, at 11.

⁵⁹ *Id.*, at 11.

⁶⁰ *Id.*, at 11.

are not given the same authority as narratives constructed by the former.⁶¹ The only recourse such constituents have is to vote against the representatives, with no guarantee of a replacement (as they could still get elected). Thus, the constitutive reason why the elected representative is enabled to make this speech is a skewed power dynamic in an elected representative-constituent relationship which provides authority only to the speech of the elected representative. Thus, here also, the enablement of the humiliating speech-act is rooted in the power wielded by the elected representative and the lack thereof with the humiliated individual. However, the question that arises then is, why cannot a discourse, perpetuated by the less powerful be given the same authority as the discourse perpetuated by the powerful? The answer to this lies in the fact that the enablement or denial of a narrative directly depends upon the extent to which the audience of such a discourse has been already prejudiced.

B. CONSTITUTIVE REASON-II: THE DENIAL OF A NARRATIVE BY A PREJUDICED AUDIENCE

“[...]Power constructs the appearance of reality by silencing the voices of the powerless, by excluding them from access to authoritative discourse. Powerlessness means that when you say ‘This is how it is,’ it is not taken as being that way”.

—Catherine Mackinnon in Francis Biddle’s Sister.⁶²

The scholarship of Catherine Mackinnon is instrumental in understanding how speech-acts by the powerful prejudice the audience. She argues that there exists a causal link between power and credibility.⁶³ It is credibility, one of the by-products of power, which ensures that the speech of a powerful individual is believed as proof over all other (counter) speeches in the marketplace made by less powerful individuals.⁶⁴ She takes this to mean that the beliefs of the powerful become proof for the society whose perception now only mirrors what the powerful want to see. Once an audience who believes the speaker to be credible, comes into the picture, the intention of the speaker to humiliate the individual no longer matters.⁶⁵ Such speech-act by the elected representative would now produce certain intangible consequential effects on the thoughts, feelings and action of the audience, which, in turn shall be guided by their perception of their ‘credible’ elected representative.⁶⁶ This essentially means that if the humiliated individual were to address the same audience after the elected representative has addressed them, her speech would not be given the same consideration and weightage because the

⁶¹ *Gertz v. Robert Welch, Inc.*, 1974 SCC OnLine US SC 152 (1974) (United States Supreme Court).

⁶² K.S. Puttaswamy, *supra* note 24.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Jerrold Sadock, *SPEECH ACTS*, 53, 55 (Laurence R. Horn, Gregory Ward 2006).

⁶⁶ Rajagopal, *supra* note 26.

views/opinion of the powerful have already become proof for the audience which has aligned itself to affirm whatever the powerful believe desirable.⁶⁷ A prolonged exposure to such devaluation discredits the group concerned and diminishes their sense of self-worth to the extent that they are required to argue for their basic social standing as a precondition to responding to the discourses initiated or perpetuated by the powerful.⁶⁸ This additional requirement to first establish oneself as a societal equal before being able to respond to a narrative that devalues one's sense of identity, normalises the subversion of any discourse initiated by them.⁶⁹ Thus, while there may obviously be instances where the discourses of the less-powerful may assume a dominant status, the access barriers created by a prejudiced or an unconsciously biased audience coupled with the authority which actively enables the dominance of the discourses of the powerful makes it a scenario which is disproportionately difficult to achieve.⁷⁰

This denigration or humiliation of an individual by an elected representative leads to the creation of a prejudice against the individual, which harms her assurance of inclusiveness by adversely affecting any narrative perpetuated by her. The distortion of such a counter narrative and the harm to the assurance of inclusiveness due to the prejudice that is created amongst the hearers is an intangible consequence of an elected representative's speech which necessarily follows once the participation of the listeners of such speech comes into the picture.⁷¹ The constitutive reason for the creation of such a prejudice against the humiliated individual which distorts her speech is a skewed power-dynamic which exists because of the credibility attached to the speech of an elected representative.⁷² The credibility convinces the audience that the views of the powerful are constitutive of the social reality, and any actions of the humiliated individual are to be seen through the prism of the words of the powerful. Since an elected representative-constituent relationship provides authority and credibility to the speech of the elected representative only, the necessary consequence is the creation of prejudice in the minds of the audience, in favour of an authoritative and credible discourse. The result, thus, is the freezing of an unjust, but authoritative and credible discourse where the dominant narrative continues to shape the social reality of the humiliated individual while the counter narrative of such an individual is drowned out and distorted.

⁶⁷ K. S. Puttaswamy, *supra* note 24.

⁶⁸ Saskatchewan (Human Rights Commission), *supra* note 29, at ¶75.

⁶⁹ Amish Devgan, *supra* note 36; Michel Rosenfeld, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis, Vol. 24, *CORDOZO L. REV.*, 1523 (2003).

⁷⁰ Take for example, Neo Nazis in the United States. A prolonged exposure to constant humiliation has made the group so marginalised and discredited that they are now virtually believed to pose any realistic danger to the dominant discourses or narratives of the society. The fact that they have to make up for such marginalisation, and re-credit their identity before being able to respond to the narratives of the society, makes it difficult for them to initiate their discourse before an already prejudiced audience. See Editorial, Counting the Jews, *NATION*, October 3, 1988, at 257.

⁷¹ New York Times Co., *supra* note 27.

⁷² K.S. Puttaswamy, *supra* note 24.

Having demonstrated that the narratives constructed by elected representatives have a direct link with the distortion of an individual's counter-narrative due to the disproportionate authority given to the former coupled with the prejudice which plagues the mind of the audience of such speech, we shall now to move on analyse how a humiliating speech-act can actually violate individual dignity.

IV. FREE SPEECH AT CROSSROADS WITH THE IDEA OF DIGNITY ('THE HOW QUESTIONS')

From the time of *Jolly George Verghese v. Bank of Cochin*,⁷³ to the recent Puttaswamy judgements,⁷⁴ the Supreme Court has delivered some path-breaking judgments which have played a pivotal role in ensuring the commitment of our Constitution towards individual dignity.⁷⁵ By explicitly reading individual dignity as an inherent part of Article 21, the Court paid a befitting tribute to the Constituent Assembly which based the entire idea of a united nation on the notions of individual dignity.⁷⁶ However, the Court's mandate did not end at this juncture. Over the course of several years, it underpinned the idea of individual dignity under Article 21 of the Constitution with the notions of personal, decisional and reproductive autonomy,⁷⁷ assurance of inclusiveness,⁷⁸ equal moral membership,⁷⁹ self-identification,⁸⁰ self-fulfilment,⁸¹ and the right to privacy.⁸² More specifically, the Court, over the course of years laid down the indicators and sacrosanct elements which complete the idea of individual dignity under Article 21. The Court's mandate thus, over the course of years, has laid down the parameters on the touchstones of which an infringement of dignity of an individual may be challenged. In doing so, the Court has not restricted itself to an exhaustive list of elements or parameters and determined them on a case-to-case basis.

Drawing from the above parameters, it is possible to determine a violation of individual dignity by the speech-acts of elected representatives from two such perspectives. This is to say that speech-acts may violate individual dignity at two parallel levels. The parameters which form the touchstones on the basis of which such violation may be argued would vary depending upon whether the idea of individual dignity is viewed from an expressive perspective or a consequentialist perspective. It would be our case that notwithstanding the perspective through

⁷³ *Jolly George Verghese v. Bank of Cochin*, (1980) 2 SCC 360.

⁷⁴ *K.S. Puttaswamy*, *supra* note 24.

⁷⁵ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *Independent Thought v. Union of India*, (2017) 10 SCC 800; *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

⁷⁶ *Amish Devgan*, *supra* note 36.

⁷⁷ *K.S. Puttaswamy*, *supra* note 24.

⁷⁸ *Indian Young Lawyers Assn. v. State of Kerala*, (2017) 11 SCC 577.

⁷⁹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

⁸⁰ *Id*; *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762.

⁸¹ *Union of India v. Naveen Jindal*, (2004) 2 SCC 510.

⁸² *K.S. Puttaswamy*, *supra* note 24.

which the idea of dignity is viewed by the Courts or the State in the future, an attack by a speech-act on any one of the parameters mentioned under either of the two approaches would violate individual dignity and pave the way imposing limits on the speech concerned.

Having apprised the reader of the implications that a violation of individual dignity would entail, we shall now move on to analyse how speech-acts may violate individual dignity when the idea of dignity is viewed from an expressive perspective. In order to do so, we shall be using Austin's argument of illocutionary acts given in his speech-acts theory.⁸³

A. VIOLATION OF DIGNITY FROM AN EXPRESSIVE PERSPECTIVE

Austin argues that all language is action.⁸⁴ In light of this, an illocutionary act is the performance of an act in saying something. He distinguishes an illocutionary act from a perlocutionary one, which is the performance of an act after saying something.⁸⁵ Perlocutionary acts underpin a consequentialist inquiry of speech and have been dealt with in Part IV(B) of the paper. Illocutionary acts on the other hand, as argued by Dr. Tarunabh Khaitan, underpin an expressive inquiry of speech.⁸⁶ He argues that if the idea of dignity is viewed from an expressive perspective, it essentially means that speech-acts and expressions matter morally *qua* expressions. This translates to the fact that speech-acts are to be viewed independently of their consequences. Thus, he essentially argues that when the idea of dignity is viewed from an expressive perspective, a humiliating speech-act violates dignity due to the meaning it expresses. For such a violation to occur, it is immaterial whether actual harm has been caused to the individual or not. As opposed to the consequences of such humiliation, the violation of dignity is dependent upon the failure of the speech-act to show respect to the individual.⁸⁷ In other words, he emphasises that the message of inferiority that is being conveyed to an individual is itself affront to her dignity, notwithstanding anything which she may have felt as a consequence of the message.⁸⁸

⁸³ J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (William James lectures, Clarendon Press, Oxford 1962).

⁸⁴ *Id.*

⁸⁵ Gautam Bhatia, *supra* note 28.

⁸⁶ *Id.*

⁸⁷ E. Anderson and R. Pildes, *Expressive Theories of Law: A General Restatement*, Vol. 148 UNIVERSITY OF PENNSYLVANIA L. REV., 1503 (2003); M. Adler, *Expressive Theories of Law: A Sceptical Overview*, Vol. 148 UNIVERSITY OF PENNSYLVANIA L. REV., 1363 (2000); D. Hellman, *The Expressive Dimension of Equal Protection*, Vol. 85 MINNESOTA L. REV. 1 (2000); C Sunstein, *On the Expressive Function of Law*, Vol. 144 UNIVERSITY OF PENNSYLVANIA L. REV. 2022 (1996).

⁸⁸ *Strauder v. West Virginia*, 25 L Ed 664 (1879) (United States Supreme Court); *Brown v Board of Education of Topeka*, 1954 SCC OnLine US SC 44 (1954) (United States Supreme Court); *Egan v. Canada* 1995 SCC OnLine Can SC 46 (Supreme Court of Canada).

Put into perspective, if the issues in Kaushal Kishore are seen against the backdrop of an expressive perspective of individual dignity, the speech-act of the elected representative violated the dignity of the victim, the moment he conveyed his message, irrespective of whether there was an audience which heard him or not. Illustratively, when a gang-rape victim and her mother filed an FIR with the police, an elected representative of the Uttar Pradesh legislature attempted to delegitimise the complaint by terming it as a “political conspiracy against the Uttar Pradesh Government”.⁸⁹ The message that was conveyed to the rape victim was one of disrespect which compounded her humiliation by trivialising her tragedy. It was an assertion of the inferiority of all rape victims by conveying to them that their complaints were not worthy of being investigated.

Let us take another example. For instance, let us assume that while addressing a public gathering, an elected representative says, “*Immigrants have subverted our traditions and our culture! It is time they head back to where they came from!*”. This speech-act stereotypes all immigrants, and conveys a message that they are of lesser worth and inferior to other non-immigrant individuals. From an expressive perspective, the individual dignity of the immigrants stands violated the moment this message is conveyed to the listeners, inasmuch as, the speech-act fails to show respect and asserts the inferiority of their class.

An expressive perspective of dignity is, however, admittedly at a higher threshold than a consequentialist perspective, inasmuch as, if violation of expressive norms, irrespective of their consequences, is made the subject of legal prohibition/regulation, it would seriously impinge on a variety of civil liberties of the people, as the regulation would equally apply to horizontal and vertical relationships.⁹⁰

Having apprised the reader of the expressive perspective and how it is a relatively taller order to achieve, I will move on the consequentialist perspective, where the regulation can more appropriately be applied to vertical relationships as the notion of a consequentialist approach itself is based upon power asymmetry (as established in Part III) that exists in the relationship between the audience and the elected representatives.

B. VIOLATION OF DIGNITY FROM A CONSEQUENTIALIST PERSPECTIVE

Since all language is action, speech-acts are necessarily bound to produce certain effects on the thoughts, feelings and actions of the listeners.⁹¹ Austin calls such speech-acts as perlocutionary acts. As discussed earlier, perlocutionary acts underpin a consequentialist inquiry of speech. This essentially

⁸⁹ Kaushal Kishor, *supra* note 4.

⁹⁰ Gautam Bhatia, *supra* note 28.

⁹¹ Tarunabh Khaitan, *supra* note 47.

means that if the idea of dignity is viewed from a consequentialist perspective, its violation would depend upon the perlocutionary force of the speech-act in question.⁹² In other words, if the idea of dignity is viewed from a consequentialist perspective, its violation may only be argued if the speech-acts in question produce any consequential effects on the individuals against whom such acts have been directed.⁹³ From a consequentialist perspective, Jeremy Waldron argues that humiliating speech-acts may violate two fundamental parameters which underpin the idea of individual dignity. These parameters are an individual's assurance of inclusiveness in the society, and her entitlement of being treated as an equal in the ordinary operations of the society.⁹⁴ Waldron argues that both these parameters lie at the heart of individual dignity, and these related values are equally damaged as a consequence of humiliating speech-acts.⁹⁵ This has been covered forthwith.

1. The Assurance of Inclusiveness

The assurance of inclusiveness lies at the heart of individual dignity as it is a guarantee to every individual that she can go about her business without facing hostility, violence, discrimination and exclusion by the State and the society. Waldron argues that the assurance of inclusiveness lends a sense of security to an individual. For numerous vulnerable groups in the society, a withdrawal of this assurance would, *inter-alia*, reinforce their existing structural inequalities and hierarchies, which, in turn undermines their individual dignity.⁹⁶

Humiliating speech-acts by elected representatives threaten this assurance of inclusiveness when they besmirch an individual's reputation in the eyes of their listeners. We have already discussed in Part III how the speech-acts and beliefs of the powerful become constitutive of the social reality in a (deemed) vertical relationship.⁹⁷ This leads to a scenario where any actions of the humiliated individual are to now seen through the prism of the words of the powerful.⁹⁸ Undertaking a consequentialist inquiry, Waldron suggests that it is not the speech-act itself which undermines individual dignity; it is the fact that this expression of humiliation becomes so embedded in the social environment, that it translates into one of the tangible features of the society, i.e something that can be seen and felt on a real-time basis.⁹⁹ Thus, the assertion of inferiority of all rape victims mentioned in the previous section gets enlivened by virtue of the compounding effect of the perpetuation of such a narrative in the public domain. This has a ripple effect throughout the society, thus affecting not only target groups but non-target groups as well. This was also acknowledged by the Supreme Court recently in *Amish*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ K.S. Puttaswamy, *supra* note 24.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *supra* Part III.

⁹⁸ Gautam Bhatia, *supra* note 28.

⁹⁹ K.S. Puttaswamy, *supra* note 24.

Devgan, where, relying on the Canadian jurisprudence, the Court held that humiliating speech-acts could make target groups experience anger, fear, devaluation and alienation from the society. This feeling of alienation and devaluation of the target group would only be further compounded when non-target groups gradually get desensitised to such humiliating speech-acts and such behaviour gets normalised for them. Once the speech-act becomes constitutive of the social reality for a prejudiced audience,¹⁰⁰ it does not affect only a particular individual. Instead, it affects all those individuals who share the same characteristics or form a part of the same group.

Put into perspective, when a cabinet minister (who was also an elected representative) termed the FIR of a rape-victim as a “political conspiracy against the Uttar Pradesh Government”,¹⁰¹ he not only threatened her assurance of inclusiveness in the society, but also threatened the assurance of all such rape-victims. The consequence of his speech-act was the stigmatisation of the victim in the eyes of the listeners. This stigmatisation of the victim and all those individuals who share the same characteristics would control their access to opportunities and an authoritative discourse in the society more powerfully than their individual abilities would ever do.¹⁰² It would psychologically harm them, and diminish their sense of self-respect.¹⁰³ This is essentially the withdrawal of an assurance of inclusiveness which, as argued by Waldron, directly undermines individual dignity.

2. The Entitlement to be Treated as a Social Equal

Another related value which speech-acts damage is an individual’s entitlement of being treated as a social equal in the society. We have already discussed how the withdrawal of an assurance of inclusiveness limits an individual’s access to opportunities and an authoritative discourse in the society. Waldron argues that this limitation brought about by humiliating speech-acts directly go to the normative basis of an individual’s equal standing in the society.¹⁰⁴ Using the case of *R. v. James Keegstra*,¹⁰⁵ he explains that imputations and vicious characterisations of speech-acts (such as “Jewish people seek to destroy Christianity” and “they created the Holocaust to gain sympathy”) denigrate and stigmatise individuals and damage their social reputation. Such stigmatisation and denigration, besides withdrawing the assurance of inclusiveness from an individual, also systematically distorts her (counter) speech in the society.

¹⁰⁰ See *supra* Part III; Extreme Speech when used from a position of power comes with the risk of normalising exclusion, distorting public opinion and enabling the conditions for violent extremist views to take root, thus weakening the marketplace of ideas.

¹⁰¹ Suryapratim Roy, *supra* note 54.

¹⁰² K.S. Puttaswamy, *supra* note 24.

¹⁰³ Don Schultziner & Itai Rabinovici, *Human Dignity, Self-Worth and Humiliation: A Comparative Legal-Psychological Approach*, Vol. 18(1) PSYCHOLOGY PUBLIC POLICY AND LAW, 107 (2012).

¹⁰⁴ *Id.*

¹⁰⁵ *R. v. James Keegstra*, 1990 SCC OnLine Can SC 119 (Supreme Court of Canada).

One of the most important basis for an individual's recognition as a social equal is according equal weightage to her speech. This is because, an entitlement of being treated as a social equal means that each individual deserves to be protected against dehumanisation, isolation, subordination and indignity. When a humiliating speech-act creates a scenario where these protections are denied to certain individuals and groups, according an equal weightage to their speech at least gives them a level playing field, i.e. an access to the same authoritative discourse to counter the speech-acts which have denigrated them.¹⁰⁶

However, in light of a prejudiced audience,¹⁰⁷ the counter-narrative initiated by a stigmatised individual with a damaged social reputation does not usually get an equal weightage from the society, where public opinion has already been distorted and exclusion has been normalised.¹⁰⁸ The result of this power asymmetry is the freezing of an unjust *status quo* where the dominant narrative seizes into the mainstream and constructs the social reality of the humiliated individual while the counter narrative of such an individual is drowned out and distorted. This systematic distortion of an individual's speech is essentially a refusal to treat her as a social equal, a value which lies at the heart of individual dignity.

V. RESTRICTING SPEECH-ACTS OF ELECTED REPRESENTATIVES WHICH VIOLATE INDIVIDUAL DIGNITY: DEPARTING FROM PRECEDENT?

“The test of the pudding is in the eating. Similarly, nobody can say that this Constitution is to be commended or condemned. The working of the Constitution alone will show whether it is a workable Constitution or whether it is unsuited to the necessities of the times and the requirement of our people or to the genius of our nation, but if we work it in the spirit of the Preamble, we must say that we have a Constitution which can be made an ideal Constitution by working it in the proper spirit”.

—Constituent Assembly Debates.¹⁰⁹

Having illustrated how speech-acts of elected representatives may undermine individual dignity from an expressive, as well as a consequentialist perspective, we have apprised the reader, why the speech-acts of such elected representatives need to be restricted. In this part, we attempt to make a case for

¹⁰⁶ *Khumalo v. Holomisa*, 2002 SCC OnLine ZACC 14, ¶23.

¹⁰⁷ See *supra* Part III.

¹⁰⁸ *Gertz v. Robert Welch, Inc.*, 1974 SCC OnLine US SC 152; For a working definition of narratives and counter-narratives, see, Part III-A, *supra*.

¹⁰⁹ CONSTITUENT ASSEMBLY DEBATES, November 21, 1949 *speech by Syed Muhammad Sa'adull*, available at <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C21111949.pdf> (Last visited on September 20, 2021).

constitutionally restricting such speech-acts in order to give effect to the true spirit of dignity envisaged under our Constitution.

It is our case that notwithstanding the perspective through which the Court, or the State may view dignity in the future, any expression of humiliation,¹¹⁰ which bolters a system of structural inequality and hierarchy; whether by creating an expressive inequality through speech,¹¹¹ threatening the assurance of inclusiveness or distorting and drowning the counter-speech of a class of persons,¹¹² undermines the idea of individual dignity. In light of this, a content-based restriction on the speech of elected representatives serves as a method to prevent or remedy the structural inequalities and hierarchies such speech-acts may create. The question that arises now is whether such an expression which forms an Article 19(1)(a) right of the elected representative be restricted on a ground which does not explicitly form a part of Article 19(2)?¹¹³ This was also one of the questions which was framed by the Attorney General before the Constitution Bench which will be hearing the Kaushal Kishore matter.¹¹⁴

The Supreme Court has been categorical in holding that the freedom of speech under Article 19(1)(a) can only be restricted on the eight grounds enumerated in Article 19(2).¹¹⁵ Interpreting the scheme of Article 19, the Court has held that the extent of restrictions on particular freedoms have been explicitly specified under clauses 19(2) to 19(6), and any restriction on these freedoms beyond what has been specified would be impermissible.¹¹⁶ This was the position of the Court in 1961, in *Sakal Papers v. Union of India*,¹¹⁷ which was reaffirmed as recently as 2015, in the case of *Shreya Singhal v. Union of India*.¹¹⁸ While a Division Bench of the Court in *Subramaniam Swamy v. Union of India*,¹¹⁹ arguably attempted to subvert this precedent by holding that there was a need to balance Article 19(1)(a) freedoms with the rights under Article 21, we believe that such an approach would be profoundly detrimental to the guarantee of free speech under the Constitution. In light of this, we shall be making a case for restricting the speech-acts of elected representatives which violate individual dignity using the grounds enumerated in Article 19(2) instead of going beyond them. This has been illustrated forthwith.

It has been argued elsewhere that that the word “morality” used in Article 19(2) of the Constitution, refers to Constitutional Morality, as opposed to

¹¹⁰ K.S. Puttaswamy, *supra* note 24.

¹¹¹ See *supra* Part IV-A.

¹¹² See *supra* Part IV-B.

¹¹³ The Constitution of India, 1950, Art. 19(1)(a).

¹¹⁴ Suryapratim Roy, *supra* note 54.

¹¹⁵ *Sakal Papers v. Union of India*, AIR1962 SC 305; *Shreya Singhal v. Union of India*, (2015) 5 SCC 1.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1.

¹¹⁹ *Subramanian Swamy v. Union of India*, (2016) 7 SCC 221.

the notions of popular or social morality.¹²⁰ Constitutional Morality mandates that when constitutional rights and freedoms are sought to be restricted by the State by using “morality” as a ground, such moral values should be limited to the values “grounded within the Constitution”.¹²¹ In other words, when the Courts are called upon to determine whether a freedom may be restricted on the grounds of morality, they should divorce themselves from the notions of what the society at large considers to be moral values.¹²² Instead, the morality clause should be interpreted by the Court in a manner which gives effect to the spirit and values that have already been enshrined in the Constitution.¹²³ Over the course of decades, while the Supreme Court subsequently reaffirmed this view in *Navtej Johar v. Union of India*,¹²⁴ and *Joseph Shine v. Union of India*,¹²⁵ it was unsuccessful in defining the contours within which Constitutional Morality was to function. As such, the question of what constitutes Constitutional Morality is yet to be decided by a seven-judge bench of the Court in the case of *Kantaru Rajeevaru v. Indian Young Lawyers Association*.¹²⁶

Notwithstanding the larger bench reference, it is undisputed that individual dignity forms an integral part of Constitutional Morality. We make this argument against the backdrop of the fact that the Court, in essence has already held the two fundamental values underpinning individual dignity to be a part of Constitutional Morality.

Illustratively, while deciding *Navtej Johar*,¹²⁷ the Court emphasised that the equal rights guaranteed to all individuals under the Constitution cannot be prejudiced by the popular notions of the society. Similarly, when the Court was deciding *Joseph Shine*,¹²⁸ it held anything which deprives an individual of her identity and agency would be at odds with Constitutional Morality. In *Indian Young Lawyers Assn. v. Union of India* (‘Sabarimala’),¹²⁹ the Court held the exclusionary religious practices of a Hindu temple as unconstitutional they were inconsistent with the notions of Constitutional Morality.¹³⁰

¹²⁰ See, Gautam Bhatia, *OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION*, (Oxford University Press, 2016); Abhinav Chandrachud, *The Many Meanings of Constitutional Morality*, SSRN, January 2020, available at <http://dx.doi.org/10.2139/ssrn.3521665> (Last visited on December 1, 2020).

¹²¹ See, Gautam Bhatia, *OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION*, (Oxford University Press, 2016).

¹²² *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762 (per AP Shah); *Indian Young Lawyers Assn. v. Union of India*, (2019) 11 SCC 1 (per Chandrachud).

¹²³ *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762.

¹²⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

¹²⁵ *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

¹²⁶ *Kantaru Rajeevaru v. Indian Young Lawyers Assn.*, (2020) 2 SCC 1.

¹²⁷ *Navtej Singh Johar*, *supra* note 124.

¹²⁸ *Joseph Shine*, *supra* note 125.

¹²⁹ *Indian Young Lawyers Assn. v. Union of India*, (2019) 11 SCC 1.

¹³⁰ *Id.*, at ¶215.

It is pertinent to note here that all the observations on Constitutional Morality in the above judgements have been made against the backdrop of the concrete Constitutional values embedded in our Constitution. For instance, the observations in Navtej Johar about the dangers of prejudicing equal rights in the society was against the backdrop of Article 14.¹³¹ Joseph Shine's observations on individual identity and agency were in the spirit of Article 21.¹³² Similarly, the rejection of exclusionary religious practices by the Court in Sabarimala advanced the rights under Articles 14, 15 and 25 of the Constitution of India.¹³³ The Court, in all the above judgements, against the backdrop of concrete constitutional provisions, has reaffirmed that the values of anti-dehumanisation, non-humiliation, self-fulfilment lie at the heart of the Constitution of India. A combined reading of these values gives rise to the twin principles of anti-exclusion and equal social standing.

When we read the Court's multiple observations on constitutional morality given against the backdrop of Articles 14, 15, 21 and 25, it becomes sufficiently clear that the twin principles of anti-exclusion (assurance of inclusiveness) and equal-social-standing (the entitlement to be treated as a social equal) serve as the two fundamental parameters which build and underpin the idea of individual dignity.¹³⁴ These principles are grounded within the Constitution itself. Given that Constitutional Morality stems from values grounded within the Constitution itself, any derogation of a speech-act under Article 19(1)(a) from these two constitutional principles would also be affront to Constitutional Morality, and would be liable to be restricted by a law on the grounds of "morality" under Article 19(2) of the Constitution.¹³⁵

The Supreme Court, while delivering the *K.S. Puttaswamy v. Union of India* judgement had quoted Aharon Barak, the former Chief Justice of the Supreme Court of Israel to observe that the idea of individual dignity besides being a constitutional value is also a constitutional goal.¹³⁶ This goal is achieved when the idea of individual dignity is used as an interpretative principle for determining the scope of all constitutional rights.¹³⁷ This was essentially a reaffirmation by the Apex Court that our Constitution is predicated on the idea of an individual and her dignity.

It is acknowledged that if the extent of the freedom of speech and expression is determined on the basis of dignity under Article 21, it would lead to an unreasonable restriction on the exercise of free speech. However, as discussed in the foregoing paragraphs, using constitutional morality under Article

¹³¹ The Constitution of India, 1950, Art. 14.

¹³² The Constitution of India, 1950, Art. 14.

¹³³ The Constitution of India, 1950, Arts. 14, 15, 21 & 25.

¹³⁴ See *supra* Part IV-B.

¹³⁵ The Constitution of India, 1950, Art. 19(2).

¹³⁶ *K.S. Puttaswamy v. Union of India*, (2019) 1 SCC 1.

¹³⁷ *K.S. Puttaswamy v. Union of India*, (2019) 1 SCC 1 (Per Sikri, J).

19(2) to restrict speech-acts of elected representatives which are affront to the twin principles of anti-exclusion and equal social standing could be a normative way to achieve the goals of upholding individual dignity, as envisaged by our Constitution without facing the risk of threatening free speech guarantees under the Constitution.

VI. SAFEGUARDS: SEPARATING THE IDEA OF DIGNITY FROM FEELINGS OF OFFENCE

Part V apprised the reader of how the speech-acts of elected representatives may be restricted on the basis of violation of individual dignity through Article 19(2) itself. However, in light of the fact that the idea of dignity is still such an expansive notion, the question arises that how do the Courts determine whether a particular speech-act has violated the dignity of an individual (unprotected speech) instead of having merely offended her feelings (protected speech)? While the principles of anti-exclusion and equal social standing could assist the Courts in making such determination,¹³⁸ the Court would still have to make a value judgement in order to conclude whether individual dignity as a constitutional value has been violated or not. It is our view that in light of the constitutional rights which are at stake here, this value judgement of the Court needs to be reasonably informed. This could be done if the Court were to undertake the inquiry of a violation of individual dignity from a subjective-objective perspective.¹³⁹ The subject-objective perspective ensures that the Courts can consciously divorce subjective feelings of hurt, anger and shock (protected speech) from threats to an individual's basic entitlement to be regarded as a member of the society in good standing (unprotected speech).¹⁴⁰

This perspective was laid down in the case of *Egan v. Canada*,¹⁴¹ and later reaffirmed by the majority in the case of *Law v. Canada*.¹⁴² The language of the subject-objective inquiry is instructive and deserves to be quoted in full.

“All of that individual's or that group's traits, history, and circumstances must be considered in evaluating whether a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity.”¹⁴³

¹³⁸ See *supra* Part V.

¹³⁹ Gautam Bhatia, *supra* note 28.

¹⁴⁰ K.S. Puttaswamy, *supra* note 24.

¹⁴¹ *Egan*, *supra* note 88.

¹⁴² *Law v. Canada* (Minister of Employment and Immigration), 1999 SCC OnLine Can SC 17 (Supreme Court of Canada).

¹⁴³ *Id.*

Essentially, the inquiry narrowly tailors the restriction on free speech, and examines the violation of one's individual dignity from the point of view of the reasonable person; one who is dispassionate and fully aware of the circumstances and possesses similar attributes under similar circumstances as the class/group of which the rights-claimant is a member. Assuming that the subjective-objective perspective is applied by the Courts in a situation where it is alleged that the speech-acts of an elected representative violated an individual's dignity, it would assist the Court in determining whether the idea of individual dignity has been violated or not. More specifically, the approach would undertake a status-based inquiry of the violation of individual dignity by saying:

“All of that individual's or that group's traits, history, and circumstances must be considered in evaluating whether a reasonable person in circumstances similar to those of the claimant would find that the speech-acts of the elected representative had the effect of threatening the assurance of inclusiveness by furthering the structural inequality or distorting the speech of that group which consequently led to the demeaning of their dignity”.

Thus, as it evident from the foregoing paragraphs, the subjective-objective perspective informs the value judgement of the Court by imploring it to consider the “shared meaning in the victim's sub-culture rather than the dominant culture”.¹⁴⁴ This inquiry ensures that if there exists a critical mass of opinion within the victim's sub-culture that their assurance of inclusiveness has been threatened due to the speech-acts which have either reinforced their structural inequalities, or distorted their speech;¹⁴⁵ the law has a reasonable basis for restricting such speech-acts of the author concerned.

This also assists the Court in divorcing the subjective feelings of hurt, anger and shock (protected speech) from threats to an individual's basic entitlement to be regarded as a member of the society in good standing (unprotected speech). This is because, any speech-acts which affect or cause offence to the subjective feelings of an individual, will fail to generate a shared meaning or a critical mass opinion in the group's sub-culture that their collective entitlement to be regarded as members of the society in good standing has been threatened or withdrawn. Once the idea of individual dignity is separated from mere offence (subjective feelings of hurt/insult), it shall pave the way for subjecting individual dignity-based restrictions on free speech to Constitutional scrutiny.

¹⁴⁴ Egan, *supra* note 88.

¹⁴⁵ Gautam Bhatia, *supra* note 28.

VII. SUBJECTING THE LAW TO CONSTITUTIONAL SCRUTINY: ENGAGING WITH THE PROPORTIONALITY TEST

Having established in Part VI that a law restricting speech must be inherently structured around an objective determination of individual dignity, so to prevent an over-expansive application, we must now consider how such a law passes the rigor of constitutional scrutiny under judicial review. A successful evaluation under constitutional scrutiny requires reinforcement of the idea that the inherently non-expansive nature of the restriction forms the foundational basis of the law, allowing it to pass the rigors of judicial review. Therefore, in Part VII, we will examine the primary mechanism of constitutional scrutiny for a law restrictive of a fundamental right, which is the proportionality test, to assert that a law restricting speech of elected representatives, in the limited context of individual dignity, passes the four-pronged test.¹⁴⁶

The proportionality test has been adopted at a global level by constitutional courts considering rights-limiting measures,¹⁴⁷ and while the specific substantive and evidential standards vary, the larger doctrine propagates the application of only proportional, non-arbitrary restrictions on fundamental rights. In the Indian judicial context, this has given rise to the creation of the four-prong test of proportionality.¹⁴⁸ It must be acknowledged however that preceding the express recognition of the proportionality doctrine in *Modern Dental College v. State of M.P.*,¹⁴⁹ the underlying principle of a reasonable balance between guaranteed constitutional freedoms, and the conflicting requirement of State restrictions on such rights, dates back to *Chintaman Rao v. State of M.P.*¹⁵⁰ In *V.G. Rao v. State of Madras*,¹⁵¹ the Court held that the “[t]he nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict”¹⁵² This mirrors the larger proportionality principle.

¹⁴⁶ Aparna Chandra, *Proportionality in India: A Bridge to Nowhere?*, Vol. 3(2), UNIVERSITY OF OXFORD HUMAN RIGHTS HUB JOURNAL (2020).

¹⁴⁷ Gregoire Webber, *Proportionality and Limitations on Freedom of Speech*, SSRN, March 22, 2019, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3358273 (Last visited on September 20, 2021).

¹⁴⁸ Gautam Bhatia, *Proportionality in Application – An Analysis of the “Least Restrictive Measure”*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG, May 8, 2020, available at <https://indconlawphil.wordpress.com/2020/05/08/guest-post-proportionality-in-application-an-analysis-of-the-least-restrictive-measure/> (Last visited on September 20, 2021).

¹⁴⁹ *Modern Dental College & Research Centre v. State of M.P.*, (2016) 7 SCC 353.

¹⁵⁰ *Chintaman Rao v. State of M.P.*, 1950 SCC 695.

¹⁵¹ *V.G. Row v. State of Madras*, 1950 SCC OnLine Mad 255.

¹⁵² Aparna Chandra, *supra* note 147.

The most recent judicial ruling, one that has cemented the four-prong test, is *Anuradha Bhasin v. Union of India*,¹⁵³ which dealt with the imposition of the internet, and movement restrictions within Jammu and Kashmir.¹⁵⁴ The judgment not only upheld that restrictive measures must be subject to necessity and proportionality tests, but specifically identified the four constituting elements of the latter.

The first prong is of legitimacy; examining as to whether the State's placement of a restriction is for a legitimate purpose.¹⁵⁵ As examined through the paper, we can conceive that the essential parameters of individual dignity – the assurance of inclusiveness and a basic social standing are the foundational principles through which we perceive all constitutional provisions. Given that the fundamental parameters of individual dignity are intrinsic to constitutional morality, which itself is a ground under Article 19(2), we can conclude that there exists an obligation to protect individual dignity, and that a denigration from such parameters dignity is a 'legitimate aim' which is sufficient enough to warrant State intervention.

The second prong is of suitability; examining as to whether a valid nexus exists between the State's legitimate purpose, and the actual measure deployed to achieve it, such that the restriction of the fundamental right is the suitable mechanism.¹⁵⁶ In the context of the restriction of free speech of elected representatives to protect individual dignity, we must reinforce the idea that expressly or consequentially, humiliating speech-acts have the ability to exclude counter-narratives. This exclusion of such counter-narratives, pose a structural threat to the assurance of inclusivity and the basic social standing of an individual as has already been discussed in the foregoing parts. Even the mere expression of humiliating speech-acts asserts the social inferiority of individuals, thus contributing towards the denigration of the said parameters. Given that the legitimate purpose of the State is to preserve individual dignity, this unequivocally establishes a causal link that exists, between the State aim and any legislation that seeks to restrict the speech of such elected representatives.

The first two prongs align similarly to traditional analysis of the reasonableness of a restriction. The third prong however, is similar to the idea of 'narrow-tailoring', which is the idea of limiting the restriction only to the extent that it imposes the least degree of intrusion or interference possible.¹⁵⁷ It is also defined as the prong of necessity, and requires the court to question if there exists a simi-

¹⁵³ *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637.

¹⁵⁴ Global Freedom of Expression, *Bhasin v. Union of India*, available at <https://globalfreedomofexpression.columbia.edu/cases/bhasin-v-union-of-india/> (Last visited on November 30, 2020).

¹⁵⁵ *Anuradha Bhasin*, *supra* note 153, at ¶78.

¹⁵⁶ *Modern Dental College*, *supra* note 150, at ¶65.

¹⁵⁷ Gautam Bhatia, *Surveillance and Privacy in India –II: Gobind and the Compelling State Interest Test*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG, December 16, 2013, available at <https://indconlawphil.wordpress.com/2013/12/16/surveillance-and-privacy-in-india-ii-gobind-and-the-compelling-state-interest-test/> (Last visited on September 20, 2021).

lar mechanism that achieves the same goal with a lower degree of intrusion onto the right.¹⁵⁸ The restriction of free speech as laid out in this paper is intrinsically linked to the higher duty placed on elected representatives, as a result of oaths under Schedule III, thus indicating that the restriction applies to a constitutionally-recognised, distinct group of people. More significantly, the restriction seeks to limit only to those speech-acts that strike at the heart of an individual's assurance of inclusiveness and her basic social standing. It does not seek to limit any speech which merely offends, shocks or disturbs such individuals.¹⁵⁹ This ensures that the limitation imposed on the freedom of speech and expression of elected representatives is least restrictive in nature.

The most distinct, and arguably strict element of the proportionality test however, is the prong of balancing.¹⁶⁰ As held in the Aadhar judgement, a balance must be achieved between the 'importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right'.¹⁶¹ The fourth prong requires a value judgement to be made by the Court; the argument extended is that the larger social purpose achieved, coupled with the reasonable nature of the restriction, outweigh the restriction itself. This is deeply linked to the narrow-tailoring of the speech-restricting law; the specific nature of the speech, and the specific category of constitutionally-recognised individuals whose speech is restricted, allows for this reasonable balance to be attained. This balance must be contextualised, and hence understood, in the larger, legitimate aim of the restriction – the protection of individual dignity.

Therefore, it can be established that the structure of regulation, as laid down in Part VI, *allows* for the restriction of speech under Article 19(2) to pass the proportionality test and withstand the rigorous standards of constitutional scrutiny developed by the Courts.

VIII. CONCLUSION

The Constitution of India was predicated on the idea that an individual matters. It was based on the idea of lending a sense of security to each individual in a space shared by many. This sense of security ensures that when a gang-rape victim goes to file a complaint with the police, her allegations are not viewed as frivolous or orchestrated merely because an elected representative believes so.

¹⁵⁸ Global Freedom of Expression, *supra* note 155.

¹⁵⁹ Ang Ladlad LGBT Party v. Commission of Elections, G.R. No.190582, Supreme Court of Philippines (2010); *Handyside v. the United Kingdom* judgment of 7 December 1976, § 49.

¹⁶⁰ *Id.*

¹⁶¹ Mariyam Kamil, *The Aadhar Judgement and the Constitution – II: On Proportionality*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG, September 30, 2018, available at <https://indcon-lawphil.wordpress.com/2018/09/30/the-aadhaar-judgment-and-the-constitution-ii-on-proportionality-guest-post/> (Last visited on September 20, 2021).

Throughout the course of this paper, we have argued how speech-acts of elected representatives threaten this shared sense of security of an individual. These threats go to the roots of individual dignity as they convince an individual that their actions shall always be viewed from the prism of the beliefs held by the powerful in the society. We believe that the idea of dignity in Constitutions and jurisdictions all over the world, including India, has always been rooted in the principles of anti-exclusion and equal social standing. The speech-acts of the powerful would continue to threaten these principles until the time speech-acts of the victims are given an equal weightage and an access to the same authoritative discourse to counter the speech-acts which have denigrated them.

Therefore, until the time such equal weightage can be given to the speech of the victims, a restriction on the speech-acts of elected representatives which undermine the idea of individual dignity is the only way to follow the principles of anti-exclusion and equal social standing, and achieve the goals of dignity envisaged by the framers of our Constitution.