
STATUTORY DISPARITY AND ACCESS TO JUSTICE FOR MARGINALIZED POPULATIONS: A SOCIO-LEGAL CRITIQUE OF JANE KAUSHIK V. UNION OF INDIA

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ABSTRACT

The Supreme Court of India's historic decision in *Jane Kaushik v. Union of India* (2025 INSC 1248) represents a turning point in the constitutional jurisprudence of non-discrimination. In contrast to most of the scholarly work that has examined the Transgender Persons (Protection of Rights) Act 2019 solely as a matter of doctrine, there is a significant void regarding the role of administrative omission in facilitating structural harm. This paper will bridge this void with a comprehensive Case Note and Legislative Comment on the judgment. As such, it will examine the Court's development of "Omissive Discrimination", the horizontal enforceability of Fundamental Rights against Private Actors, and the cross-fertilization of Reasonable Accommodation from Disability Law. More importantly than this, through the use of preliminary findings from an ongoing socio-legal study into the *Prohibition of Sexual Offenses against marginalized populations within the NCT (National Capital Territory) of Delhi*, this case note will illustrate that "omissive discrimination" occurs far beyond the confines of Employment Disputes and directly threatens marginalized bodies and denies those bodies avenues of redress against systemic and sexual violence.

I: Introduction: The Promise of Transformative Constitutionalism

It has been over twelve years that the Supreme Court of India declared transgender people to be the “third gender” in *National Legal Services Authority v. Union of India (NALSA)*¹, and well over seven years since the enactment of the Transgender Persons (Protection of Rights) Act, 2019 (“2019 Act”), an act intended to provide for the realization of the transformative constitutionalism that was first articulated in NALSA and then further developed in *Navtej Singh Johar v. Union of India*.²

Transformative Constitutionalism rejects the myth of pure formality regarding equality in law (that all people are treated the same) and ignores the deep-seated prejudice that has developed historically. It is, rather, a long-term process for the radical transformation of a society's political, social, and power relations through an egalitarian lens³. As Gautam Bhatia articulates in the context of India, this vision of transformation will also dismantle those forms of State-sanctioned oppression that have been entrenching themselves privately through discriminatory systems of power and social hierarchies⁴. In order to achieve this constitutional promise, Tarunabh Khaitan asserts within his theory of discrimination law, we must move from a concept of formal equality to substantive equality. The State must actively eliminate the pervasive disadvantages that affect cognate groups in order to provide the essential conditions of autonomy for individuals⁵. This however does not seem to be happening. A very good example of this can be seen with the *Jane Kaushik v. Union of India* decision, which clearly indicates how the transgender population remains excluded from mainstream life due to system-wide exclusion. The *Jane Kaushik* judgment is an excellent representation of how years of administrative delays will effectively render laws and regulations into nothing but “dead letters” and therefore ineffective. As well, as the Supreme Court expands upon existing discrimination law and has held both public institutions (the state) and private institutions (schools, etc.) accountable for failing to comply with the provisions set out in the 2019 Act and subsequent rules in 2020, there is much more at play here than simply understanding the legal implications of this case. It would be beneficial for us to understand how a purely legal analysis

¹ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

³ Karl E. Klare, "Legal Culture and Transformative Constitutionalism" 14 *South African Journal on Human Rights* 146 (1998). (Note: Justice D.Y. Chandrachud heavily relied upon Klare's definition in the *Navtej Singh Johar* judgment).

⁴ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins India, New Delhi, 2019).

⁵ Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, Oxford, 2015).

fails to convey the severity of the State's inaction towards this community if we are to fully appreciate the extent of the harm caused by the State's lack of action.

II: Factual Conspectus and Procedural History

Jane Kaushik, a qualified female-to-male transgender individual, petitioned the Supreme Court of India to invoke the writ jurisdiction of the court (Article 32 of the Constitution of India), arguing that she had been illegally terminated and discriminated against by two separate private schools when applying for work at each establishment.

First School:

In November 2022, Jane Kaushik was hired as a Trainee Graduate Teacher (TGT) and worked for only eight days. During those eight days, Ms. Kaushik was subject to extreme workplace bullying, verbal abuse (name-calling), and body shaming by her coworkers and students. After discovering her gender identity, the employer threatened to withhold her pay unless she resigned. The school then used a combination of poor performance and temperamental problems as justification for terminating her employment.

Second School:

Following video interviews conducted in July 2023, Ms. Kaushik received a job offer from a second school. She travelled to join the school, providing her identification documents for verification purposes before commencing work. When the school learned about her transgender status from reviewing those documents, they immediately withdrew their job offer. They refused to allow her to enter the premises where she would have been employed.

Petitioner sought redress from several statutory bodies. The NCW formed an inquiry committee, which determined there was no evidence of discrimination demonstrated by First School. The National Council for Transgender Persons failed to act at all. Because she had no viable administrative remedies available to her, the petitioner pursued relief through the Supreme Court.

III: Legal Issues Raised

Issues raised were as follows:

1. Whether the Union and/or states have an affirmative duty to prevent discrimination against transgender persons under the Constitution and the 2019 law?
2. Whether state inaction/omissions caused discrimination to the petitioner?
3. Whether actions of the First school or Second school discriminatory based on gender identity?
4. Whether the petitioner has an entitlement to damages?

IV: The Court's Decision and Doctrinal Innovation(s)

The Supreme Court (**JB Pardiwala & Justice R. Mahadevan, JJ.**) ruled in favor of the petitioner. While the court noted that first school's actions may have been discriminatory under the evidentiary standards used, the Court found the second school revoking its offer letter after learning of petitioner/s identity indicated mala fide intent to discriminate. Additionally, the Court held the Union of India and the respective State Governments liable for their gross administrative indifference. Relying on the public law remedy jurisprudence established in landmark cases such as *Rudul Sah v. State of Bihar*⁶, *Nilabati Behera v. State of Orissa*⁷, and *Jeeja Ghosh v. Union of India*⁸, the Court held that monetary compensation under Article 32 is a valid constitutional remedy for the violation of fundamental rights, distinct from private damages in civil law. Applying this principle, the Court directed the second school to pay ₹50,000 as damages, and directed both the Union and State Governments to pay the petitioner ₹50,000 for failing to provide the statutory grievance mechanisms necessary to allow the petitioner to seek redress.

A. Rethinking Reasonable Accommodation

The court made use of principles from disability law to give substance to the mandate of the 2019 Act. Citing **Vikash Kumar vs. UPSC**⁹, the court stated that an affirmation of an opportunity to be treated equally means nothing if a person does not have access to the resources necessary to utilize that opportunity. The court also referenced international

⁶ *Rudul Sah v. State of Bihar*, (1983) 4 SCC 141.

⁷ *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746.

⁸ *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761.

⁹ *Vikash Kumar v. UPSC*, (2021) 5 SCC 370.

frameworks as well. For example, the Canadian Human Rights Act, 1985, states that individuals have a right to “reasonable accommodation,” based upon their sex or sexual orientation. The U.S., for example, cited cases such as *Bostock v. Clayton County*¹⁰ and *Williams v. Kincaid*¹¹, wherein courts have used the Americans with Disabilities Act (ADA) to provide accommodations to individuals who experience gender dysphoria. Through its adoption of this model, the court found that employers are required by statute, pursuant to the provisions of the 2019 Act, to take affirmative steps to accommodate transgender employees in the workplace.

B. Addressing Omissive and Indirect Discrimination

One of the key concepts that arises out of this decision is that of “omissive discrimination”. The court references research of Adrain Conyers and Tony Carrizales¹², stating that discrimination can occur both through express acts of exclusion; as well as “privileged omissions” or failure(s) of the law to protect disadvantaged populations when there is a duty to do so. To assess how to remedy these privileged omissions, the court utilizes Sandra Fredman’s four-dimensional framework for substantive equality; i.e., addressing disadvantages, reducing stigma, enhancing voice, and accommodating structural differences¹³.

C. Horizontal Application of Fundamental Rights

The court clearly articulated that the 2019 Act constitutes a legislative bridge that enables horizontal application of Articles 14, 15, and 21 of the Constitution against private parties. Section 2(b) of the Act broadly includes private businesses in its definition of “establishment”. Gautam Bhatia discusses in his work on the horizontal application of fundamental rights, the drafters of the Indian Constitution intended for it to be able to address long-standing social inequalities practiced by private entities¹⁴. Therefore, using the 2019 Act to circumvent the long-standing State Action Doctrine, the Court has enabled private employment spaces to be subject to the constitutional prohibition on discrimination.

¹⁰*Bostock v. Clayton County*, 590 U.S. 644 (2020).

¹¹*Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022).

¹²Adrain Conyers and Tony Carrizales, “Privileged Omissions: The Impact of Discriminatory Inaction” 56 *Administration & Society* 3 (2024).

¹³ Sandra Fredman, “Substantive equality revisited” 14 *International Journal of Constitutional Law* 712 (2016).

¹⁴ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins India, New Delhi, 2019).

D. Nuance and Critique: The Limits of the Remedy

While the court has been quite innovative in terms of the legal doctrine it uses, there are still some serious risks associated with its approach. First, when the court imports a concept such as “reasonable accommodation” from the area of disability law, they may be promoting unintentionally what many would call the “medicalization,” or “pathological” representation of transgender identity. Many Trans-Rights Advocates have worked for years to deconstruct the very idea that transgender people are sick; thus, the Court could potentially reinforce the very same ideas it is trying to overturn. Second, the Court’s solution — which consists of appointing a retired judge to lead an advisory committee charged with developing a National Equal Employment Opportunity Policy — raises significant concerns about judicial overreach. Although the Court has developed this remedy as a response to the Executive Branch’s complete lack of action, creating broad national employment policies is typically a function of the Executive. Therefore, whether or not the Court’s remedy is successful depends almost exclusively upon whether or not the Executive will choose to implement the recommendations of the advisory committee.

Part V: Legislative Comment: Statutory Disparity and the Implementation Gap

The court also provides a stark legislative critique of both the 2019 Act and the 2020 Rules.

1. The Facade of Statutory Protection

The 2019 Act has numerous “relative legislative omissions.” In addition to general prohibitions against discrimination in Chapters II (Section 3) and V (Section 9) of the Act, Rule 12 of the 2020 Rules mandates that all businesses create an equal opportunity policy, while Section 11 mandates that each business designate a complaint officer. However, despite these directives, the State had a grossly indifferent posture towards creating a national employment policy for transgender employees. Specifically, the Ministry of Social Justice & Empowerment (MoSJE) refused to develop an employment policy based on the mistaken belief that the provisions contained within the 2019 Act were adequate on their own.

2. Medicalization and Identity Documentation

The court correctly notes that the 2019 Act focuses too much on medicalizing gender. As noted above, Sections 4 – 7 of the Act subject transgender individuals to a labyrinthine bureaucratic

process to receive a Certificate of Identity, and most significantly, require transgender individuals to obtain a medical certification to receive said Certificate. This is contradictory to the principle of Self-Determination articulated in NALSA. Requiring transgender individuals to repeatedly provide proof of their identity to government agencies creates institutionalized humiliation for transgender individuals and is a total barrier to obtaining formal employment.

Part VI: Omissive Discrimination, Sexual Offences, and Access to Justice: Findings from the NCT of Delhi

To accurately measure how much the inability to act, as described by *Jane Kaushik*, harmed people, legal theory must be based on the real world, qualitatively and empirically. As Upendra Baxi has been saying for years, the social study of Indian law requires us to move beyond the language of statutes to analyze how they are used violently at the periphery of society.¹⁵

My ongoing doctoral research, titled *Prohibition of Sexual Offences against Transgender Persons: A Socio-Legal Study in the National Capital Territory of Delhi*, provides quantitative evidence supporting the observations made by the Supreme Court.

Methodological Disclosure: I have employed a purposeful sampling strategy of conducting in-depth, semi-structured interviews with transgender individuals, community organizers, and primary governmental actors (the police) in Delhi. I have received rigorous ethics approval, secured informed consent from each participant, and applied thematic coding to each participant's qualitative narrative so that their identity would remain protected while identifying systemic patterns related to interactions with statutes. The data collected through this method provide direct evidence that "omissive discrimination" is not simply an example of passive bureaucratization; rather, omissive discrimination is an active agent of structural violence. In terms of the 2019 Act, the lack of establishing Transgender Protection Cells and mandating Compliant Officers who can include transgender individuals in complaints about sexual offenses not only impedes employment opportunities but also creates a void of jurisdiction, such that there are no records or penalties provided when sexual offenses occur to non-binary and transgender individuals.

¹⁵Upendra Baxi, *Towards a Sociology of Indian Law* (Satvahan Publications, New Delhi, 1986).

A. Intersectionality and Marginalized Individuals' Exposure to Sexual Offenses

Jane Kaushik's case focused on gender identity harassment and termination in the workplace. The qualitative data collected from marginalized populations in the NCT of Delhi demonstrate that for many marginalized communities, sexual offenses and workplace sexual harassment intersect. Where an individual experiences sexual harassment in a private organization, without an internal Complaint Officer (mandated by Section 11), they are forced to use the public law enforcement apparatus.

While the conventional criminal justice system is still very binary. Analysis of thematic interview responses shows repeated patterns of secondary victimization at the hands of law enforcement when marginalized people make reports about sexual offenses. Police organizations lack specialized training related to trans victims of sexual violence and specific units as required by Rule 11(5) of the 2020 rules. Therefore, sexual violence against the body of a trans person is viewed by many police officers through a prism of distrust and prejudice.

B. Statutory Disparities as Obstacles to Justice

My thesis's central premise—statutory disparities create a sense of justice but deny the actuality of justice—is reflected in the decisions made by the Supreme Court. The 2019 Act stipulates that all survivors of violence and abuse have rights. However, there is no formal pathway to obtain those rights within the framework of the act.

This was demonstrated through human-centered stories that were collected during field research regarding how the “medicalization” of identity affects a survivor's opportunity to report a sexual offense. Medical exams for the purpose of documenting injuries and gathering evidence can be traumatic experiences for survivors. Furthermore, when a transgender survivor has documentation such as identification cards that reflect a different gender than their self-identified gender, resulting from the bureaucratic requirements outlined in the 2019 Act, the criminal justice process may misgender them, incorrectly classify the sexual offense according to the provisions of the Bharatiya Nyaya Sanhita/Indian Penal Code, or refuse to file a First Information Report (F.I.R.) based on their own judgment.

Thus, the Supreme Court's decision to hold the state accountable for its “laxness” represents a legally informed understanding of how states fail to provide access to justice for marginalized

communities who are especially vulnerable to experiencing both sexual and physical violence.

C. The Necessity of Qualitative Methodology in Legal Reform

For the Advisory Committee to be successful in creating a comprehensive policy for equal opportunities under Article 16 of the Constitution, and to evaluate the 2019 Act, it will need to go beyond the interpretation of the doctrine of law (what the statute said) and use qualitative research (how the statute was violated). The legal statutes tell us what is written in them; however, the socio-legal qualitative research informs us about how they are being violated. Based upon our qualitative research findings within the NCT of Delhi, we can confirm that any policies created without considering the lived experiences of the marginalized population will ultimately lead to failure. To transform from simply identifying individuals who are experiencing marginalization (recognizing their identity), the Advisory Committee will have to conduct a deep and thematic analysis of survivors' experiences, so they may dismantle the statutory disparities that bar marginalized populations from accessing justice.

VII. Conclusion

Jane Kaushik vs. Union of India is a significant advancement in Indian Anti-Discriminatory Law. By finding liability for the State's omission of legislation and administration, the Supreme Court has reinforced that the constitutional guarantee of equality is not passive; rather, it is an active and binding obligation. Additionally, the inclusion of "reasonable accommodations", the formal acknowledgment of omissive discrimination, and horizontal application of rights against private entities creates a strong legal tool kit.

However, as our qualitative research concerning sexual offenses and access to justice in the NCT of Delhi demonstrates, achieving substantive equality through the courts alone is insufficient. The continuing presence of statutory disparity poses a serious threat to marginalized populations, rendering legal rights into empty promises. Moving forward in India to bridge the gap between statutory protections and actual access to justice will necessitate not only continued judicial oversight but also a fundamental social transformation based upon rigorous socio-legal research, empirical evidence, and the enhanced, person-centered voice(s) of those whose lives the law is intended to protect.