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CRITICAL ANALYSIS OF JANE KAUSHIK V. UNION OF INDIA

AUTHORED BY - HIMANSHU PANDAY

The judgment in *Jane Kaushik v. Union of India* (2025 INSC 1248) marks a decisive shift in Indian transgender rights jurisprudence from symbolic recognition to a regime of enforceable, positive obligations on both State and private actors, centring substantive equality, reasonable accommodation and the doctrine of “omissive discrimination.” At the same time, the Court’s reliance on continuing mandamus and far-reaching structural directions raises difficult questions about separation of powers, doctrinal precision, and the outer limits of judicially enforced social reform.

Introduction and Case Overview

The Supreme Court’s decision in *Jane Kaushik v. Union of India & Ors.*, W.P. (C) No. 1405 of 2023, decided on 17 October 2025, is among the most significant judgments on transgender rights after *National Legal Services Authority v. Union of India* (NALSA), 2014 (5) SCC 438. Decided by Justices J.B. Pardiwala and R. Mahadevan, the judgment moves the discourse from recognition of gender identity to enforcement of substantive rights in employment, dignity, and participation in public life.

The petition arose from the experience of Jane Kaushik, a transgender woman and trained teacher, who faced discrimination from private schools in Uttar Pradesh and Gujarat despite her qualifications and candid disclosure of her gender identity. Her inability to obtain effective relief through the mechanisms contemplated by the Transgender Persons (Protection of Rights) Act, 2019 led her to invoke Article 32 of the Constitution directly before the Supreme Court.

The judgment is remarkable for several reasons. It endorses substantive equality, treats governmental inaction as a form of unconstitutional discrimination, strengthens obligations of private employers under anti-discrimination law, extends reasonable accommodation to transgender persons, and deploys continuing mandamus to ensure implementation. It is, therefore, both a rights-expanding and institutionally interventionist decision.

Factual Background and Procedural History

Jane Kaushik completed undergraduate and postgraduate studies, pursued teacher training, and sought to enter the teaching profession after obtaining recognition of her gender identity. She was first appointed as a teacher in a private school in Uttar Pradesh, where she alleged that she was subjected to harassment, ridicule, and body-shaming by students and staff because she did not conform to stereotypical expectations of femininity. Within days, she was compelled to resign, and she claimed that the school was unwilling to employ an openly transgender person. She later received an appointment from another private school in Gujarat. However, after the school requested identity documents and came to know of her transgender status, the offer was effectively withdrawn and she was denied employment. The sequence of events persuaded the Court that discrimination in employment remained a lived reality for transgender persons, notwithstanding statutory guarantees.

Before approaching the Supreme Court, the petitioner sought redress before several authorities, including the National Commission for Women, the police, the National Council for Transgender Persons, and the National Human Rights Commission. These efforts proved ineffective, and the Court found that many of the statutory mechanisms envisaged by the 2019 Act and the 2020 Rules were either absent or non-functional. This institutional vacuum formed the basis for the Court's later articulation of "omissive discrimination."

Constitutional Context

The Court situated the case within the broader trajectory of transgender rights jurisprudence after *NALSA*. In *NALSA*, the Supreme Court recognised transgender persons as entitled to constitutional protection under Articles 14, 15, 16, 19 and 21, and affirmed the right to self-identification. The 2019 Act was enacted against that background to prohibit discrimination, regulate identity recognition, and create institutional safeguards.

Yet, the Court observed that legal recognition had not translated into substantive equality. Transgender persons continued to face exclusion in employment, housing, education, healthcare, and access to public services, revealing a serious gap between constitutional promise and administrative practice. *Jane Kaushik* thus represents the next phase in constitutional evolution: not the recognition of rights in theory, but their enforcement in everyday life.

Substantive Equality

One of the judgment's most important contributions is its explicit endorsement of substantive equality rather than formal equality. Instead of asking only whether transgender persons are treated identically to others, the Court examined whether social structures, institutional practices, and legal omissions place them at a comparative disadvantage.

Drawing on Sandra Fredman's influential theory, the Court identified four dimensions of substantive equality: redressing disadvantage, addressing stigma and stereotyping, facilitating participation, and accommodating difference to produce structural transformation. The Court treated these dimensions as already embedded in Indian constitutional jurisprudence, thereby integrating comparative equality theory with domestic constitutional doctrine.

This is a major jurisprudential development. It aligns Indian equality law with a more mature and realistic understanding of discrimination, one that recognises that identical treatment can perpetuate inequality when individuals begin from historically unequal positions. In that sense, the judgment deepens the transformative orientation of the Constitution.

Critical Evaluation

The embrace of substantive equality is one of the judgment's greatest strengths. It reflects a sophisticated understanding of how discrimination operates through systems, stereotypes, and institutional design rather than only through explicit exclusion.

At the same time, one possible criticism is that the Court relies heavily on academic theory without always fully explaining the constitutional text that grounds each aspect of Fredman's four-part framework. Although Articles 14, 15 and 21 can plausibly support such a framework, greater doctrinal elaboration would have made the judgment more resistant to criticism that it leans too heavily on extra-textual theory.

Omissive Discrimination

Perhaps the most innovative doctrinal aspect of the judgment is its recognition of "*omissive discrimination*." The Court held that discrimination can arise not only from direct harmful acts but also from the State's failure to implement laws and create conditions necessary for the enjoyment of rights. Where the State enacts protective legislation but fails to operationalise it,

such inaction may itself violate constitutional guarantees.

This formulation is significant because it expands the logic of constitutional accountability. The Court effectively held that rights become illusory if governments do not establish complaint mechanisms, appoint officers, create safe reporting structures, and ensure administrative follow-through. In the petitioner's case, the failure to activate the institutional framework of the 2019 Act denied her meaningful access to redress and therefore amounted to discrimination by omission.

Critical Evaluation

The doctrine of omissive discrimination is normatively persuasive. It reflects the evolution of constitutionalism from a model centred primarily on restraint of State interference to one that recognises positive obligations toward vulnerable groups.

However, the doctrine also raises practical concerns. If every failure of implementation is treated as a constitutional wrong, courts may be drawn into reviewing routine administrative deficiencies on a large scale. The judgment does not fully clarify the threshold at which inaction becomes unconstitutional omission, and this could complicate future application.

Horizontal Application of Rights

The judgment also reinforces the horizontal reach of constitutional values through the statutory scheme of the 2019 Act. Although fundamental rights traditionally operate vertically against the State, the Court recognised that private institutions such as schools and employers can inflict forms of discrimination that are equally damaging to dignity and equal opportunity.

This aspect of the judgment is especially important in a liberalised economy where employment, education, healthcare, and housing are often controlled by private actors. By holding that private schools cannot deny opportunities on grounds of gender identity and by reading the 2019 Act as imposing concrete obligations on such establishments, the Court acknowledged that constitutional protections must remain effective in changing socio-economic conditions.

Critical Evaluation

The extension of legal accountability to private actors enhances the practical protection of rights. Discrimination by private employers can be as harmful as discrimination by the State, particularly where access to work and livelihood is at stake.

Yet this development also raises questions of legal certainty. The Constitution does not expressly impose the full range of Part III obligations on private entities, and the precise doctrinal route for horizontal enforcement remains somewhat under-theorised. Future cases will need to define the scope and limits of this horizontal application more carefully.

Reasonable Accommodation

Another major contribution of the judgment is its extension of reasonable accommodation to transgender persons. The Court treated reasonable accommodation as a component of substantive equality rather than as a concept confined to disability rights. Institutions, in this view, must make adjustments necessary to enable transgender persons to participate on equal terms in workplaces and public institutions.

The significance of this holding is far-reaching. It can support inclusive workplace rules, protection from harassment, recognition of chosen names and gender identity, flexible documentation procedures, and access to gender-appropriate or gender-neutral facilities. The judgment therefore shifts the discourse from mere tolerance to institutional adaptation.

Critical Evaluation

This reasoning is persuasive because equal treatment often requires differential measures. A formally identical rule may disadvantage transgender persons if it is based on cisnormative assumptions about identity, bodies, or documentation.

However, the Court leaves several questions unresolved: what counts as “reasonable,” how burdens and costs should be assessed, and what limits may apply to institutional obligations. These issues are likely to become central in future litigation and policy design.

Structural Discrimination

A notable strength of the judgment is its recognition that transgender discrimination is

structural, not merely episodic. The Court situates the petitioner's experience within a broader pattern of stigma, economic exclusion, educational marginalisation, and social invisibility faced by transgender persons in India.

This shift in perspective matters. It transforms the petitioner from an isolated litigant into a representative of a community facing entrenched institutional barriers. As a result, the Court's analysis speaks not only to individual wrongs but to the constitutional obligation to dismantle structures of exclusion.

Continuing Mandamus and Judicial Activism

The Court did not stop at declaring rights; it also issued a continuing mandamus aimed at ensuring implementation. It constituted an Advisory Committee headed by Justice Asha Menon (Retd.) and directed the formulation of an Equal Opportunity Policy to operationalise transgender inclusion more effectively. The Court also retained supervisory jurisdiction over compliance.

This remedial approach has clear advantages. It prevents rights from remaining symbolic, addresses long-standing executive inertia, and creates ongoing institutional pressure for compliance.

Critical Evaluation

At the same time, these directions invite concerns about separation of powers. Policy formulation, institutional design, and implementation are classically executive functions, and courts do not always possess the expertise or democratic legitimacy to manage them in detail. There is also the risk that continuing judicial supervision may become indefinite. Even if justified by governmental failure, such intervention pushes the boundaries of traditional adjudication and may be criticised as judicial lawmaking.

Impact on the 2019 Act

The judgment substantially revitalises the Transgender Persons (Protection of Rights) Act, 2019. Before this ruling, the Act was widely seen as under-implemented and often ineffective in practice. By mandating implementation, clarifying obligations, and connecting the Act to constitutional guarantees, the Court transforms it into a more meaningful enforcement

framework.

This is important not only for transgender rights but for Indian statutory rights jurisprudence more generally. The judgment signals that legislation designed to protect vulnerable groups cannot be allowed to remain dormant through administrative neglect.

Comparative and International Dimensions

The judgment also resonates with comparative constitutional and human rights jurisprudence. Its emphasis on dignity, accommodation, participation, and positive obligations resembles approaches seen in jurisdictions such as South Africa, Canada, and the United Kingdom.

This comparative orientation strengthens the judgment's intellectual foundation. It also suggests that Indian constitutional law is increasingly willing to engage with global equality discourse while adapting it to local constitutional principles.

Limitations

Despite its strengths, the judgment is not without limitations. First, it provides broad directions but leaves many enforcement questions unresolved, including how compliance is to be monitored and how future violations are to be remedied in a consistent manner.

Second, implementation ultimately depends on executive cooperation. Judicial declarations and committees cannot, by themselves, transform deeply rooted social attitudes or administrative cultures.

Third, the judgment does not fully engage with the issue of reservations or broader affirmative action for transgender persons. Given the structural barriers recognised by the Court itself, this omission is notable.

Fourth, the policy-oriented nature of the directions may be criticised as institutional overreach. Although the Court acted in response to genuine neglect, the decision stretches the traditional boundaries of judicial function.

Long-Term Significance

The long-term significance of *Jane Kaushik* is likely to extend beyond transgender rights. Its

articulation of ommissive discrimination and substantive equality may influence future cases involving disability, gender, sexual orientation, caste exclusion, and other contexts in which State inaction perpetuates inequality.

The judgment may therefore become a foundational precedent for a more robust theory of positive constitutional obligations in India. If so, its implications will reach far beyond the facts of this particular case.

Conclusion

Jane Kaushik v. Union of India is one of the most important constitutional judgments of the post-*NALSA* era. It transforms transgender rights jurisprudence from symbolic recognition to practical enforcement by embracing substantive equality, recognising ommissive discrimination, extending reasonable accommodation, and imposing obligations on both State and private actors.

The judgment is not free from criticism. Concerns about judicial activism, separation of powers, enforceability, and doctrinal clarity remain substantial and deserve serious engagement. Yet these concerns do not diminish its broader constitutional significance.

Ultimately, the decision reaffirms a central constitutional principle: equality is not achieved merely by recognising rights on paper. It requires active institutional measures to dismantle structures of exclusion and ensure that dignity, participation, and opportunity are genuinely available to all.

References:

1. *National Legal Services Authority vs Union of India*, (2014) 5 SCC 438.
2. *Navtej Singh Johar vs Union of India*, (2018) 10 SCC 1.
3. *Justice K S Puttaswamy (Retd) vs Union of India*, (2017) 10 SCC 1.
4. *Indian Young Lawyers Associations vs State of Kerala*, (2019) 11 SCC 1.
5. *Nitisha vs Union of India*, (2021) 7 SCC 715.
6. *Kaushal Kishor vs State of Uttar Pradesh*, (2023) 4 SCC 1.
7. *Constitution of India*, arts 14, 15, 16, 17, 19, 21.
8. Sandra Fredman, *Discrimination Law*, 2nd edn, Oxford University Press, 2011.