



ILS Law College, Pune

**CENTRE FOR PUBLIC LAW'S**

# **PUBLIC LAW BULLETIN**

**VOL. XVI**

**WEDNESDAY**

**SEPTEMBER 30, 2020**

**THEME: GENDER AND SEXUAL MINORITIES**

# Public Law Bulletin

---

CENTRE FOR PUBLIC LAW AT ILS LAW COLLEGE,  
PUNE

## EDITORIAL BOARD

---

### **DR SANJAY JAIN**

ASSOCIATE PROFESSOR &  
FACULTY CO-ORDINATOR  
CENTRE FOR PUBLIC LAW

ADDITIONAL CHARGE,  
PRINCIPAL  
ILS LAW COLLEGE, PUNE

### **MR. D.P. KENDRE**

ASSISTANT PROFESSOR &  
FACULTY CO-ORDINATOR  
CENTRE FOR PUBLIC LAW  
ILS LAW COLLEGE, PUNE

### **MS. MADHURA SAWANT**

ASSISTANT PROFESSOR &  
FACULTY CO-ORDINATOR  
CENTRE FOR PUBLIC LAW

### **STUDENT EDITORS**

NIHAR CHITRE

V BALL.B

RASHMI RAGHAVAN

V BALL.B

## CONTENT CONTRIBUTOR

---

SOHAM BHALERAO V BA LL.B	DEWANGI SHARMA III BA LL.B	SAMRAGGI DEBROY III BA LL.B	VISHAKHA PATIL III BA LL.B
--------------------------------	----------------------------------	-----------------------------------	----------------------------------

## INDEX

---

A. MESSAGE FROM THE EDITOR .....	5
B. CARTOON: TOWARDS AN INCLUSIVE WORLD .....	7
C. VITAL CONSTITUTIONAL QUESTION: SEXUAL MINORITIES AND THE SOUTH AFRICAN CONSTITUTION.....	8
D. CASE STUDY: TRACING WOMEN'S FOOTPRINTS IN NATIONAL POLITICS OVER THE YEARS.....	17
E. LEGAL THEORY & PUBLIC LAW: KIMBERLE CRENSHAW'S THEORY OF INTERSECTIONALITY IN REALIZING THE MARRIAGE PROJECT .....	47
F. TRANSGENDERS IN SPORT: A REVIEW OF THE STATUS QUO .....	54
G. "FOSTERING A CULTURE OF TRUST, TRUTH AND ACCEPTANCE": IS ZOMATO'S PERIOD LEAVE POLICY A PROGRESSIVE MOVE, MERE TOKENISM OR A REGRESSIVE STANCE?.....	61
H. CRITICAL ANALYSIS OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 IN THE LIGHT OF THE NALSA JUDGMENT. ....	66
I. NEED FOR AN ANTI-DISCRIMINATION FRAMEWORK FOR LGBTQ+ PEOPLE .....	74
J. RAISING THE AGE FOR MARRIAGE FOR WOMEN: VIEW .....	81
K. RAISING THE AGE FOR MARRIAGE FOR WOMEN: COUNTERVIEW.....	86

<b>L. OBJECTION YOUR HONOUR! SURENDRA MOHAN VS. STATE OF TAMIL NADU.....</b>	<b>91</b>
<b>M. PUBLIC LAW IN THE NEWS .....</b>	<b>97</b>
<b>N. CASES ACROSS THE POND.....</b>	<b>102</b>
<b>O. MESMERISING QUOTES .....</b>	<b>107</b>
<b>P. PUBLIC LAW ON OTHER BLOGS.....</b>	<b>109</b>
<b>CONTACT US .....</b>	<b>110</b>

# A. MESSAGE FROM THE EDITOR

---

September 30, 2020

Dear all,

It gives us immense pleasure to present yet another volume of Public Law Bulletin. I am particularly impressed with the theme of this volume. The volume is dedicated to the issue of sexual minorities. At a time when after every 15 minutes, rape takes place in India and with Delhi being virtually dubbed as the rape capital, the approach of the Indian state towards the fair sex and people aspiring distinct sexual orientations is questionable. A recent incident in Hathras-U.P. is an eye-opener how rape can be used by a particular community to weaponize and to demoralize the vulnerable sections of society in general and women in particular. Gone are the days when rape was perceived merely as an affront on the body of women owing to andocentric lust. Presently rape or sexual molestation is increasingly resorted to by the monstrous majority to teach a lesson not only to the victim but to the community to which she belongs. The deafening silence of the police and the paralyzing response of the state in commencing the investigation is a textbook example of open indulgence of state with impunity in exasperating the crimes against women in general and sexual minorities in particular.

The insistence of the majority to conform to a uniform pattern of behaviour including sexual conduct is an anathema to the principles of constitutional morality and transformative constitutionalism mantras so frequently exchanged by the Supreme Court and high courts in their recent verdicts. The mark of distinguishing a run of mill institution from an institution with a forward-looking face is the ability of the latter to be sensitive to all this and to take cognizance of the same in its critical research agenda. ILS being the candidate in the latter class, its young student brigade took a conscious decision to spill some ink on issues touching the rights of sexual minorities.

In a real sense, the volume is characteristically inclusive as apart from focusing on LGBTQ+ and women, it also focuses on the rights of the disabled.

This volume has several new initiatives. I congratulate Samraggi Debroy (III BA LL.B) for undertaking a very exhaustive empirical study on women's involvement in the political canvass of India. There is also a very interesting back and forth interactive exchange on the issue of whether the age of marriage is increased. Besides Rashmi Raghvan (V BA LL.B) has displayed her research skills by linking the issue of same-sex marriage with the idea of intersectionality evolved by Prof. KimberléCrenshaw. Three interesting articles are dealing with LGBTQ+ -one focusing on LGBTQ'srepresentation in sports and the other going into the question of whether the existing anti-discrimination framework is robust enough to address the rights of LGBTQ. The third article revisits the Transgender Persons (Protection of Rights) Act, 2019 from a jaundiced eye. There is also an interesting article going into period leave policy evolved by the Zomato for its women workforce.

Besides, the volume has the usual features like important articles from blogs and notes from interesting cases, particularly I would like the applaud the team as I am given to understand that barring one, all other articles are written by the girl students. Kudos for your efforts but boys also deserve a pat as the formatting and the other allied tasks to bring this volume in shape have been performed by them.

All in all, the volume seems to be yet another step towards nurturing the research culture amongst the students. I congratulate the entire team of Public Law Bulletin and the student contributors for writing interesting articles and hope to present yet another volume dedicated to some theme of contemporary socio-legal relevance very soon.

Dr Sanjay Jain  
Editor-In Chief  
Associate Professor,  
Additional Charge

Ms. Madhura Sawant  
Faculty Editor  
Assistant Professor

Mr. DP Kendre  
Faculty Editor  
Assistant Professor

Principal, ILS Law College

# B. CARTOON: TOWARDS AN INCLUSIVE WORLD

-VISHAKHA PATIL, III BA LL.B

---



# C. VITAL CONSTITUTIONAL QUESTION:SEXUAL MINORITIES AND THE SOUTH AFRICAN CONSTITUTION

-AUTHORED BY: DEWANGI SHARMA (III BA LL.B)

---

If one looks at the history of India and South Africa and their evolution into independent democratic nations, one cannot amiss but realise that these two third-world countries have much in common. Their long, reflective and arduous process of adopting a new constitution and carving out an independent country from the clutches of oppression was set against dramatic historic backdrops. It was the partition in India and the end of the highly advanced system of racial discrimination - Apartheid in South Africa. In turbulent conditions of social, political and cultural changes, these two nations emerged as newly formed democracies with Constitutions built on ideas of social justice, equality, liberty and fundamental human rights that would guide their futures. The struggles against racial and caste- dominations in South Africa and India have profoundly shaped their Constitutional frameworks, prompting Prof. Upendra Baxi to call them 'Transformative Constitutions'.<sup>1</sup>

The final<sup>2</sup> South African Constitution, adopted in 1996, is hailed worldwide as a defining document on human rights and the first deliberate and calculated effort in history to craft a human rights state. <sup>3</sup> It was also the first Constitutions in the world to categorically deny discrimination on the grounds of sexual orientation and provide

---

<sup>1</sup>Upendra Baxi et al (eds.), Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa, p. 19-47, Pretoria University Law Press

<sup>2</sup>It is the fourth South African Constitution in the nation's history, but the one that was adopted at the end of the transition from apartheid to a multi-racial democracy

<sup>3</sup>Makauwa Matua, Hope and Despair for a New South Africa: The Limits of Right Discourse, 10 HARV. HUM.



safeguards to the rights of sexual minorities<sup>4</sup>. However, in India, the struggle for LGBTQ+ rights and for their wider rights of dignity did not find a place in the country's Constitutional architecture for the longest time. A very formalist reading of the Constitution has often led to the exclusion of sexual minorities from the wide scope of individual rights that the Indian Constitution aims to protect. It was in the landmark judgement which finally decriminalised homosexuality<sup>5</sup> in 2017, that the Supreme Court read 'sexual orientation' into the non-discrimination clause of the Constitution, but the legal, political and social landscape in India has still not been able to fully realize its promises of equality, dignity and non-discrimination to LGBT persons.

Through its constitutional process, South Africa has reinvented itself as a human rights state and defined human rights in a dramatically progressive manner. An understanding of the normative fundamental rights framework embedded in the South African Constitution would help us in realizing the vast potential of expansive and broad scope of rights that could be available to sexual minorities under the Indian Constitution.

## I.SUBSTANTIVE EQUALITY

The South African Constitution has adopted unique and unparalleled protections for its minorities, including sexual minorities. Scholars say that this was because of the political leaders' deep commitment towards building a non-discriminatory and equal society in a post-apartheid South Africa after being oppressed for years under a regime where any form of equality and dignity was absent<sup>6</sup>. The 'Right to Equality' guaranteed

---

<sup>4</sup>Here, Sexual minorities refer to persons who identify as homosexuals (including members of LGBTQ+ community), or individuals whose sexual orientation is different from heterosexual individuals.

<sup>5</sup> Section 377 of the Indian Penal Code criminalised "unnatural acts against the order of nature".

<sup>6</sup>Eric C. Christiansen, Ending The Apartheid Of The Closet: Sexual Orientation In The South African Constitutional Process,

under the Equality clause<sup>7</sup> (often referred to as the cornerstone of the Bill of Rights) is distinctive from various contemporary democratic Constitutions as it principally focuses on Substantial equality.

To enforce this claim, Section 9(1) of the South African Constitution not only provides for equality before law and equal protection of law but also for '*equal benefit of law*' (emphasis added). The clause '*equal benefit of law*' allow citizens the additional protection that ---laws that benefit people need to be applied equally. Here, '*equality*' does not mean that the government cannot make classification for differential treatment between citizens but the Constitutional protections restrict and set a standard for State action that only allows for legitimate and constitutionally permissible classification.<sup>8</sup>

The Constitution is not interested in '*formal equality*' (*likes should be treated alike*) but '*substantial equality*' which moves from the negative right orientation of non-discrimination to the positive right of accommodating differences and addressing inequalities against disadvantaged and minority groups.<sup>9</sup> This notion of Substantive equality has been adopted in the Constitution under Section 9(2) which defines '*equality*' in an expansive and comprehensive manner to the extent that it ordains the government with responsibility to *promote the achievement of equality* and take measures to *protect or advance* classes of people disadvantaged due to unfair discrimination. Section 9(4) mandates the government to enact National legislation to *prevent or prohibit unfair discrimination*.

Thus, the Constitution recognises the *duty* of the State to correct past injustices, to address current inequalities and envisages more than a nominal duty of non-discrimination towards disadvantaged classes and groups. In this context, affirmative

---

<sup>7</sup> Section 9, Constitution of South Africa

<sup>8</sup>Pius NkondoLanga, Equality Provisions of the South African Constitution, SMU Law Review

<sup>9</sup>Anne Smith, Equality constitutional adjudication in South Africa, [2014] AHRLJ 30

action is not viewed as an exception to the Equality clause but rather as an essential, enabling and necessary ingredient to effectively achieve and fulfill the right to equality.

In a 1992 speech, Edward Cameron<sup>10</sup> sagaciously warned against the then Law Commission's recommendation of excluding explicit mention of anti-discrimination protections for sexual minorities in the Bill of Rights; arguing that the judges' interpretation of the Equality clause<sup>11</sup> would ultimately include 'gays and lesbians' under the purview of Constitutional protections. Cameron found this to be an uncertain and problematic component -

'judges' discretion is a disturbing area of trust at best in light of the judiciary's history on gay and lesbian issues and it raises the question that whether future judges would be prepared to be any more explicit in the matter considering the delicacy and controversy of the topic'.

Echoing of similar concerns by activists, politicians, and legal experts led to the adoption of explicit protections for sexual minorities in the Constitution.<sup>12</sup> Section 9(3) categorically prohibits the state from unfairly discriminating against anyone on grounds of 'sexual orientation' (among other grounds including marital status, gender and pregnancy), thus specifically stating that the state cannot discriminate against sexual minorities<sup>13</sup> and bringing them under the purview of the Bill of Rights. The

---

<sup>10</sup> A gay activist and the erstwhile acting Judge of the Constitutional Court of South Africa

<sup>11</sup> According to the Law Commission, gays and lesbians would be identified by the judges as a "natural group" like women, children, or disabled persons. Hence, protections would be there and governmental discrimination would be prohibited.

<sup>12</sup> Supra 6

<sup>13</sup> In *NCGL v. Minister of Justice*, the Court expanded the definition of homosexual (gays and lesbians) by including people "who are bi-sexual, or transsexual and . . . persons who might on a single occasion only be erotically attracted to a member of their own sex. Be erotically attracted to a member of their own sex"

Courts need to apply the same level of protection to all recognized categories<sup>14</sup>, allowing sexual minorities to enjoy unprecedented rights and protections against arbitrary and discriminatory laws.

The South African Constitution also prohibits any (*direct or indirect*) form of unfair discrimination<sup>15</sup>; no legislation can discriminate on the basis of an individual's sexuality and thus has to give legal equality and equal status to sexual minorities. By disallowing even *indirect* discrimination, the Constitution deters the perpetuation of inequality because of past injustices which has or continues to deprive certain classes of a level-playing field in the society. The courts are thus empowered to scrutinise even seemingly neutral laws and policies on the indirect and disproportionate impact they may have on individual (or group) rights and freedoms.

Under Section 9(4) the Right to equality is horizontally applied to also include protection from private discrimination<sup>16</sup> based on sexual orientation. This significantly expands the scope of rights and protections against unfair discrimination for sexual minorities. The Constitutional language, as it declares that if an applicant is alleging discrimination, the onus is on the respondent to prove that the discrimination was fair<sup>17</sup>, reflects the textual affirmation of substantive equality protections.

Thus, it can be argued that the illustrative, specific, expansive and comprehensive articulation of rights, their scope and applicability is one of the most distinctive and impressive characteristics of the South African Constitution. The struggle for minority rights in South Africa has relied less on the prudence of judicial interpretation but

---

<sup>14</sup> Sexual minorities is not specifically mentioned a protected class under the South African Constitution, but it is included in the rights framework with the inclusion of 'sexual orientation' as a recognised ground under Section 9(3).

<sup>15</sup>Section 9(3), Constitution of South Africa

<sup>16</sup>Includes individuals and juristic persons

<sup>17</sup>Section 9(5)

rather on well-beings of normative framework of the Constitution which has incorporated progressive and updated principles of substantial equality. Though this has not changed the on-ground social reality of sexual minority groups significantly<sup>18</sup>, it provides them with a sufficiently progressive legal framework through which they can claim their rights and at least find equal treatment and equal citizenship in the legal letter.

## II. JUDICIAL INTERPRETATION

A simple reading of Section 9(3) of the Constitution shows that the Constitution recognises the concept of intersectionality - which unfair discrimination can ensue on multiple grounds. In *The National Coalition Case*<sup>19</sup>, the court declared the common law and criminal law offence of sodomy as unconstitutional. In doing so, Judge Sachs conceptualised the concept of intersection - *the recognition that grounds of unfair discrimination can intersect would allow the courts to evaluate the discriminatory impact according to the combination of multiple grounds, globally and contextually, not separately and abstractly.*

Further, in the judgement the term 'unfair discrimination' was interpreted to mean that *careful analysis of the impact and context of discriminatory action on the concerned people, needs to be taken into account to understand its overall effect on equality.*<sup>20</sup> The judgement employed a more nuanced and substantive approach to analyse the right to Equality and non-discrimination by addressing the broader social context in which laws are affected. It ultimately declared criminalisation of sodomy to be unconstitutional on the grounds that it essentially violated the Right to Equality and dignity, but also said that the law was against the Right to Privacy of gay men. Justice Sachs eloquently summarised 'Equality' as *"not suppression of difference or homogenization of*

---

<sup>18</sup>Sebastian Magurie, *The Human Rights of Sexual Minorities in Africa*, CWILJ, 2004

<sup>19</sup>*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC)

<sup>20</sup>*Id.*

*behaviour"rather "it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment."*

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*<sup>21</sup>, the court recognised 'same-sex partnerships' and dictated that same-sex spouses deserve same benefits (here, immigration rights) under law as those available to heterosexual couples. The court said that the denial of immigration benefits to same-sex couples in a conjugal relationship amounts to unfair discrimination on the grounds of 'sexual orientation' and 'marital rights' (violative of Section 9 of the Constitution). It asserted that "*the family and family life which gays and lesbians are capable of establishing ... are in all significant respects indistinguishable from those of [different-sex] spouses.*" The court, while declaring the impugned section to be also violative of Right to dignity of same-sex couples, read the words "or partner in a permanent same-sex life partnership" into the statute to make it compatible with the constitution.

In the *Du Toit case*<sup>22</sup>, the court found that denial of rights to lesbian couples in a permanent relationship from jointly adopting children was an instance of direct unfair discrimination on the grounds of sexual orientation and marital status. The court once again revisited the concepts of 'family', 'marriage', 'spouse' and reflected that their definitions need to be widened. The courts have time and again read these definitions to provide 'same-sex couples' with the same rights as heterosexual couples, treating gays and lesbian equally.<sup>23</sup>In *Minister of Home Affairs v. M.A. Fourie*<sup>24</sup>it affirmed this approach and used the Constitutional provisions to propound that that only the legal recognition

---

<sup>21</sup> National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)

<sup>22</sup>Du Toit & Another v Minister of Welfare and Population Development & Others [2002] ZACC 20

<sup>23</sup>Satchwell v President of the Republic of South Africa 2003 (4) SA 266 (CC); J v Director General, Department of Home Affairs 2003 (5) SA 621 (CC)

<sup>24</sup>Minister of Home Affairs v. M.A. Fourie, Dec. 2005 (3) BCLR 355 (CC)

of marriage (same-sex unions) on par with heterosexuals would stand the test of equality and dignity as laid down in the Constitution

### III. CONCLUSION

The South African Constitution and its understanding of 'Substantive equality' has been the foundation of the progressive developments in the recognition of the rights of sexual minorities in South Africa and its treatment as a recognised protected class. It can be argued that the explicit protections available to sexual minorities under the Constitution are unprecedented. The inclusion of substantive equality claims for sexual minorities in the Constitution has had a trickling down effect in the country's political system. The recognition of indirect discrimination, incorporation of doctrines of intersectionality and private discrimination has resulted in various comparatively progressive legislations in South Africa including those where same-sex unions and permanent same-sex couples are treated at par with heterosexual married couples<sup>25</sup> and conversion therapy has been banned. There are also laws that penalise discrimination and harassment against individuals on the grounds of sexual orientation in private spheres like employment, housing, etc.

In *Navtej Singh Johar v. Union of India*<sup>26</sup>, Justice Chandrachud discussed ingredients of substantive equality and opined that the Indian Supreme Court needs to move away from legal formalism in interpretation of the equality and non discrimination clauses of the Constitution. He rightly pointed out that Indian courts need to recognise the concept of *indirect* discrimination to develop an advanced and updated understanding of the discrimination, taking into account the socio-political and economic context in analysing the effect of the law. The judgement itself acknowledged the need for more

---

<sup>25</sup>H de Rue, A historical perspective on the recognition of same-sex unions in South Africa, Pretoria Feb. 2013

<sup>26</sup>*Navtej Singh Johar v. Union of India*

work, a long 'road ahead' to ensure full protection of the rights of sexual minorities and their inclusion as equal members in our society.

The Indian Supreme Court's views on issues of equality and non-discrimination have been static. Judges also need to revisit the 'classification test' and requirement of 'rational nexus' as they have reduced to being mere formulas without substance in analysing the claims of discrimination.<sup>27</sup> The court's exclusion of the concept of intersectionality shows a strict and restrictive reading of Article 15, unlike the South African jurisprudence.<sup>28</sup> The recognition of horizontal discrimination and exception of discrimination claims from the presumption of Constitutionality by the Constitution and courts in South Africa can guide Indian courts and legislators in developing a more nuanced reinterpretation of the contours of our discrimination law. The principles adopted by the South African Constitution and Courts are reflective of the commitments that the Indian Constitution also makes to its minorities and the role it aims to play as a Transformative Constitution.

---

<sup>27</sup>Gautam Bhatia, "Civilization has been brutal": NavtejJohar, Section 377, and the Supreme Court's Moment of Atonement, available at <https://indconlawphil.wordpress.com/>

<sup>28</sup>Shreya Atrey, Through the looking glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15, TERV, Vol. Sixteen (2016)



# D. CASE STUDY: TRACING WOMEN'S FOOTPRINTS IN NATIONAL POLITICS OVER THE YEARS

AUTHORED BY: SAMRAGGI DEBROY (III BA LL.B)

---

The roots of female political participation of the new age in India can be traced back to the *andarmahals* (the inner quarters of a house reserved for women) of Bengali households of the early 20th century. The Swadeshi Movement of 1905 marked the beginning of female participation in political spaces.<sup>1</sup> More than a hundred years down the line, though much has changed qualitatively, a lot more needs to be achieved quantitatively. Despite the overwhelming contribution of women like Basanti Devi, Kamala Devi Chattopadhyay, Aruna Asaf Ali, Madam Cama, Kumudini Mitra, Sucheta Kriplani, Annie Besant<sup>2</sup> and their likes in winning independence for India, the first general election of 1951-52 saw a paltry 4.90%<sup>3</sup> of women members in the Lok Sabha. However, the representation of women in Lok Sabha has generally been an upward trend with a sudden spike in 1984<sup>4</sup> after Indira Gandhi's assassination and now stands at 14.39%.<sup>5</sup> The '1984 phenomenon' has been explained in detail in a subsequent section. This is still significantly lower than 20% that is the 'critical mass'<sup>6</sup> required to introduce gender parity in political and legislative spheres and significantly lower to represent the female population of 48%<sup>7</sup> in our country. Apart from the socio-historical drawbacks

---

<sup>1</sup> Praveen Rai, "Electoral Participation of Women in India: Key Determinants & Barriers" 46(3) *Economic and Political Weekly* 47-55 (2011).

<sup>2</sup> *Ibid.*

<sup>3</sup> Election Commission of India, "Statistical Reports of General Election to Lok Sabha" (1951).

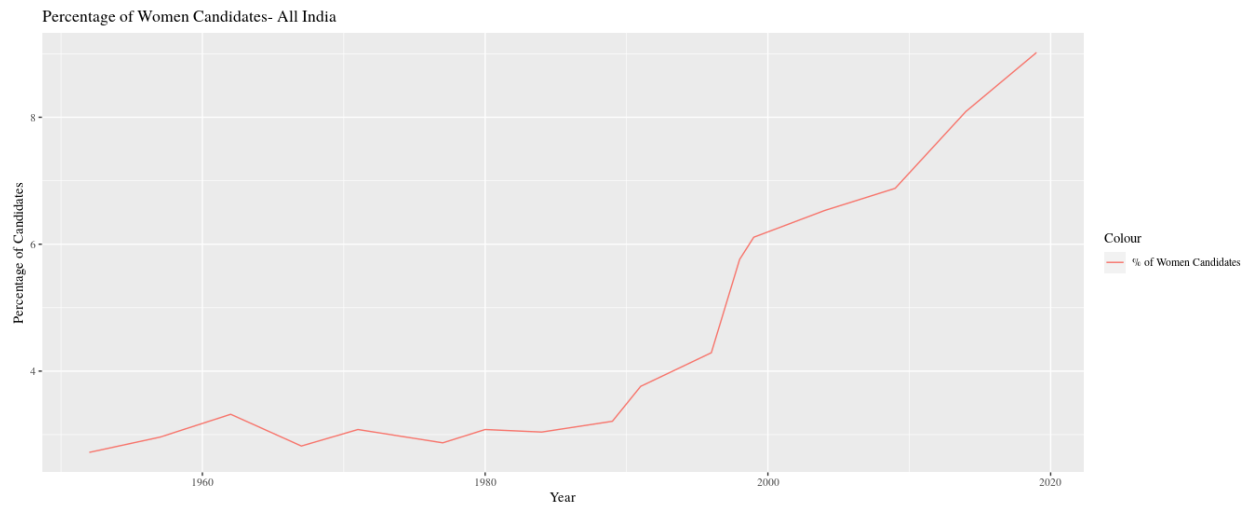
<sup>4</sup> Election Commission of India, "Statistical Reports of General Election to Lok Sabha" (1984).

<sup>5</sup> Election Commission of India, "Statistical Reports of General Election to Lok Sabha" (2019).

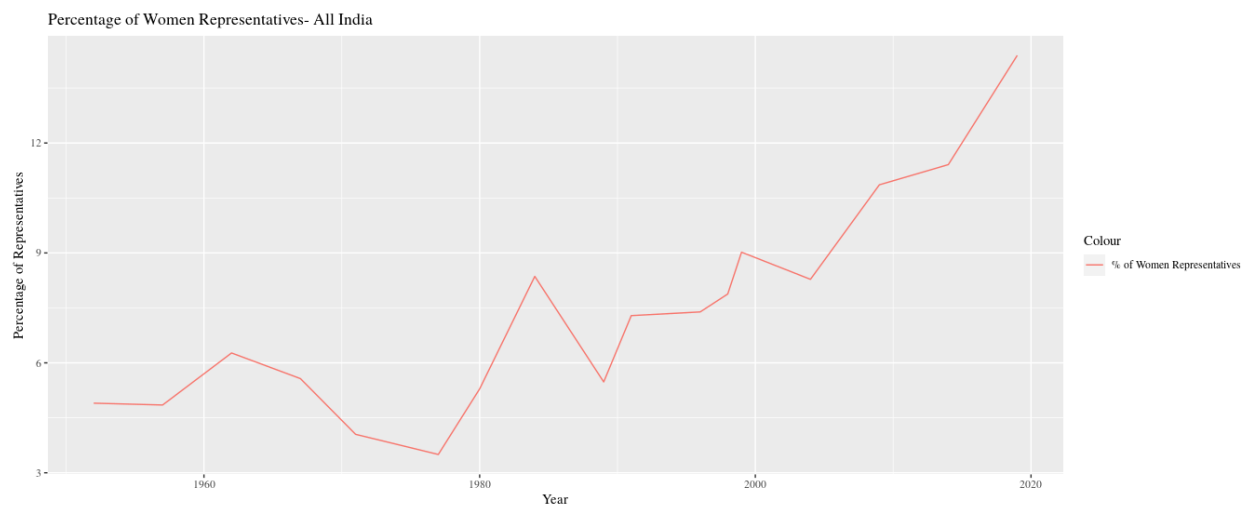
<sup>6</sup> *Supra* note 1.

<sup>7</sup> Office of Registrar General & Census Commissioner, "Gender Composition" (2011).

that include male dominance & patriarchal mindset,<sup>8</sup> the major institutional impediments faced by women in going to the top are the discrimination faced in terms of seat allocation by national and regional parties, and the lack of reservation in the higher tiers of public offices.



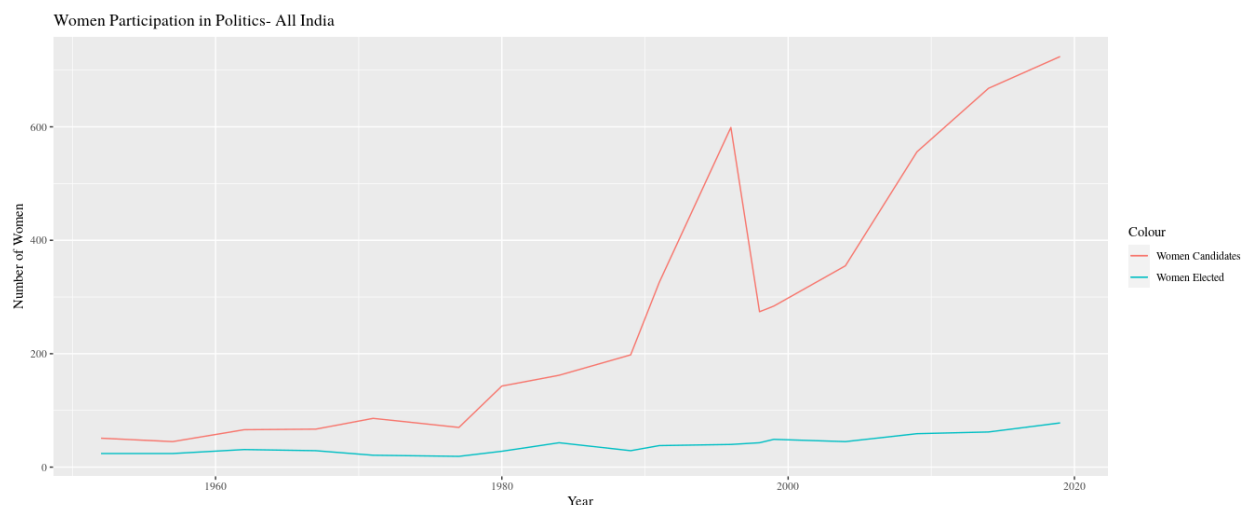
**Figure 1: Percentage of Women Candidates - All India.**



**Figure 2: Percentage of Women Representatives - All India.**

---

<sup>8</sup>Supra note 1.



**Figure 3: Women Participants - All India.**

Women candidacy in the first general election was an embarrassing 2.72%,<sup>9</sup> and the numbers rest at a little less than the 10% mark<sup>10</sup> in the last general election. To begin with, political representation has been defined as a citizen's active involvement with public institutions that includes voting, campaigning, contesting, lobbying individually or through a group and occupying office.<sup>11</sup> In the article, women's political participation has been analysed in three strata. The lowermost widest stratum of the pyramid is that of women's electoral participation - including registration and voting numbers. The middle stratum represents the number of women running for office, i.e. number of female candidates Vis - a - Vis the number of total candidates. The apex of this pyramid is formed by the women who are members of the Lower House of the Parliament. For the purpose of this article, the statistics of national political parties and general elections have been taken into consideration. Since in general election voters' preferences regarding government formation often outweigh local candidate preferences, the seat allocation of parties at a national level vying to form the government becomes

<sup>9</sup> Election Commission of India, "Statistical Reports of General Election to Lok Sabha" (1951).

<sup>10</sup> Election Commission of India, "Statistical Reports of General Election to Lok Sabha" (2019).

<sup>11</sup> Lock "Situating Women in the Politics of Health" in S Sherwin et al (eds.), *The Politics of Women's Health: Exploring Agency and Autonomy* (Philadelphia, Temple University Press, 1998).

extremely important. Similarly while independent candidates are integral to the democratic set up of the country, they lack the organizational, financial, and infrastructural capability of national parties. Therefore, the members of national parties are better positioned to be successful in elections as opposed to the others. While independents and regional parties are important, due to the paucity of time and space this study looks at a national picture leaving the study of regional parties, state, and local elections for the future. The study employs numerical data that demonstrates the percentage of women candidates; percentage of women members of Lok Sabha; success rate of women candidates; percentage of women voters; women voter turnout; total voter turnout and tickets given to women by political parties.

#### I.STATE WISE - LOK SABHA WISE TRENDS<sup>12</sup>

Over the years smaller states have been carved out of larger states Chhattisgarh from Madhya Pradesh, Jharkhand from Bihar, Uttarakhand, and most recently Telangana from Andhra Pradesh. There has been reorganization of Union Territories and States like Himachal Pradesh, Haryana. Since they all formed part of larger states earlier there is no exact data for them for as long as the other states. There are also numerous smaller states especially those in the North East as well as Union Territories which send not more than a couple of representatives. Expectantly their representation would be skewed. Thus for the purpose of this study a cursory look has been taken at them and the results have been summarized.

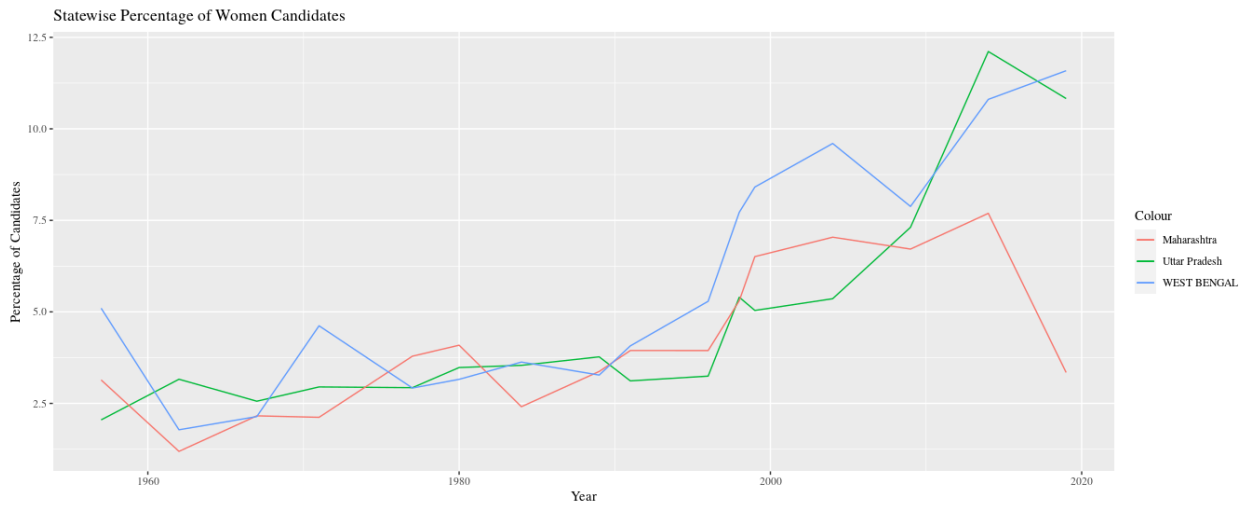
In order to examine the state wise trends, they have been divided into 3 groups according to their number of seats. Group A consists of Uttar Pradesh (80), Maharashtra (48) and West Bengal (42). Group B consists of undivided Andhra Pradesh (42), Bihar (39) and Tamil Nadu (39). The next group includes Madhya Pradesh (29), Karnataka (28), Gujarat (26), Rajasthan (25), Odisha (21), Kerala (20). Each group has 4 graphs,

---

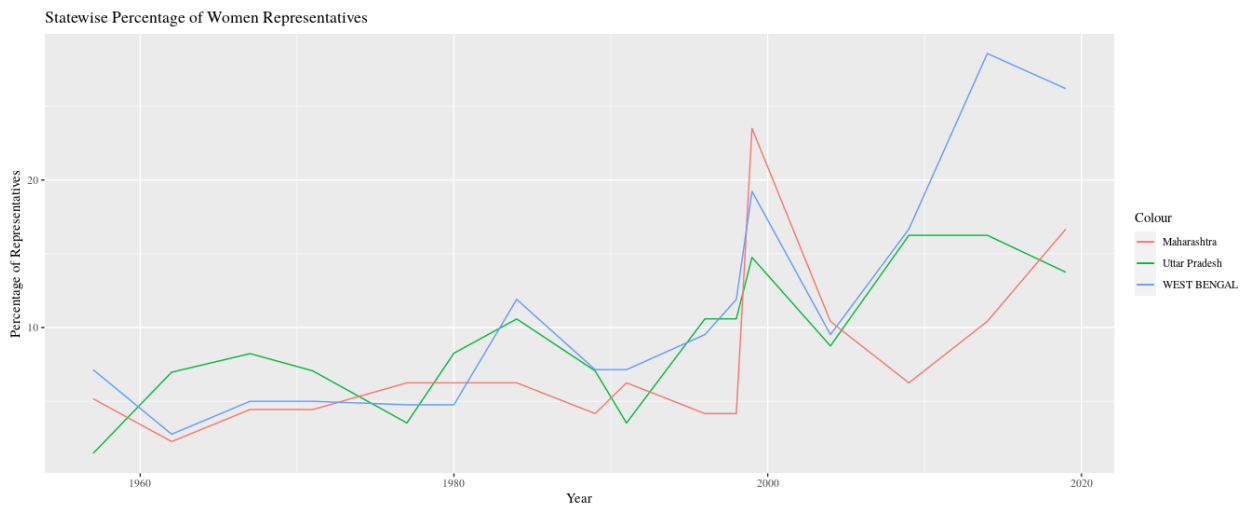
<sup>12</sup> All the data has been taken from the Archives of ECI's Statistical Reports, *available at:* <https://eci.gov.in/statistical-report/statistical-reports/> (last visited on September 20, 2020).

showing women candidacy, women representatives, women voters, and finally women voters' turnout versus total voters' turnout.

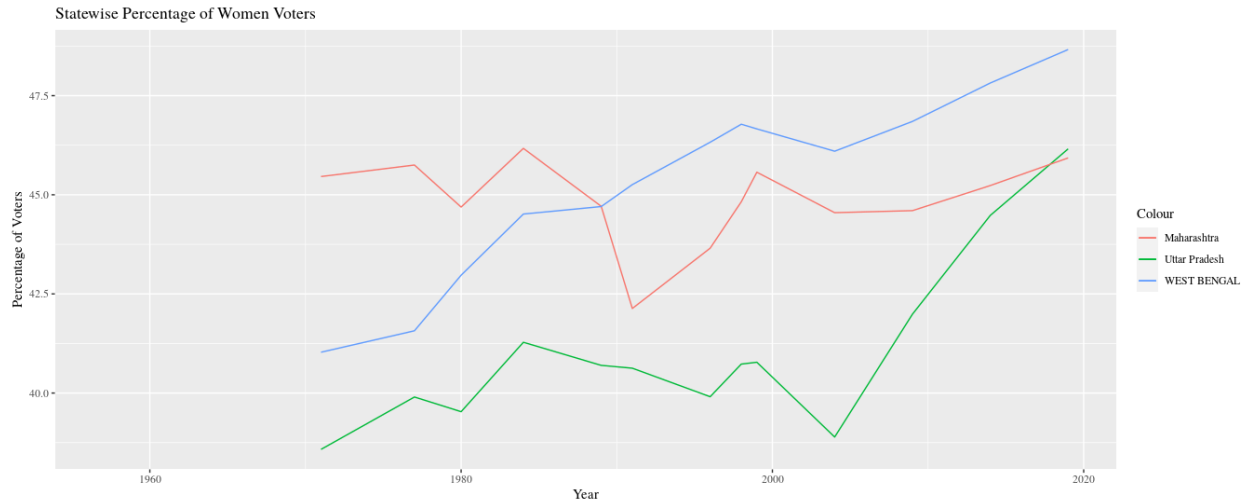
### A. GROUP A STATES



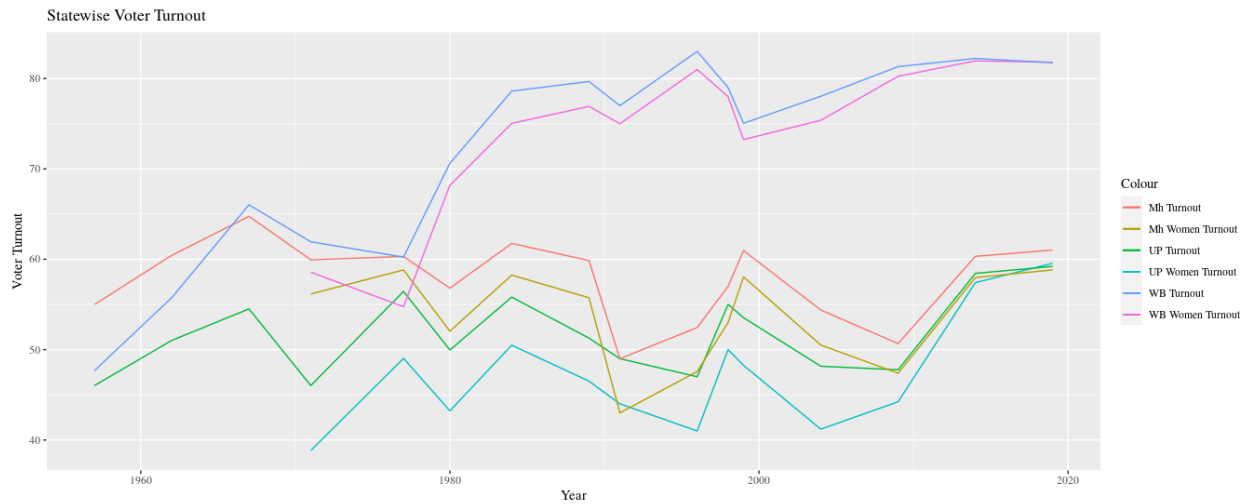
**Figure 4: Statewise Percentage of Women Candidates.**



**Figure 5: Statewise Percentage of Women Representatives.**



**Figure 6: Statewise Percentage of Women Voters.**



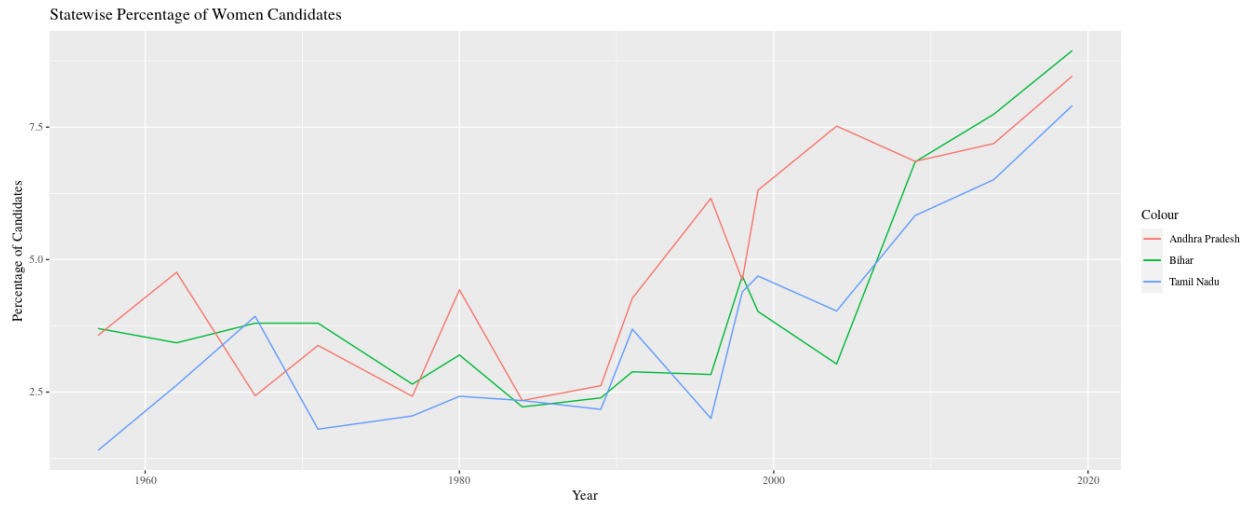
**Figure 7: State Wise Voter Turnout.**

Among the **first group of states**, Uttar Pradesh had the lowest percentage of women voting until the last election of 2019 where it overtook Maharashtra by a small margin. However, the women voter percentage in UP has improved significantly post the 2004 elections. Maharashtra, starting with the highest percentage of women voters has not seen much improvement and thus the percentage hovers around 45% mark. West Bengal has seen most improvement in its numbers, starting lowest amongst the three states, it registered the highest percentage of women voters in Group A. Spike in the

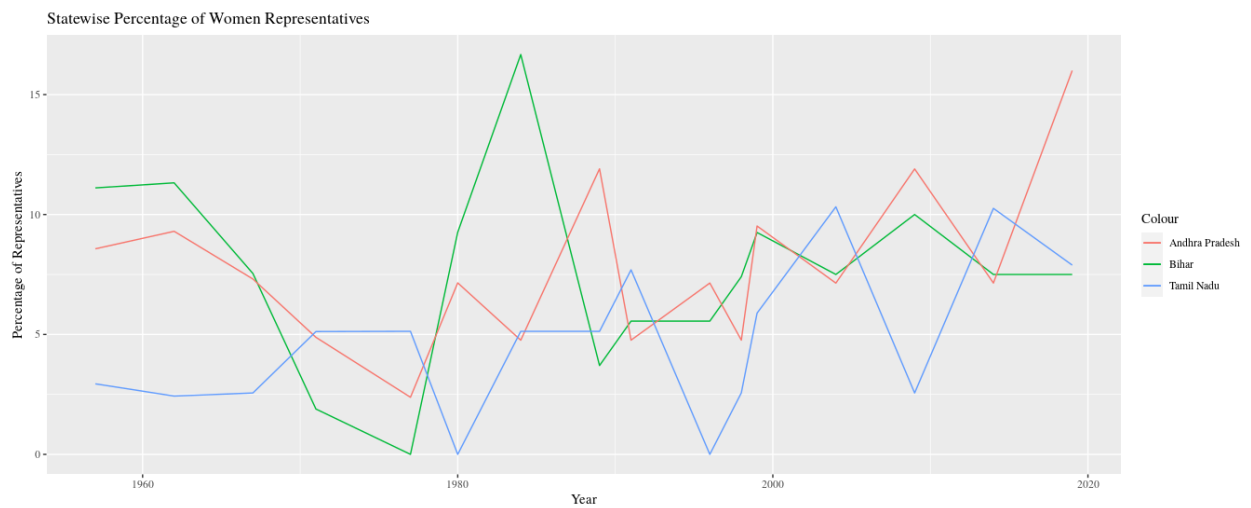
number of voters in the year 1984 after the assassination of former Prime Minister Indira Gandhi is common to all the three states. Interestingly, the women voter turnout is in consonance with the total voter turnout in all these states. Women candidacy in West Bengal has seen a general rise for most years since the 1980s. The rise gets steeper after the 1996 general election and has risen ever since except for a fall in the 2009 election. The trajectory for UP and Maharashtra has been quite close to each other till 1998.

In Maharashtra, the percentage of women candidates crossed the 5% mark in the 1998 elections and subsequently crossed the 7.5% mark in the 2009 general elections after which it has recorded a steep downward plummet, registering a paltry 3.34% in the 2019 general elections. Having crossed the 5% mark in 1998, UP crossed the 10% mark in 2014 and settled at 10.82% in the last election. With respect to representation in the Lok Sabha, UP and WB recorded their peak in 1984 crossing the 10% mark, whereas Maharashtra did not show a significant change. The steepest rise was observed in 1999, with 23.50% women representation in the state of Maharashtra, followed by 19.23% in WB and 14.75% in UP. This was followed by a steep decline in the subsequent election. Post 2004, *WB had the highest rise in women representation in the Lok Sabha* that coincides with the rise of Mamata Banerjee in state politics. The percentage of women members from WB hit 28.57% in 2014 and 26.19% in 2019, highest for any state with more than 15 Lok Sabha seats. UP showed improvement after 2004 with a small drop from 16.25% in 2014 to 13.75% in 2019. Maharashtra, however, had another consecutive fall after 2004, and *improved greatly in the 2019 elections with 16.67% representation.*

**B. GROUP B STATES**

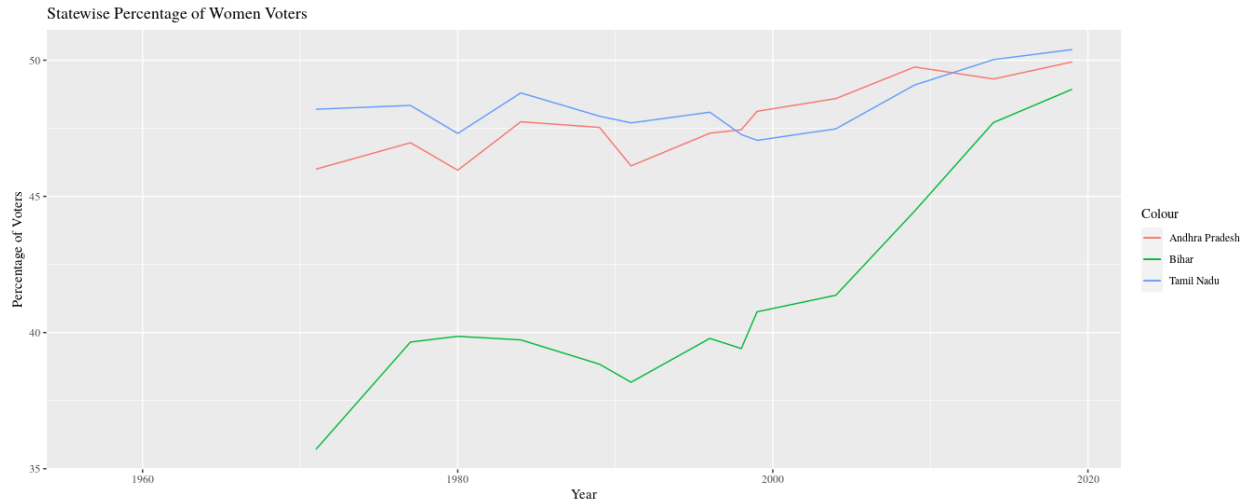


**Figure 8: Statewise Percentage of Women Candidates.**

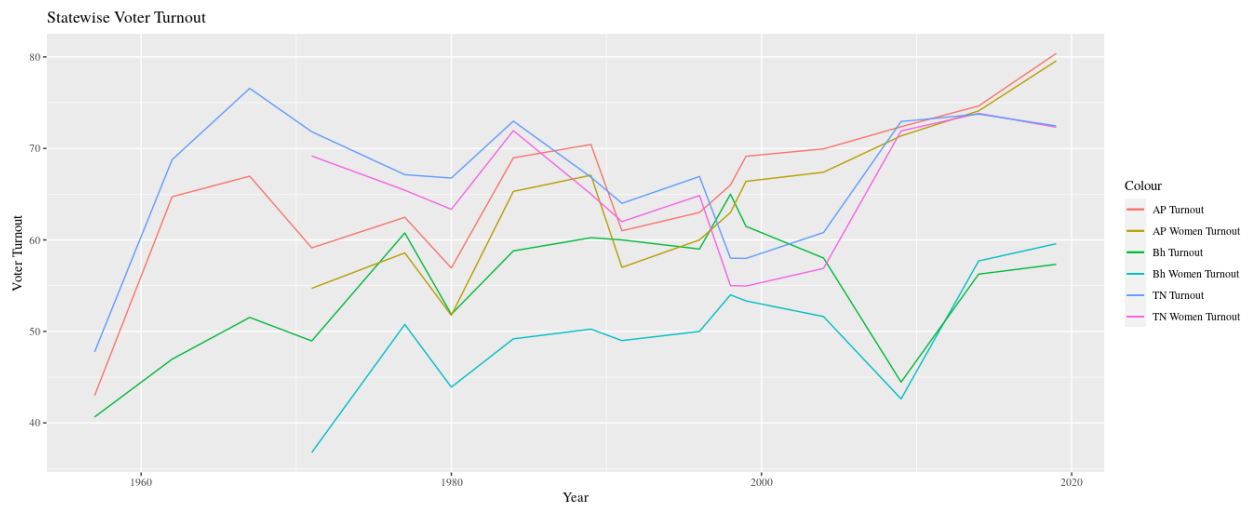


**Figure 9: State Wise Percentage of Women Representatives.**





**Figure 10: State Wise Percentage of Women Voters.**



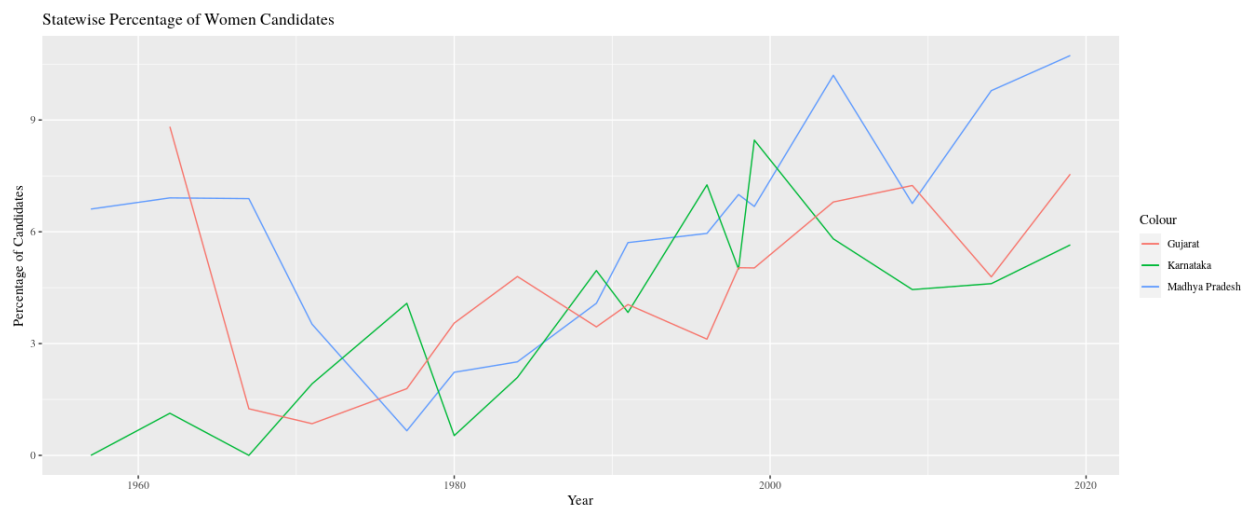
**Figure 11: State wise Voter Turnout.**

In **Group B**, Andhra Pradesh and Tamil Nadu demonstrate similar women voter percentage trends. Both states have consistently had women voter percentages of **more than 45%**. Bihar had a poor start as compared to other states. In 1971, the women voter percentage was 35.71%. However, the state showed a massive improvement in the successive terms, pushing the percentage to an impressive 48.93%. AP and TN have very similar trajectories of total voter turnout and women voter turnout. However, the women voter turnout of Bihar lags behind the total turnout, despite having improved

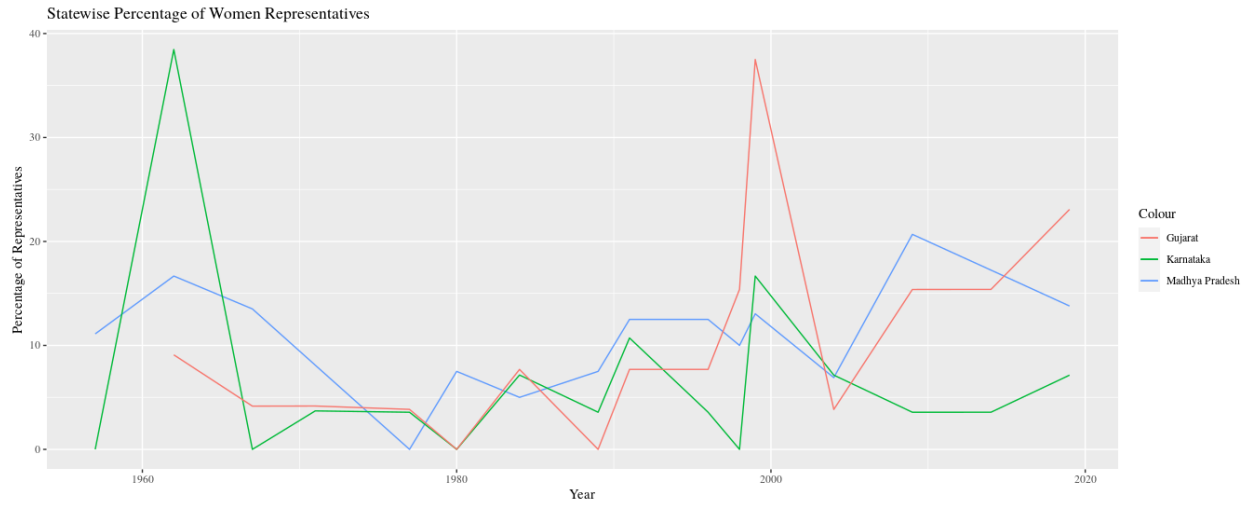
remarkably. The percentage of women candidates in all the three states does not follow a consistent trend, with intermittent peaks and dips.

The percentage of women members in Group B exhibits extremely varied trends. In Bihar, a general dip was observed between 1962 to 1977. A major rise in percentage occurred in 1980 (9.26%), followed by 1984 where it achieved an all time high of 16.67%. The percentage of women members has ranged between 5% to 10% from 1991. Andhra Pradesh followed a trajectory similar to that of Bihar till 1977. It rose in 1980 with 7.15%, however dropped to 4.76% in 1984. In the recent years, alternate crests and troughs in the trajectory of the percentage of women members have been accounted for in the State ending with a significant rise to 16% in 2019. Tamil Nadu touched the 5% mark for the first time in 1971 and remained stable around that mark till 1989 except for hitting 0% in 1980. It saw an improvement in 1991 with 7.69% women member representation from the state. It crossed the 10% mark in 2004 and finished at 7.89% in the 2019 election.

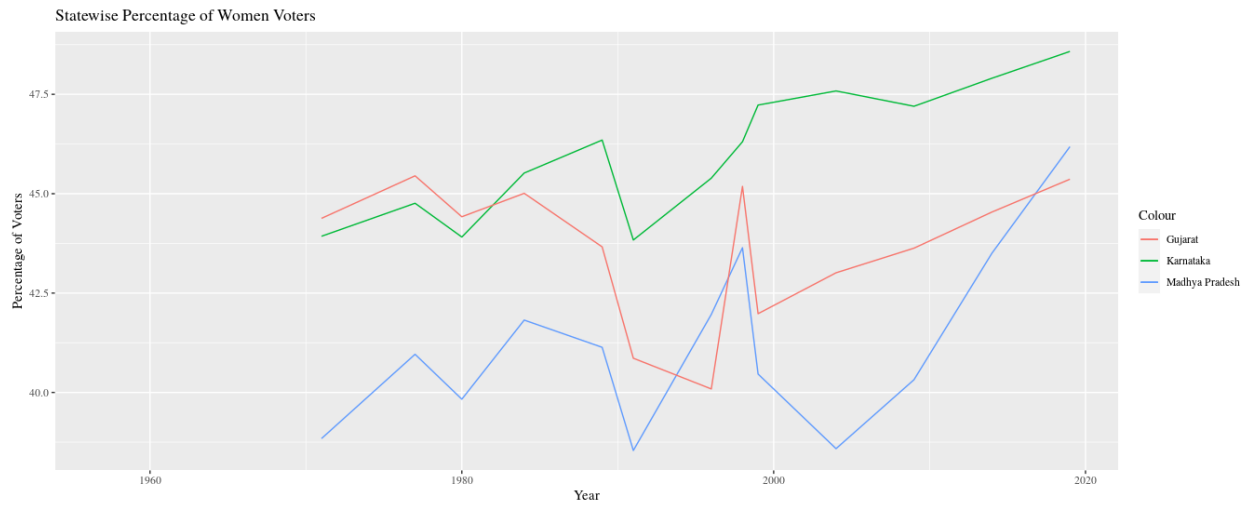
### C. GROUP C STATES



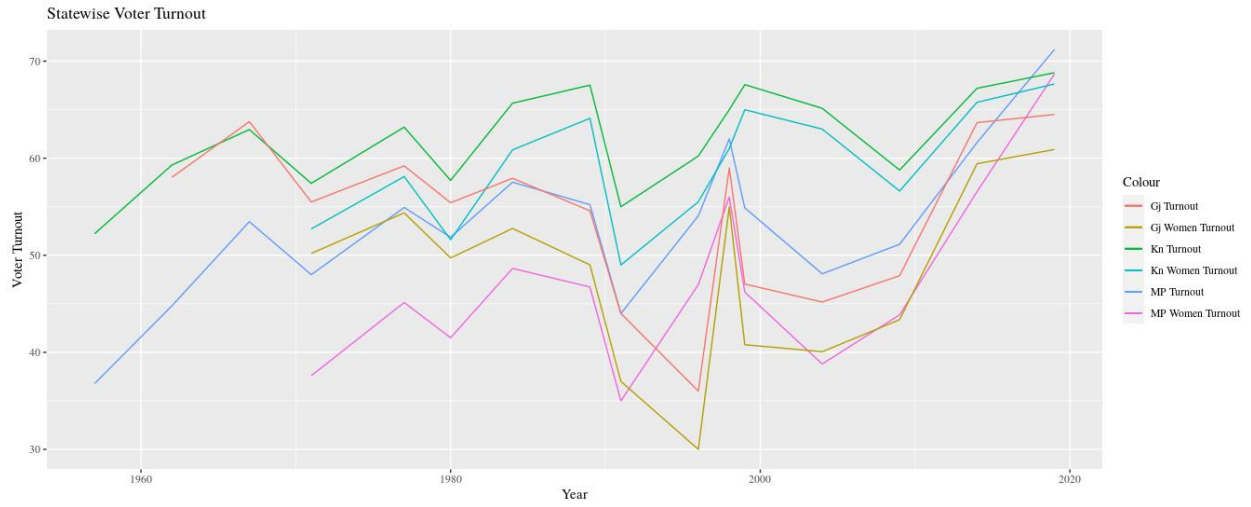
**Figure 12: State Wise Percentage of Women Candidates.**



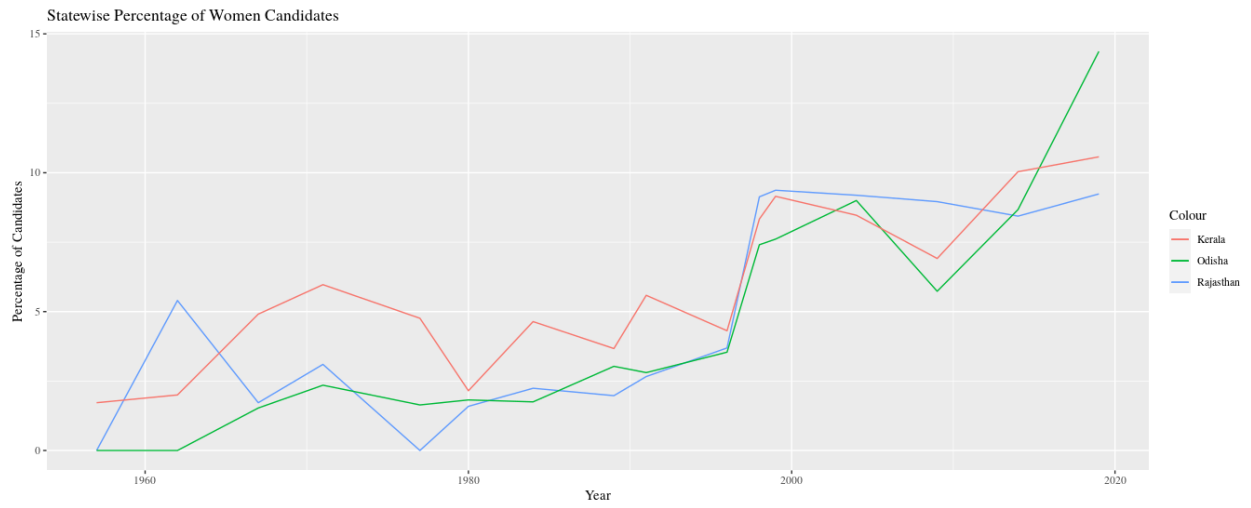
**Figure 13: State Wise Percentage of Women Representatives.**



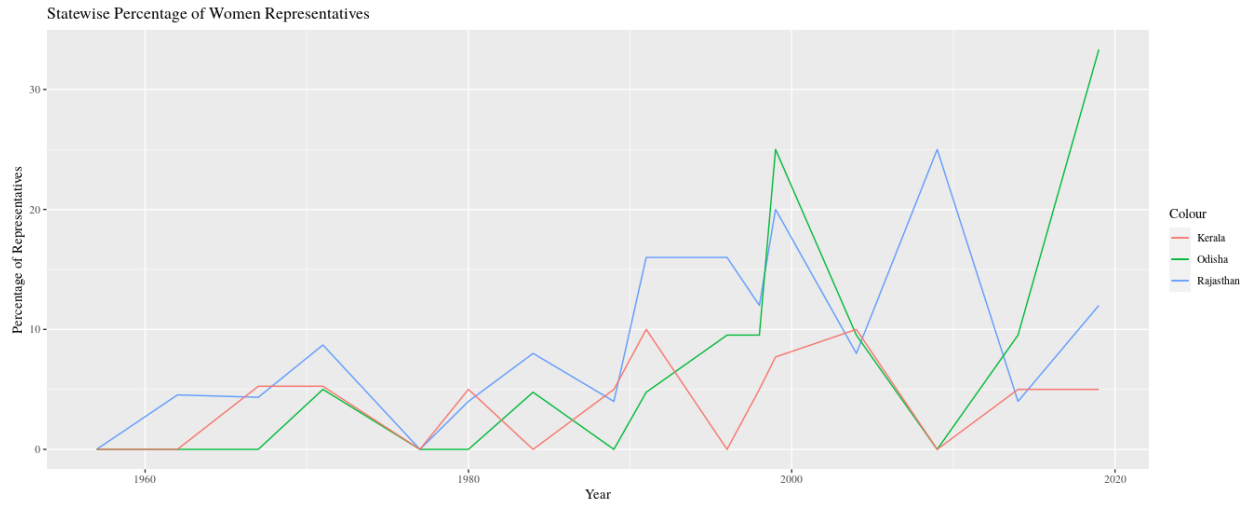
**Figure 14: Statewise Percentage of Women Voters.**



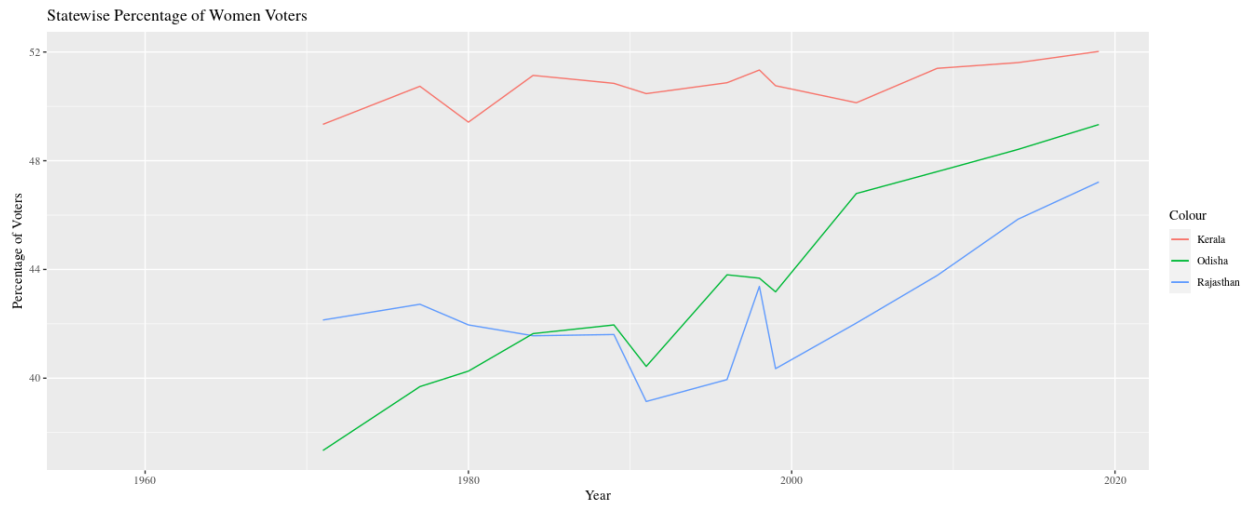
**Figure 15: Statewise Voter Turnout.**



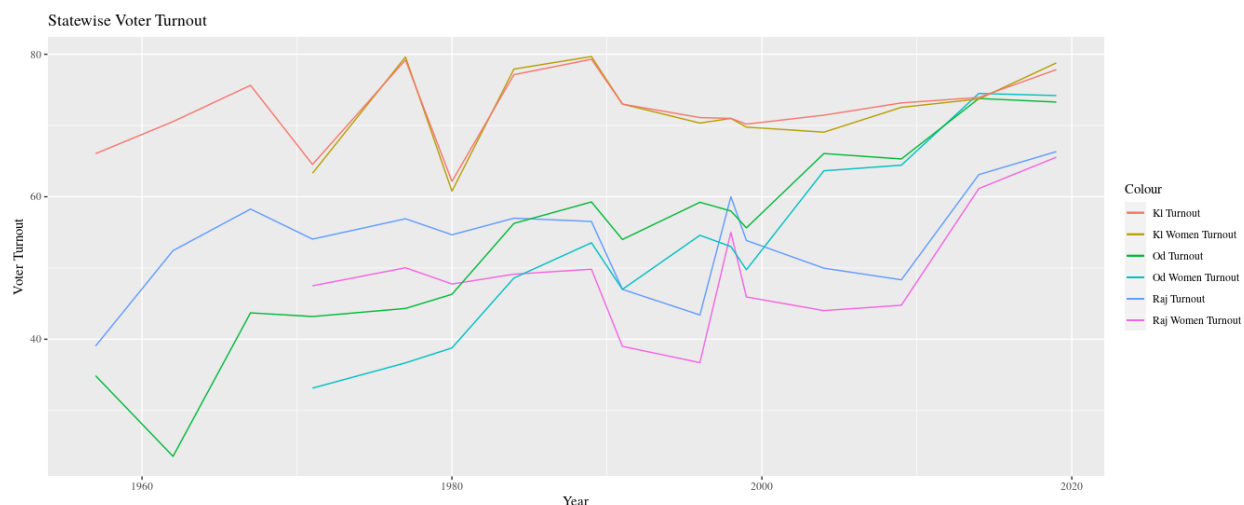
**Figure 16: Statewise Percentage of Women Candidates.**



**Figure 17: Statewise Percentage of Women Representatives.**



**Figure 18: Statewise Percentage of Women Voters.**



**Figure 19: State Wise Voter Turnout.**

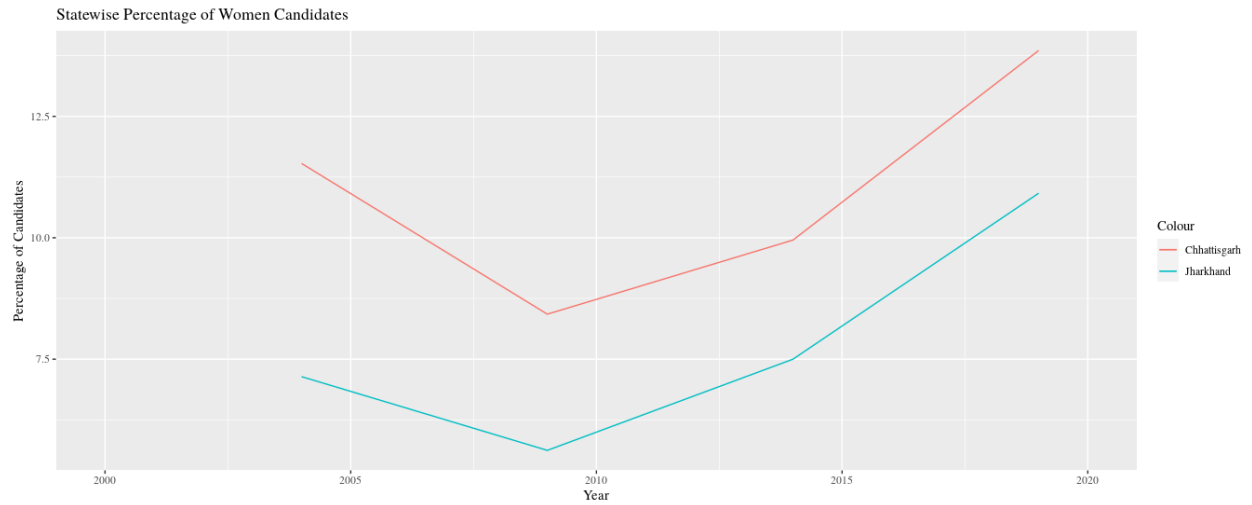
In the **Group C** states, Kerala has the highest women voter percentage, not only within the group but also amongst the states with 20 or more seats. It has a slightly upward trend, with women voter percentage constantly being above 50% since the 1980s. It recorded 49.34% in 1971, and the percentage has gone up to 52.02% in 2019. Karnataka and Gujarat were amongst the better performing states initially with around 44% women voters. However, while Karnataka demonstrated a largely upward trend except the dip in 1991 and achieved the 48.75% mark in the 2019 election, the percentage in Gujarat kept decreasing till 1996 to 40.08%. Since then there has been an upward trajectory to achieving 45.36% in 2019. Rajasthan has a parallel (to Gujarat) trajectory, though with lower numbers. It peaked in 1998 with 43.37% women voter participation and dropped in the next year. Post 1999, a steady growth was observed and Rajasthan registered 47.21% women voters in 2019. Odisha has seen the highest rate of change in this group. In 1971, it had a meagre 37.34% women voter percentage, but over the years it went up to 49.33% in 2019. MP has a fluctuating graph, with a prominent peak in 1998 (43.64%). In 2019, it recorded 46.18% women voter percentage. Constant fluctuations in women voter turnout deter the possibility of accurately deriving a conclusion.

Women candidacy in all these states have majorly seen an upward trend with a few dips. The 1984 rise was observed in all the states except Odisha where a fall was

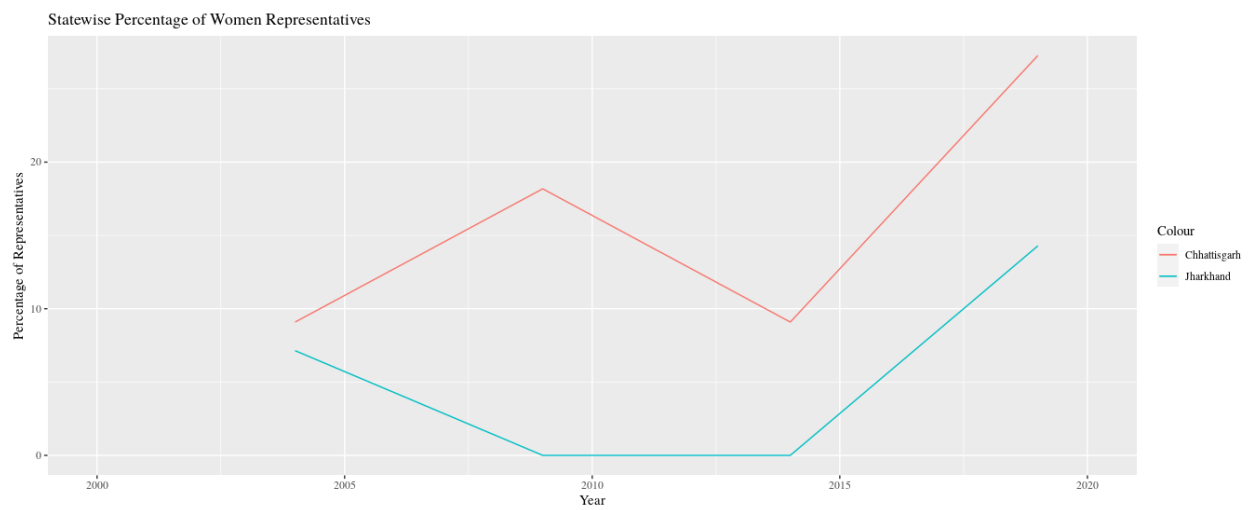
noticed. Gujarat and Kerala recorded the highest rise in 1984 peaking at 4.80% and 4.64% respectively. The next peak was noted in the late 1990s when all the states crossed the 5% mark but remained below 10% in terms of women candidacy. In the 2000s, Odisha measured tremendous growth and reached 14.36% in 2019, highest in this group. The percentage of women Lok Sabha members also has a fluctuating trend for all these states. A moderate peak was attained in 1984 for most states except Kerala and MP; however, the mark did not exceed 10% even for the best state. The next prominent rise was in 1999, where every state recorded a steep change, the highest for Gujarat (37.50%), followed by Odisha (25%) and Rajasthan (20%). In 2019 Odisha had 33.33% of women members, the highest in this group.

In terms of electoral participation of women in Manipur, Meghalaya, Mizoram, Nagaland, and Tripura all the states have consistently had an overall turnout of more than 50% since 1980; Tripura has had a turnout of more than 60% all throughout breaching the 75% mark at various points over the years. Women turnout in Tripura has also been higher than 60%, even crossing 80% in a few elections over the years and in all elections from 2009 onwards. Manipur, Nagaland, and Meghalaya have had a similar trajectory with consistently high women voter turnout, though not as high as overall voter turnout. Amongst the other Union Territories voter turnout has been at the higher end of the spectrum except for a couple of years when the turnout in Daman and Diu, and Sikkim fell just under 50% both the women's turnout and overall turnout has been about 60%, turnout in Andaman has fallen since its peak of 82% in 1986 yet remains above 60%. Women voting in Assam has increased from around 40% in 1972 to above 80% in 2019. The trend is consistent with the overall voter turnout. It had one of the highest women representation in Parliament in 1957 with 20% of the members being women since then it has fallen considerably though 14% of members from Assam have been women in 1977, 1999, 2009, and 2014.

#### D. OTHER STATES

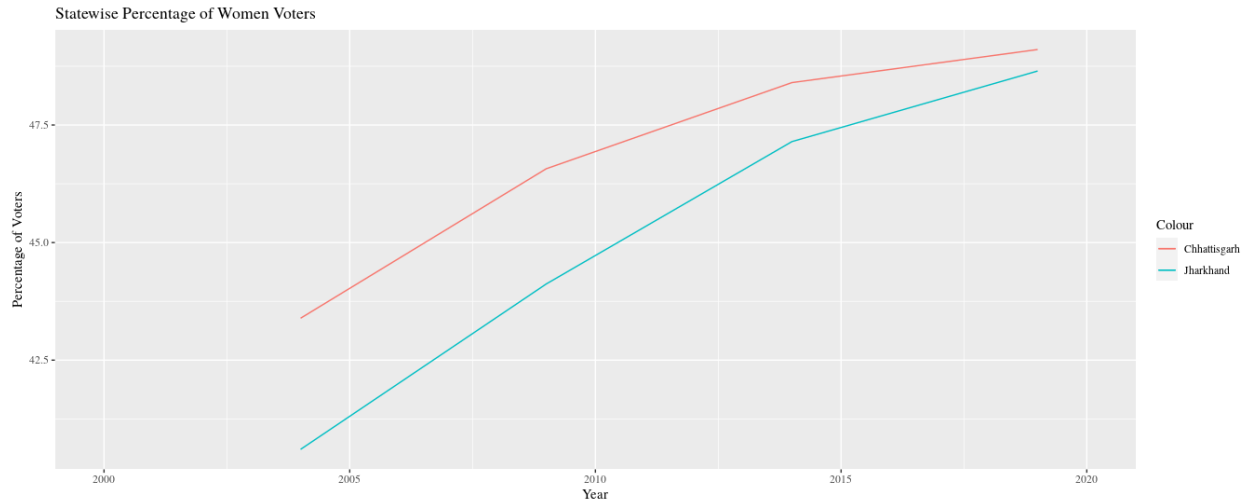


**Figure 20: Statewise Percentage of Women Candidates.**

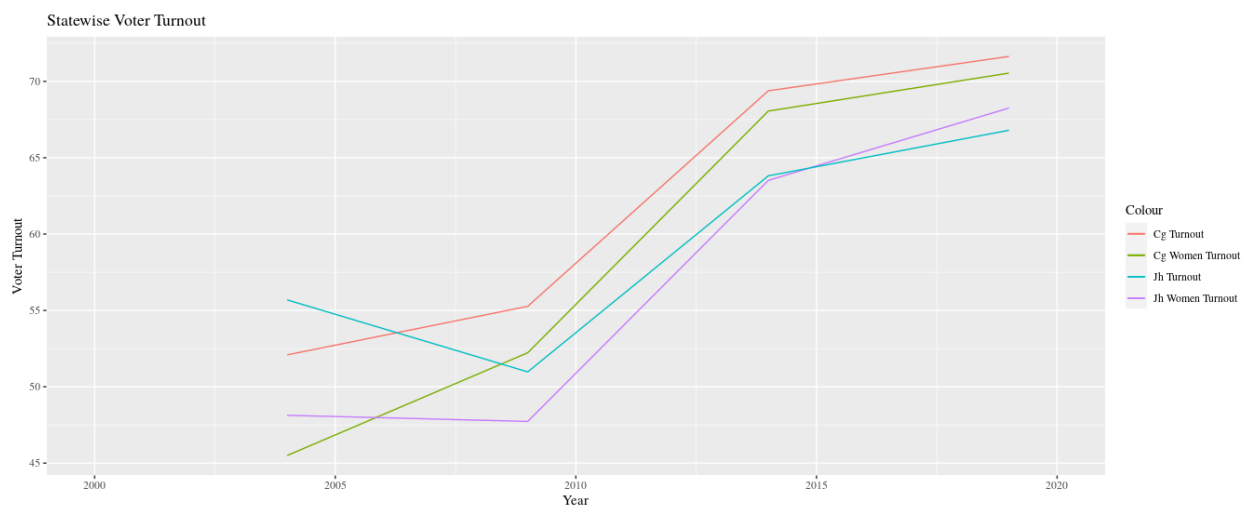


**Figure 21: Statewise Percentage of Women Representatives.**





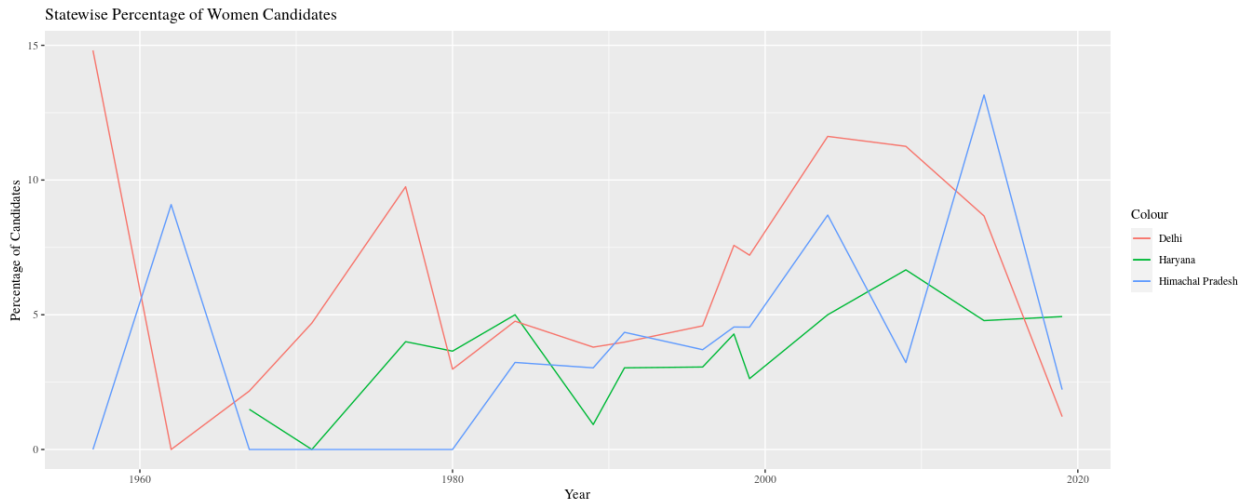
**Figure 22: Statewise Percentage of Women Voters.**



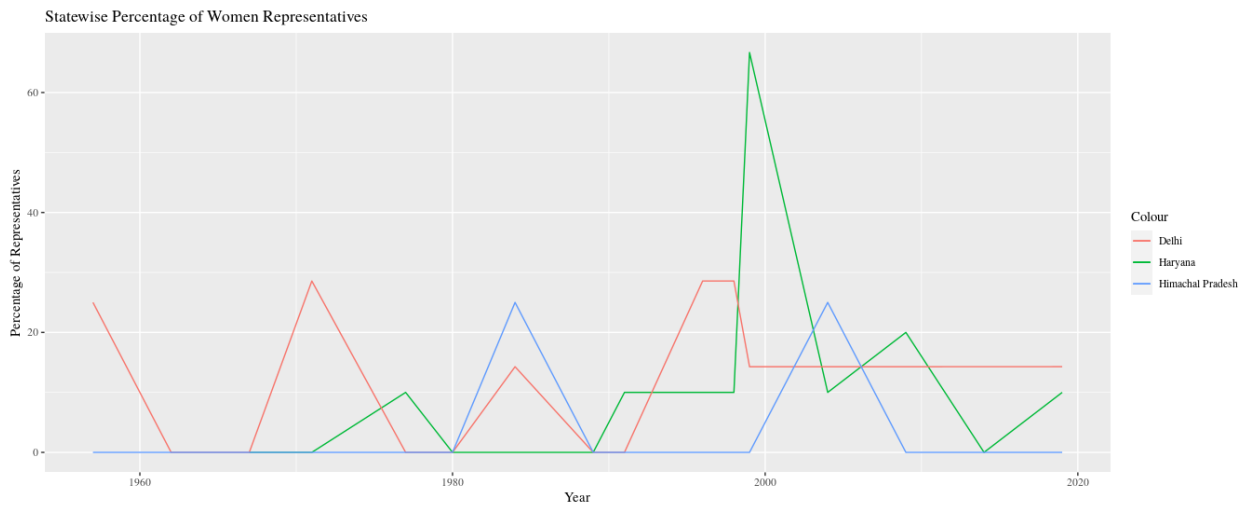
**Figure 23: State Wise Voter Turnout.**

Nearly 15% of the representatives from Jharkhand in 2019 have been women, yet in two elections prior to 2019 none of those elected were Women. The voter turnout both women and overall has been on an upward surge from below 50% (women’s turnout) to 65% in 2019. The turnout trend for Chhattisgarh has been similar increasing to 75% in 2019. From having just below 10% women representatives in 2004 and 2014 and 18% in 2009 they have increased to a whopping 17% in 2019 whether that trend holds is to be

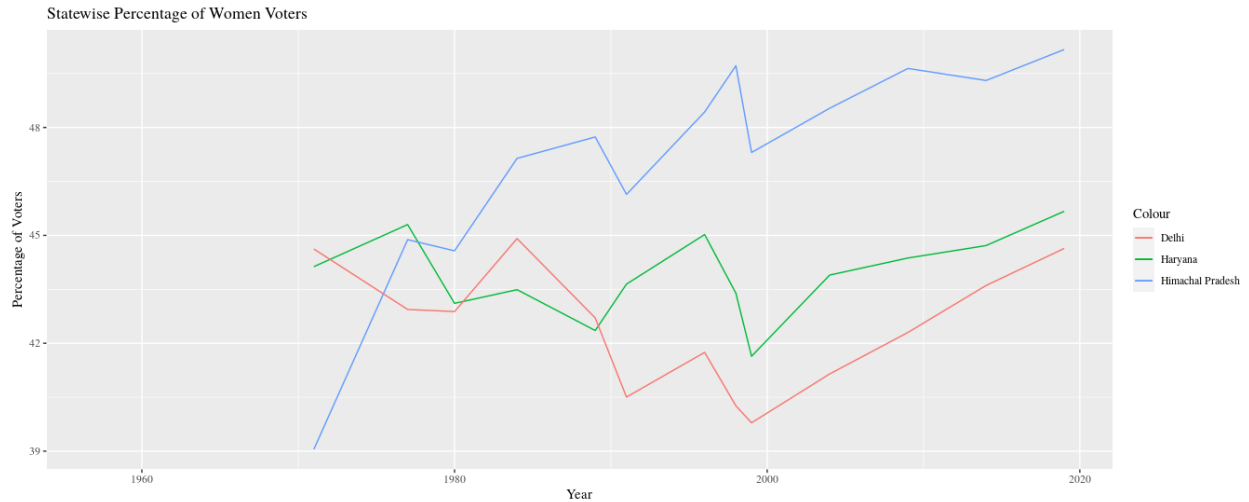
seen. Uttarakhand has had a trend similar to Chhattisgarh and Jharkhand, 20% of its representatives were women in both 2014 and 2019.



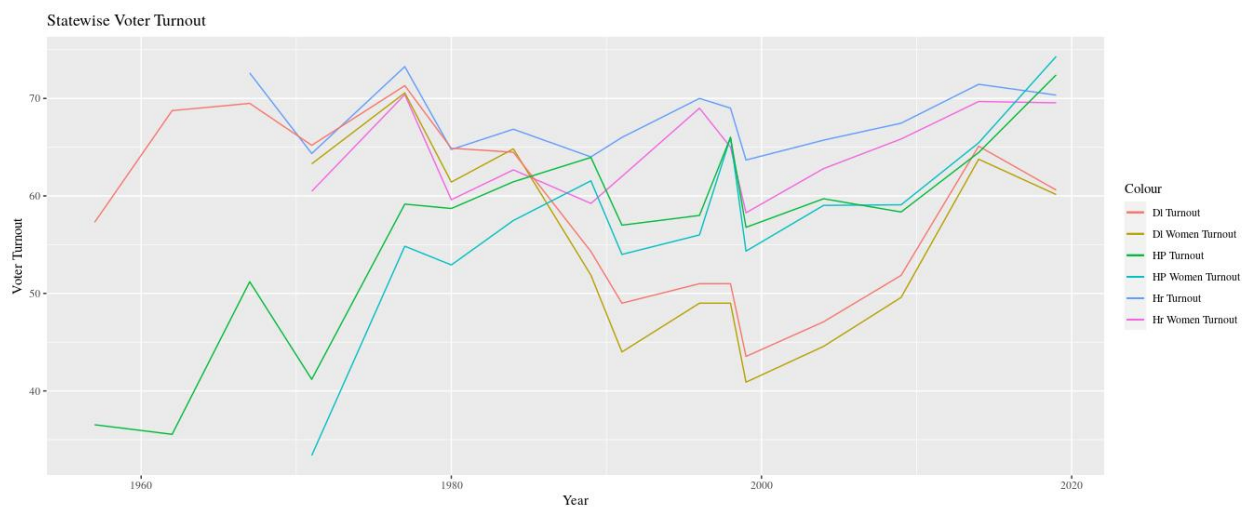
**Figure 24: Statewise Percentage of Women Candidates.**



**Figure 25: Statewise Percentage of Women Representatives.**



**Figure 26: Statewise Percentage of Women Voters.**



**Figure 27: State Wise Voter Turnout.**

The state of Haryana has had a fluctuating trend from sending no women members in 5 general elections to sending 66% women members in 1999 and 20% in 2009. On the other hand women voting has been more consistent being above 60% except for three elections when it fell just below 60%, the fluctuations from 70%- 60% are similar to its overall voter turnout. Women voter turnout has been on an upward surge since 1977 from below 40% to above 70% in 2019, closely following the overall voter turnout.

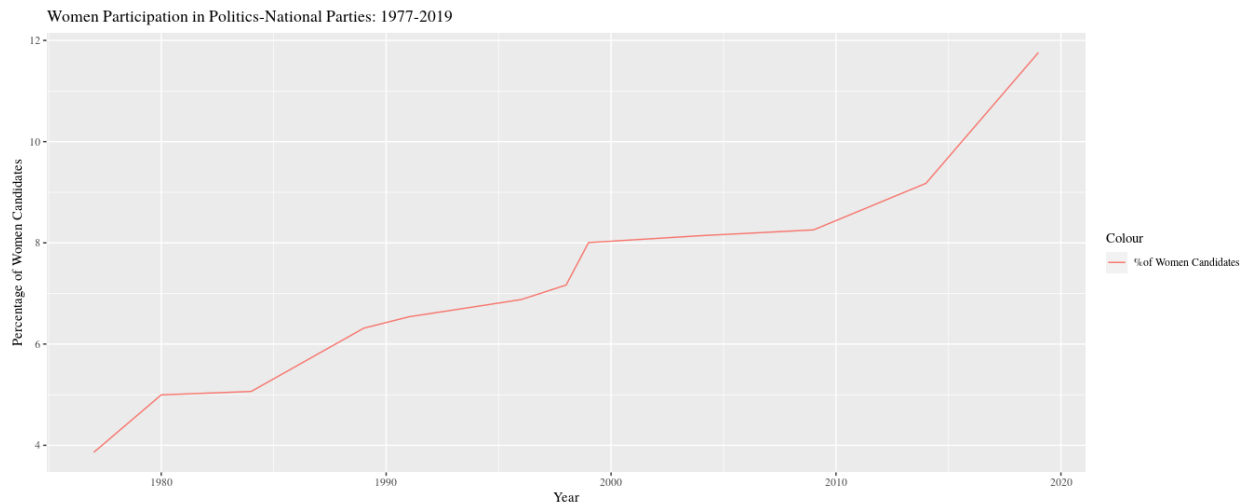
Women representation from Punjab has been increasing at a slow pace; it reached just below 12% in 1998, but otherwise has been below 9%. Women voter turnout has been below 50% all throughout though it has risen it is considerably lower than overall voter turnout. Delhi has had a fluctuating trend regarding women representation sending more than 20% women representatives in 4 elections, 0 women representatives in 6 elections and since 1998 it has been constant at 14%.

## II.NATIONAL POLITICAL PARTIES TRENDS<sup>13</sup>

Seat distribution is of paramount importance for any political party, it can make or break the party's fortune in that election, thus there is no doubt that before any election party leaders spend a lot of time before they finalize their candidates and that party cadre look forward to candidate announcement with as much gusto as they do the election results. Despite a long period of coalition governments our democracy has remained party centric. The political ecosystem is such that for every elected representative from a constituency there are numerous others who remain hopeful of winning that seat in the next election and thus continue to be an active part either as political leaders or social workers. Currently the entire political ecosystem is skewed in favour of men both in terms of electoral politics and otherwise.

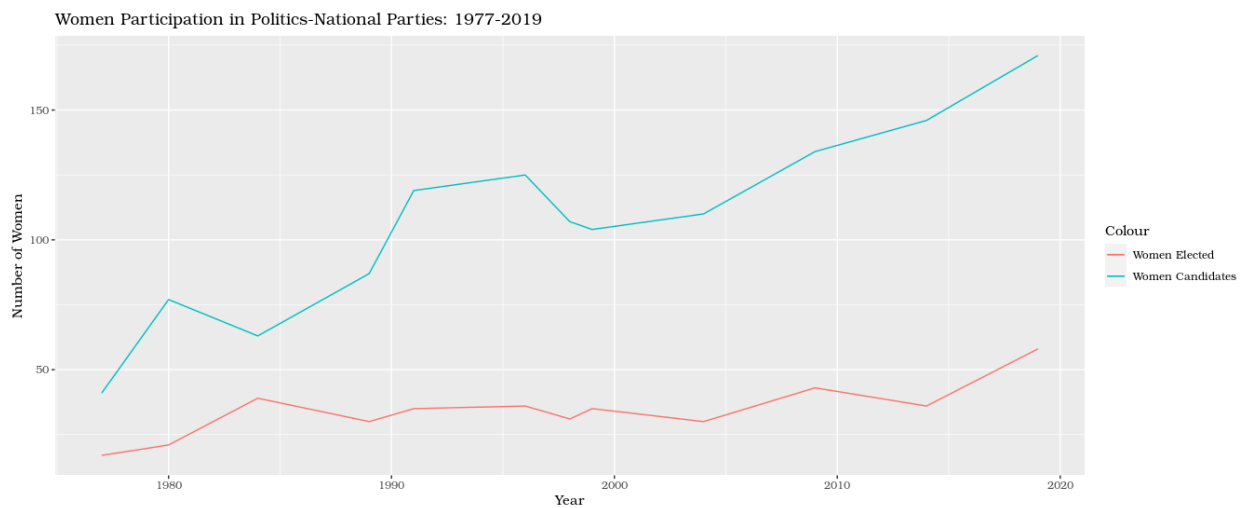
---

<sup>13</sup> All the data has been taken from the Archives of ECI's Statistical Reports, *available at:* <https://eci.gov.in/statistical-report/statistical-reports/> (last visited on September 20, 2020).

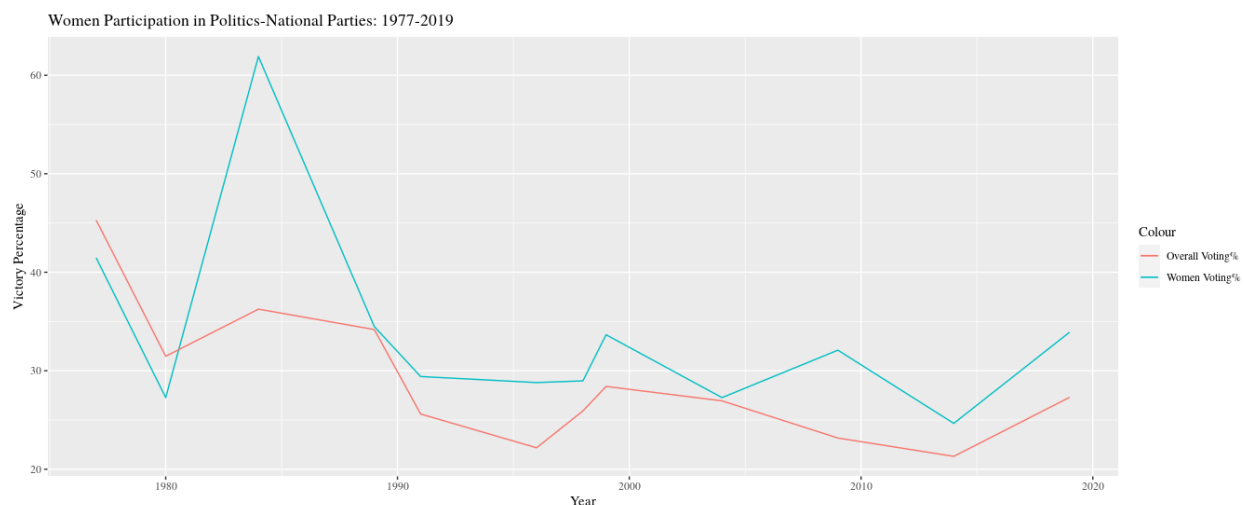


**Figure 27 (i): Women Participation in Politics - National Parties (1999 - 2019).**

Ticket distribution to women candidates has been abysmal from the very start with just about 3% of the seats being given to women it has increased to 11% in 2019. It was not till 1984 when the 5% mark was breached since then there has been a steadier albeit slow increase to 8% in 1999. It remained at the 8% mark for the next decade till 2009 increasing to 9% in 2014 and then to 11% in 2019.



**Figure 27 (ii): Women Participation in Politics - National Parties (1999 - 2019).**



**Figure 27 (iii): Women Participation in Politics - National Parties (1999 - 2019).**

In terms of number of women who won the elections as candidates representing national parties, in 1957, 20 women won which increased to 58 in 2019. One may argue that since parties would prefer giving seats to candidates they feel that have the best chance of winning elections, as at the end of the day that remains their goal, they should be allowed to distribute tickets as they deem fit. If we compare the winning percentage of women candidates to the winning percentage of all the candidates representing national parties except in 1977 and 1980 the women candidates winning percentage has consistently been higher than the overall winning percentage which would imply that parties are not at a disadvantage but actually will be better off fielding women candidates.

### III. GAME CHANGERS AFFECTING THE TRENDS

#### A. ASSASSINATION OF FORMER PM INDIRA GANDHI IN 1984

The first crucial event that altered the voting pattern of women in most Indian states, especially the Hindi belt region,<sup>14</sup> was the assassination of former Prime Minister Indira Gandhi in 1984. She was dubbed to have been the most popular female leader in South

<sup>14</sup> Election Commission of India, “Statistical Reports of General Election to Lok Sabha” (1984).

Asia - a region marred by years of male hegemony coupled with female subordination,<sup>15</sup> or for that matter, even amongst one of the most popular and powerful leaders of the region, irrespective of gender. Having risen in the shadow of her father's political career,<sup>16</sup> She was one of those privileged women who had an institutional backing to her political career. However, there is no second doubt that she transformed herself into an extremely popular leader of the masses<sup>17</sup> without necessarily crawling her way up from the grassroots levels of Indian politics. Her regime did not showcase impressive women electoral participation be it voting or contesting. Her home state UP, despite flaunting a substantial number of women leaders since before the country's independence, remained to be one of the relatively poorly performing states. The only change was brought about by her unfortunate demise, when the masses translated the sorrow of losing India's daughter into a comfortable victory for her son Rajiv Gandhi. What did change, and noticeably so, was the voting pattern of women voters as well as the success rate of women candidates. There were more women voters in most states who largely made an informed choice.<sup>18</sup> There was a small surge in the number of women candidates in most states, but a bigger surge in the percentage of successful women candidates. For example, the Indian National Congress fielded 39 women in the 1984 elections (up from 32 in 1980), and 37 of them tasted victory.<sup>19</sup> The trend is more or

---

<sup>15</sup> Anonymous, "Political Dynasty and Discrimination: The Female Leaders of South Asia" *European Foundation for South Asian Studies* (2020) available at: <https://www.efsas.org/publications/articles-by-efsas/political-dynasty-and-discrimination-the-female-leaders/> (last visited on September 20, 2020).

<sup>16</sup> Linda Charlton, "Assassination in India: A Leader of will and force; Indira Gandhi, born to politics, left her own imprint on India", *The New York Times*, Nov. 1, 1984, available at: <https://www.nytimes.com/1984/11/01/obituaries/assassination-in-india-a-leader-of-will-and-force-indira-gandhi.html> (last visited on September 20, 2020).

<sup>17</sup> *Ibid.*

<sup>18</sup> Ranjana Kumari, "Patriarchal Politics: The Struggle for Genuine Democracy in Contemporary India" available at: <https://www.boell.de/en/2014/02/26/patriarchal-politics-struggle-genuine-democracy-contemporary-india> (last visited on September 20, 2020).

<sup>19</sup> Election Commission of India, "Statistical Reports of General Election to Lok Sabha" (1984).

less similar for other parties too. Interestingly, Maharashtra and Kerala<sup>20</sup> were among the few states that did not see a rise.

B. *THE 73RD & 74TH CONSTITUTION AMENDMENT ACT*

Reservation of seats in elective bodies was initiated during the colonial days of India. The Government of India Act, 1935 introduced the quota policy for women by reserving 41 seats in the provincial legislatures in line with their goal of securing one woman legislator for every 5 men.<sup>21</sup> They further reserved limited seats in the central legislative<sup>22</sup> body. It is crucial to note that women were historically against this reservation on the basis of gender. However, they took advantage of this scheme and managed to win a mighty 80 number of seats, making India the country with the 3rd highest number of women legislators after the United States and Soviet Union.<sup>23</sup> After the Constitution of India came into effect in 1951, it did not contain any such provision for women, resulting in disastrous numbers of women's political representation in every level. The demand for reservation saw support in the 1970 Report by the Committee on the Status of Women in India (CSWI). It was recommended that women needed institutional support in increasing their representation, especially in the grassroot level.<sup>24</sup> The 1988 Report by National Perspective Plan for Women too suggested a 30% quota at all levels of elective bodies.<sup>25</sup> Action was finally taken in 1993, when through the 73rd and 74th Amendments of the Constitution, 33% of all the seats were reserved in the Panchayats, Nagarpalikas and Municipalities, thereby laying

---

<sup>20</sup>Election Commission of India, "Statistical Reports of General Election to Lok Sabha" (1984).

<sup>21</sup>Visram, Rozina, "Women in India and Pakistan: The Struggle for Independence from British Rule" Cambridge University Press (1992).

<sup>22</sup>*Ibid.*

<sup>23</sup>*Ibid.*

<sup>24</sup> Ministry of Women & Child Development, "Report of the Committee on the Status of Women in India" (1970).

<sup>25</sup>*Supra* note 1.



foundation for women's participation at the grassroots level of political decision making, Owing to this, most states have witnessed an upward surge in the number of women candidates contesting and winning elections. The larger states showed a significant upward trend in the late 1990s. This trend was not consistent in the early 2000s due to several other factors that were in play. But, it is safe to conclude that reservation in the lower tiers of decision making bodies does bring about an affirmative change in the form of a subtle chain reaction in the upper levels too.

### C. RISE OF FEMALE POLITICIANS

The 1980s and 1990s saw the rise of post independence female political leaders from many parts of India. Leaders like Sushma Swaraj, Uma Bharti, Jayalalitha, Mayawati, Mamta Banerjee, Sheila Dixit, Sonia Gandhi, Vasundhara Raje, Brinda Karat and their likes have monumentally changed the political landscape of the country paving way for more younger female politicians like Smriti Irani. There have primarily been two kinds of women leaders - i) those who belong to political dynasties - either are born into such a family or marry into such a family;<sup>26</sup> and ii) those who rise through the ranks. Women of the Nehru - Gandhi family, Vasundhara Raje, Rabri Devi belong to the former group, whereas Mamta Banerjee and Mayawati are the loudest examples of the latter group. More often than not, one would like to conclude that the rise of a female leader affects the participation of women in various tiers. However, in order to draw a relation between the rise of female political participation and rise of popular female leaders, a distinction needs to be drawn. As a two - time Chief Minister (and former Cabinet Minister), Mamata Banerjee's increase in power and popularity in the 2000s coincides with the rising participation of women in West Bengal. Trinamool Congress (along with Naveen Pattnaik's Biju Janata Dal), managed to field 23 women candidates out of 62 total candidates in 2019, which is close to 37%. Moreover, the voters elected 9 women,

---

<sup>26</sup> Richter, "Exploring Theories of Female Leadership in South and Southeast Asia" 63(4) *Pacific Affairs* 524-40 (1990).

the number of total TMC candidates elected being 22. That is a whopping 41% female representation in Lok Sabha from the state of WB. Whereas, someone like Rabri Devi, who was a puppet Chief Minister and used as a rubber stamp when her husband and former Chief Minister Lalu Yadav was accused of the Fodder Scam, did not cause any change in the political scenario of Bihar. Similarly, Sonia Gandhi, who inherited the reigns of the INC after the demise of her husband, could not increase the female participation within her party folds. A significant number of women leaders are products of male patronage.<sup>27</sup> Therefore in most cases there is a gap between women's participation and their meaningful use of power.<sup>28</sup> Sheila Dixit's tenure as the Chief Minister of Delhi did see a general rise of women participation, though it cannot be definitively attributed to her since the trend did not involve major growth, and it would be erroneous to assess the trend using just the Lok Sabha data as Delhi has a low number of seats. Jayalalitha, who ruled the political scenario of Tamil Nadu for nearly 2 decades, was another powerful regional leader. Her tenure as a Chief Minister also saw a general growth in women's participation, which can also be credited to the amendments introduced in the 1990s. Therefore, it can be concluded that in some cases 'like begets like' that is more women leaders do have the potential to give rise to women participation in every level, however it is also a function of other factors, and may not always be true. Most prominent women leaders have not been able to facilitate the entry of a greater number of women in electoral or party politics.<sup>29</sup>

#### **IV. MEASURES TO IMPROVE THE SITUATION**

The historical marginalisation of women in the political spheres needs multi - level corrections to undo the discrimination. Below are some ways to achieve parity between men and women in politics.

---

<sup>27</sup>Maroju Rama Chary, "Women and Political Participation in India: A Historical Perspective" 73(1) *The Indian Journal of Political Science* (2012).

<sup>28</sup>Susheela Kaushik, "Women's Participation in Politics" *Vikas Publishing House Pvt. Ltd.* (1993).

<sup>29</sup>Madhu Kishwar, "Women and Politics: Beyond Quotas" 31(43) *Economic & Political Weekly* 2871 (1996).

## A. INTRODUCING QUOTAS

While the lower tiers of the political system did introduce quotas for female contestants, there is a dire need to do the same in the higher levels as well. That will be the fastest means to induce the 'critical mass' required to initiate a multiplier effect of women's participation. The Women's Reservation Bill was introduced by UPA-1 in 2008, that proposed the reservation of 33% seats for women in state and national parliaments for 15 years.<sup>30</sup> By reserving 181 seats in national parliament and 1370 seats in state assemblies,<sup>31</sup> it has the capacity to significantly transform the political landscape in India. Moreover, by introducing a 'quota within quota' scheme for women with caste disabilities, it offers a holistic solution. This Bill, if passed, will ensure equality in opportunity for women that will eventually help garnering more women participation at every level. However, the Bill has not been passed for 12 years now and remains to be a mere political ball.

## B. INCREASING PARTY LEVEL PARTICIPATION OF WOMEN

Female marginalisation stems from the discrimination faced by them within the party folds in terms of seat allocation or party rank.<sup>32</sup> This inequality in opportunity is primarily responsible for poor trends. The Constitution of India through Articles 14 and 15 guarantees equal opportunities to all irrespective of their gender.<sup>33</sup> Apart from initiating affirmative action in legislative bodies, the State also needs to initiate similar action in the party levels. Increased participation of women is not only achieved through higher representation in Parliament and State Assemblies but by also

---

<sup>30</sup> The Constitution (One Hundred and Eighth Amendment) Bill, 2008, available at:[https://www.prsindia.org/sites/default/files/bill\\_files/1211455181\\_The\\_Constitution\\_One\\_Hundred\\_and\\_Eighth\\_Amendment\\_Bill\\_2008.pdf](https://www.prsindia.org/sites/default/files/bill_files/1211455181_The_Constitution_One_Hundred_and_Eighth_Amendment_Bill_2008.pdf) (last visited on September 20, 2020).

<sup>31</sup> *Supra* note 15.

<sup>32</sup> *Supra* note 1.

<sup>33</sup> The Constitution of India, art. 14, 15.

encouraging for women leaders in the political ecosystem who may or may not wish to contest. Kishwar (1996) recommended that political parties should be compelled to give 1/3rd of their tickets to female candidates by amending the Representation of People Act.<sup>34</sup> This method has worked well in many countries like Germany, Norway and Sweden and therefore can be applied in India also to bring more women into participating in the country's political discourse.<sup>35</sup>

### C. ECONOMIC EMPOWERMENT OF WOMEN

Politics is an arena where money does the talking. People with more money have a higher chance of winning. Given the fact that women lack access to finances and ownership of productive resources, their participation percentage does lag behind men.<sup>36</sup> This consequently results in restricting their scope of political activity. *Gender related deficiencies generally hint at a deeper inequality beyond gender.* Therefore, effort must be taken to financially empower women through Government enabled schemes.

### D. IMPROVING WORKING CONDITIONS FOR WOMEN

Several incidents in the past have not promoted a healthy picture of the political scenario in India. The violence, exploitation - physical, mental and sexual, and corruption has a negative impact on women's political participation. Threats of character assassination<sup>37</sup> often deter women from participating in active politics. After the SP-BSP alliance broke in 1995, Mayawati, a prominent BSP leader, was attacked at the guest house where she was in a meeting with her MLAs. Her room was vandalised,

---

<sup>34</sup>Supra note 26.

<sup>35</sup>Supra note 15.

<sup>36</sup> Farzana Bari, "Women's Political Participation: Issues and Challenges" available at: <https://pdfs.semanticscholar.org/5692/9580a608ee4677031f77c86309e2468fefed2.pdf> (last visited on September 20, 2020).

<sup>37</sup>Supra note 15.

casteist and sexist slurs were hurled at her and she was beaten up.<sup>38</sup> For political watchers, the CPM's 'Hazra attack' on Mamata Banerjee is not new. She was flogged in the streets of Hazra by the ruling party's goons.<sup>39</sup> Jayalalitha is yet another example who was a victim of physical assault in 1989 when the MLAs of DMK pulled her *sari*,<sup>40</sup> as others in the TN Assembly watched. Moreover she was also physically attacked by an MLA during the funeral procession of former CM of TN - MGR.<sup>41</sup> Plus, sexism at the workplace is a recurring phenomenon faced by women. In 2019, Parliamentarian Azam Khan disrespected the lady deputy speaker of the House by his innuendo laced remarks. He did not stop even after being politely asked to do so. The remark was strongly criticised by women and men Parliamentarians like Smriti Irani, Nirmala Sitharaman, Babul Supriyo, Ravi Shankar Prasad, Mimi Chakraborty *et al.*<sup>42</sup> The Sexual Harassment at the Workplace (Prevention, Prohibition and Redressal) Act, 2013 is extremely broad legislature, broad enough to include all types of workplaces. Therefore it contains government and private organisations within the ambit of the meaning of

---

<sup>38</sup> Anonymous, "1995 Guest House Scandal: How Mayawati, Mulayam turned arch rivals", *The Quint*, Apr. 19, 2019, available at: <https://www.thequint.com/news/politics/mayawati-mulayam-singh-guest-house-scandal> (last visited on September 20, 2020).

<sup>39</sup> Anonymous, "Remember 'Hazra 1990', says Mamata as CPM ups ante over Aishe protests", *The Times of India*, Feb. 15, 2020, available at: <https://timesofindia.indiatimes.com/city/kolkata/remember-hazra-1990-says-mamata-as-cpm-ups-ante-over-aishe-protests/articleshow/74143513.cms> (last visited on September 20, 2020).

<sup>40</sup> Anonymous, "How Jayalalitha became the most authoritative figure in Indian Politics", *The Economic Times*, Dec. 6, 2016, available at: <https://economictimes.indiatimes.com/nation-world/how-jayalalitha-became-the-most-authoritative-figure-in-indian-politics/fighting-a-mans-world/slideshow/55837790.cms> (last visited on September 20, 2020).

<sup>41</sup> *Ibid.*

<sup>42</sup> Anonymous, "Azam Khan's remarks a reflection of his character, blot on all the male legislators: Smriti Irani", *Times Now News*, July 25, 2019, available at: <https://www.timesnownews.com/india/article/azam-khans-remarks-reflection-of-his-character-blot-on-on-male-legislators-smriti-irani/459193> (last visited on September 20, 2020).

the word 'workplace'.<sup>43</sup> Strong application of the act must be ensured so as to allow women to play a larger role in politics.

Political empowerment of women is closely linked with other forms of women empowerment in other sectors like finance, society, education and all. In order to encourage holistic empowerment of women, increasing political representation is a must. Representation of women in politics is closely associated with adoption of social schemes that favour women, and result in their upliftment. Therefore, there is a serious need to increase the women's participation at every level to cement the cracks. These gaps in India's vibrant democracy need to be filled up. Afterall, participation of women in elections is an important marker of the maturity and efficacy of a healthy democracy.<sup>44</sup>

---

<sup>43</sup> The Sexual Harassment at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, s. 2(o).

<sup>44</sup> *Supra* note 1.

# E. LEGAL THEORY & PUBLIC LAW: KIMBERLE CRENSHAW'S THEORY OF INTERSECTIONALITY IN REALIZING THE MARRIAGE PROJECT

-AUTHORED BY: RASHMI RAGHAVAN (V BA LL.B)<sup>1</sup>

---

The past few years can be seen as years of disruption. Unchallenged norms in our society started unravelling with lawsuits filed against businesses for discriminatory treatment against the LGBTQ+ community, immigration policies found themselves being scrutinized as targeting particular racial and religious minorities and environmental activism took on a new term while analyzing the adverse impact of global warming on the global poor. The world's Supreme Courts are keeping up with the changing times and have recognized the rights of the marginalized; by holding that same-sex marriage is constitutional or by delegitimizing intersectional discrimination in State level employment or recognizing the rights of self-identity and expression of the marginalized genders and even decriminalizing Victorian laws that penalized homosexuality. Every anti-discrimination protest that takes itself out on the streets has emboldened the values for a more just and equal world. At such protests and popular discussions around them, it is hard to overlook the influence of Kimberle Crenshaw's doctrine of '*Intersectionality*'.

Crenshaw introduced the theory of intersectionality in 1989 in her paper written for the University of Chicago Legal Forum, titled "*Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*".<sup>2</sup> Here, she introduced intersectionality as a legal as well as socio-political concept by drawing a lens on the lives and experiences of African-American

---

<sup>1</sup>The author would wish to thank Nauman Beig (IV B.A.LL.B) for his valuable inputs.

<sup>2</sup> University of Chicago Legal Forum: Vol. 1989: Iss. 1, Article 8.

women. She draws an analogy that Black women have been subjugated by both classes of social inequalities operating on them; **patriarchy and racism**. She proceeds to analyse that when such multiple inequalities attach to a person, due to the multiplicity of their inclusion within their group (say Black, immigrant) coupled with their individual identities (say woman, Trans); the effect is the disenfranchisement of such people from the formalistic legal system. The legal systems built by the Legislatures and interpreted by the Courts do not recognize such multiple focal points of discrimination and thus disentitle such groups from any remedial actions for their benefit. She further theorizes that any policy that tries to solve a women's problem is incomplete without analysing how race affects women particularly and going forth with only a single axis point of discrimination like patriarchy would never fully or holistically aid women with multiple axis of discrimination, like ethnicity, religion, age, economic attainments, sexuality., etc.

Crenshaw's doctrine never found acceptance in the Courts but was the buzzword in academic circles discussing gender studies or critical race theories. Most movements accepted the term for its simplicity to analyse discrimination operating from different focal points; religion and women, economics and black women, economics-religion and black women for instance allowed a microscopic analysis of how discrimination operated on multiple levels to the disadvantage of minority groups. This process of recognizing as social and systemic what was formerly perceived as isolated and individual has also characterized the identity politics of people of colour and gays and lesbians, among others. For all these groups, identity-based politics has been a source of strength, community, and intellectual development. <sup>3</sup>

Most people who are against intersectionality are against such niche-groupings; arguing that such demarcations inevitably create a hierarchy of victimhood where the one on the bottom is the white-male who is incessantly criticized and even blamed for the

---

<sup>3</sup>Supra Crenshaw



disadvantages of other victims above him. Is the ultimate end-goal to celebrate the pride of multiple identities? Is it to replace power structures which earlier had a white man at the forefront to a black-women-lesbian at the forefront?<sup>4</sup> We can enquire into these concerns by paying close attention to the Indian LGBTQ+ dream of the marriage project.

The LGBTQ+ community was always marginalized from the Indian social as well as political spectrum. They have constantly been a source of ridicule in mainstream cinema, stereotyped for their effeminateness, their professional choices of being commercial sex workers or that they pose serious health risks to the 'general' populace. Their unique issues never became a political focal point, their activism generally outcast and termed as errant behaviour on the streets. Not surprisingly, when the *Naz Foundation* case was being heard, the sitting judge innocently remarked that he knew no such people who were gay, trans etc. The Supreme Court however recognized the rights of such gender and sexual minorities through its landmark verdicts of *NALSA v Union of India*<sup>5</sup> and *Navtej Singh Johar v Union of India*<sup>6</sup>. These judgments became the starting point of integration of sexual minorities into our constitutional fabric. Their separate and distinct identities formed a unique and renewed inquiry on Articles 14, 19 and 21. This form of declaration is a reaffirmation of the LGBTQ+ communities' rights to a dignified human existence like any other person on the Indian soil.

However, a constitutional affirmation is only the starting point to recognize and co-exist with people of multiple identities. Senior advocate Maneka Guruswamy and her partner, Advocate Arundathi Katju remarked at the Oxford Union that the next step

---

<sup>4</sup> <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination>

<sup>5</sup> AIR 2014 SC 1863

<sup>6</sup> (2018) 10 SCC 1

towards such integration is the marriage project.<sup>7</sup> She explains that the young see the *Navtej* verdict only as a starting point and are bold enough to want the other pleasures that hetero-sexual couples have had for centuries. *"They are unafraid to love, and unafraid to show it to the world"*- Arundhati remarks. They show that marriage is inbuilt into the social fabric of the Indian context- *we live, breathe and talk about marriage*.<sup>8</sup> It is unavoidable and alluring at the same time. A recent petition filed in the Delhi High Court reflects the same urgency at getting their rightful due. The petition states,

*"....despite the fact that there is absolutely no statutory bar under the Hindu Marriage Act of 1955 and the Special Marriage Act of 1956 against gay marriage, the same are not being registered throughout the country and also in the National Capital territory of Delhi"*<sup>9</sup>

Replying to this petition, our Solicitor General has remarked that the concept of same-sex marriage is not recognized under Indian culture or Indian law. *"As per law, a marriage is only between a husband and a wife"* he stated and without changing multiple statutes such a declaratory right cannot be given effect to.<sup>10</sup>

Such arguments are not new or even original. The rights of most disadvantaged groups have been systematically denied citing divine forces, their own incompetence, tradition or legal originalism. However, Intersectionality operates as both the observance and analysis of power imbalances, and the tool by which those power imbalances could be eliminated altogether. Crenshaw explains that the point of intersectionality is to make

---

<sup>7</sup> <https://www.youtube.com/watch?v=-Lp6H4YYN-k>

<sup>8</sup> Ibid

<sup>9</sup> [www.livelaw.in/top-stories/not-allowing-homosexual-marriage-a-violation-of-right-to-life-pil-in-delhi-hc-seeks-recognition-of-same-sex-marriage-162869](http://www.livelaw.in/top-stories/not-allowing-homosexual-marriage-a-violation-of-right-to-life-pil-in-delhi-hc-seeks-recognition-of-same-sex-marriage-162869)

<sup>10</sup> <https://www.livelaw.in/top-stories/our-culture-law-does-not-recognize-the-concept-of-same-sex-marriages-centre-tells-delhi-hc-162902>

room “for more advocacy and remedial practices” and to create a more egalitarian system.<sup>11</sup>

In the Indian society, marriage is a decided and often divinely rite of passage that every man and woman is ordained to. It is an act of familial integration often reproducing our caste and class ideologies. The marriage system reproduces what women ought to do in the name of religion and traditional womanly roles; it also affects their mobility and autonomy and places the primary burden of child rearing and raising on them. Most married women perform unpaid physical and emotional labour in such child rearing and household work, sometimes even caring for old relatives in the family. Married men are relegated to provider roles and often are expected to play disciplinarians and enforce tradition (religious, class or caste) on the young. The heterosexual couple is often revered for sticking through thick and thin and raising a new generation albeit amidst domestic violence, constant strife, sexual chastity and a tiring adherence to social mores of “duty”. Ultimately, they unknowingly or subconsciously reproduce such roles despite the personal financial, physical or mental toll it takes on them and their relationship. An LGBTQ+ couple challenges all of these dominant mores. Proudly loving across caste and class backgrounds, their autonomy is a threat to religious notions of purity and heterosexual standards of unions. Their choices to either be parents or not, live life on individual terms and engage in a pursuit of happiness is a direct attack on cracking norms that often stifle heterosexual couples. Such homosexual relationships begin with empathy and mutual love as their starting point rather than reinforcing and normalizing social evils like dowry, child marriage or marital rapes. Moreover, such couples may often choose to not marry, tired of the traditionalism and rigidity of the institution itself. This itself is a huge wave of change, where marriage is not a pre-requisite to child bearing or to give legitimacy to their relationships. There is always a danger that such queer+ couples may end up reproducing the gender roles

---

<sup>11</sup>Supra note vox article

that heterosexual couples do, however, there is a much better hope for a more dignified and equal treatment in the relationship itself.

The envisioned marriage project is not only to recognize the right of LGBTQ+ couples to a dignified life, but to *shake up such systems of power* as Crenshaw says. This process of social integration of LGBTQ+ couples to marriage will inevitably change dominant ideas about marriage, family and inheritance among heterosexual couples. There is much better hope for such a disruptive movement to challenge and rethink our own hopelessly archaic conceptions of a dignified familial life. This harmonization allows social assimilation of sexual minorities to the well-deserved perks of familial relationships and legal protections for heterosexual couples, while giving the heterosexual couples a new lens to look at autonomy and personal space within their own marriages. As Crenshaw states, the view that the social power in delineating difference need not only be the power of domination; it can instead be the source of political empowerment and social reconstruction.<sup>12</sup> The Marriage Project is a reconstruction of marriage for *all*, with notions of equality, freedom and mutual co-operation at its centrality.

More so, LGBTQ+ couples are a proud display of diversity. They encompass huge intersections within themselves. If we move from the traditional understanding of their identities as only Lesbian, Gay, Bisexual etc., we can uncover that their identity moves beyond sexuality. For instance, they could be from minority religions, minority castes, be from the economically weaker sections, or even underprivileged or discriminated against on other issues that India constantly grapples with. While asserting the right to marry, these couples are continuously negotiating with their other prominent identities; sometimes adopting them or otherwise rejecting them completely. An inter-religious or inter-caste queer couple not only challenges notions of heterosexual marriage but also

---

<sup>12</sup>See Kimberlé Williams Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color

the religious sanction and adherence to such norms. This negotiation and re-negotiation is the only way to build a social project to reform the institution of marriage. It is the only way to change mentalities or resolve conflicts surrounding LGBTQ+ couples rather than bringing them from the legislature; as is usually the case in India.

Crenshaw advocates for Intersectionality not only for an accurate understanding of discrimination, but because, otherwise, (in the context of Black-women) single-minded focus on patriarchy will inevitably produce racial stereotypes and never help the Black community and focus on racism would reproduce patriarchal stereotypes and marginalize women. Crenshaw's analogy is applicable to any other social movement trying to eliminate discrimination as a single-axis movement is incomplete when it fails to understand the complexities of discrimination operating on multiple facets of life. The same can be said about the Marriage Project. Unless feminists or dalit activists or minority religions confront with the numerous possibilities that LGBTQ+ marriages can bring about, in terms of reformation within their own communities, they can only half-heartedly improve their own minority status in the larger society. Such an integration and constant negotiation is at the heart of Crenshaw's Intersectionality where potential coalitions are waiting to be formed. Therefore, the goal of the Marriage Project should be to facilitate the inclusion of marginalized groups for whom it can be said: *"When they enter, we all enter."*

# F. TRANSGENDERS IN SPORT: A REVIEW OF THE STATUS QUO

AUTHORED BY: ARYA WAKDIKAR AND UNNATI RATHI (IV BA LL.B)

---

## INTRODUCTION

In 2014, the Supreme Court of India through the National Legal Services Authority v. Union of India (“NALSA”)<sup>1</sup> gave citizens the opportunity of identifying as any gender irrespective of their sex. Transgender is a term used to describe people whose gender identity differs from the sex they were assigned to at birth. This self-perceived idea of gender is mostly influenced by the general psycho-social norms of society. Due to this non-conformity with norms, time and again, in professional sport, the members of the Trans community have been subjected to a lot of scrutiny. The main underlying rationale of competitive sport is fairness and integrity. Fairness encompasses the idea of inclusivity, which essentially subsumes the right to participation in sport. Inclusion of Trans-people in sports is extremely imperative, every person, irrespective of their gender, should have the right to participate in sport based on their self-perceived gender identity. Recently, the question of including Trans women in female competitions has been highly debated, owing to their high endogenous testosterone levels. The prevalent dilemma is - The disadvantage faced by cisgender participants against the transgender persons’ opportunity to participate.

This article aims at discussing the impediments which lie in creating a gender-neutral and fair environment for the trans community and the need for clear cut policies to prevent discrimination against them.

---

<sup>1</sup>National Legal Services Authority v. Union of India, AIR 2014 SC 1863.

## OPPORTUNITY TO PARTICIPATE

International Charter of Physical Education, Physical Activity and Sport by UNESCO<sup>2</sup> suggest that sport is a fundamental right for all. It promotes gender equality and social inclusion and bars any form of discrimination. Since 2014, people have a right to identify their gender identity. Article 21<sup>3</sup> of the constitution also mandates the right to choose the “inner” aspects of life, namely, under the right to privacy and to make one’s own choices. Sports are extremely important for a person’s all-round development. Article 14<sup>4</sup> of the constitution devises that everyone has a right to equal opportunities and prohibits discrimination on the grounds of sex. Discrimination based on sex materializes in its gendered state<sup>5</sup>. Additionally, as held in the NALSA judgement that *‘Incidents of sex or gender will no longer be ousted from the prohibition of sex discrimination or justified as protective discrimination without scrutiny’*<sup>6</sup>. Thus, conclusively the trans-people should get an opportunity to participate in sporting activities and should not be discriminated against on the basis of their gender. Also, in promotion of the same, their participation should be positively discriminated and special facilities should be provided to bring them to an equal footing.

Recently, the only complication in the way of inclusivity is that the sporting authorities think men may masquerade as women to gain an unfair advantage in sport events. As it cannot be denied that it is close to impossible to find if an individual wants to change his or her gender for genuine reasons or is doing the same to gain an unfair competitive advantage. Owing to this, sporting organisations have come up with stringent

---

<sup>2</sup>United Nations Educational, Scientific and Cultural Organization, Physical Education, Physical Activity and Sport.

<sup>3</sup> The Constitution of India, art.21.

<sup>4</sup> The Constitution of India, art.14.

<sup>5</sup>Jaising, I., “Gender Justice and the Supreme Court” in Kirpal, B.N. et al (eds.), *Supreme but Not Infallible: Essays in honour of the Supreme Court of India*, Oxford India Paperbacks, 2000, p. 294.

<sup>6</sup>*Id at 1.*

regulations of sex determination techniques which not only come in the way of transwomen but also, cisgender women, which will be discussed below.

#### IMPEDIMENTS IN THE WAY OF INCLUSIVITY

##### *Alleged physiological differences*

A deeper understanding of the issue at hand provides a clearer picture regarding the physiological repercussions of having higher testosterone level in a transgender participant. Many sporting organizations have given wind to the unsubstantiated belief that the presence of testosterone leads to an athletic advantage in transgender people, particularly in individuals who were assigned male at birth but identify as female. No research has drawn a direct link and uniformly found transgender people to have an athletic advantage in sport<sup>7</sup>. Thus, it is difficult to understand why so many current policies or their lack thereof continue to discriminate. Inclusive transgender sporting policies need to be developed and implemented that allow transgender people to compete in accordance with their gender identity, regardless of hormone levels.

The stringent and unfair policies have a negative impact on transgender people's experiences of sport and physical activity; even when the activity is engaged in at a recreational level, such as considering joining a local football team or going to the gym. The stigma that prevails in the society hinders their confidence and ability to grow as members of the sports community. To participate in sports is a human right. Due to the unfavorable treatment, most of the trans-persons admitted to disengaging from sports during their transition journey because they were concerned about how their team-mates would treat them.

---

<sup>7</sup> Beth Jones, Transgender People in Sport. Available at:

<https://www.lboro.ac.uk/research/spotlights/transgender-in-sport/>





individual who aspired to contest in the female category should contain a total serum testosterone level below 10 nanomoles/L for at least 12 months prior to their first competition in that category<sup>11</sup>.

### *Legislations present globally*

In July 2019, Sport Australia in collaboration with Australian Human Rights Commission created guidelines<sup>12</sup> on making the arena of sport more inclusive and gender diverse for transgenders. The guidelines specifically mark the act of ‘not allowing a trans-person an opportunity to participate or to join any sporting club’ as an act of unlawful discrimination. The guidelines suggest that discrimination is allowed in terms of special measures and exemptions. Special measures are positive actions used to promote equality for disadvantaged groups. They are often referred to as ‘positive discrimination’ or ‘affirmative action’. Exemptions are put in place to make conduct lawful and prevent a person from successfully claiming that an action falls under unlawful discrimination. It also recognizes the sexual harassment faced by the trans community in the society and appropriately devised clauses to control it. In 2018, Canada’s U Sports<sup>13</sup> also developed a policy to accommodate transgender student-athletes at its 56 member institutions across the country. This step was taken to ensure that all students of Canadian universities are on an equal footing to be selected in varsity teams regardless of their gender or their gender identity

---

<sup>11</sup> International Olympic Committee, ‘IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism’ (Meeting Summary, November 2010).

<sup>12</sup> Australia Sport, Guidelines for the inclusion of transgender and gender diverse people in sport, June 2019. Available at:[https://www.sportaus.gov.au/\\_data/assets/pdf\\_file/0008/706184/Trans\\_and\\_Gender\\_Diverse\\_Guidelines\\_2019.pdf](https://www.sportaus.gov.au/_data/assets/pdf_file/0008/706184/Trans_and_Gender_Diverse_Guidelines_2019.pdf)

<sup>13</sup> Press Release, U sports approves inclusive new policy for transgender student athletes September 26, 2018, available at: [https://usports.ca/uploads/hq/Media\\_Releases/Members\\_Info/2018-19/Press\\_Release\\_-\\_Transgender\\_Policy.pdf](https://usports.ca/uploads/hq/Media_Releases/Members_Info/2018-19/Press_Release_-_Transgender_Policy.pdf)

## THE WAY FORWARD

It is extremely crucial at this point to develop legislation to promote the participation of transgenders in sport. The requisite legislation must be in line with the idea of inclusivity. The act must clearly articulate the participation in sport should be based on a person's affirmed gender identity and not the sex they were assigned at birth, to the fullest extent possible.

Additionally, there should be an eternal exception concerning 'competitive sporting activity'. This is known as the 'single-sex competition' exemption, although it does not operate to make all single-sex or single-gender sporting competitions lawful. The exemption allows for discrimination on the grounds of sex or gender identity only in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant. It would further help the cause if there are transgender people in leadership positions to bridge the gap of the lack of representation. Active steps by way of reservations should be taken to commit to the inclusion of transgender and gender diverse people in various sporting organizations. Also, a strict code of conduct should be implemented, highlighting a stringent anti-harassment policy. The code should also work towards educating and training the staff, players and volunteers about identifying, addressing and preventing the harassment of transgender and gender diverse people.

## CONCLUSION

Citizens have the freedom to identify themselves as any gender based on their own self-perceived notions of themselves. Being transgender is about how an individual describes their own gender. It is not necessarily about their biological characteristics. Trans-persons have been though, considered as a third gender, has become an umbrella term for all the other people identifying as genders, which is non-conventional and also,

with people of different sexual orientations<sup>14</sup>. There has not been yet, since the advent of NALSA, a well-equipped legislation which would promote and positively help to uplift their social standing in the society. With the countries across the world developing gender inclusivity policies, there is an urgent need to develop policies and statutes, which enforce the idea of equality in sport arenas and otherwise, substantiating with positive affirmations and certain exemption for the betterment of the community.

---

<sup>14</sup> "The Transgender Persons (Protection of Rights) Act, 2019 [No. 40 of 2019]

## G. “FOSTERING A CULTURE OF TRUST, TRUTH AND ACCEPTANCE”: IS ZOMATO’S PERIOD LEAVE POLICY A PROGRESSIVE MOVE, MERE TOKENISM OR A REGRESSIVE STANCE?

-AUTHORED BY: DEBARGHA MUKHERJEE (II BA LL. B)

---

Menstrual Leave Policies have witnessed sharp debates every time they make up the headlines. The policy grants leave to menstruating people who may have the option to take paid/unpaid leave from their employment if they are inept to go to work owing to menstruation pain. The Policies are contentious as some view such norms as a criticism of work competency. On the other hand, supporters of such policies liken its purpose to that of ‘maternal leave’ and assess it as a promoter of gender equality. The concept of such leave originated in Japan in the early 20<sup>th</sup> Century and subsequently gained widespread acceptance in several other countries viz. Indonesia, South Korea, Taiwan and Zambia. In India, a couple of extra leave days for periods are granted to female government employees in Bihar only.

Recently, Online Restaurant Guide and an Indian Unicorn Zomato made headlines not for its food quality but for its move to introduce the ‘menstrual leave policy’ which granted ten days of ‘period leave’ in a particular year for all menstruating employees with an aim to shape a better ‘all-encompassing work culture’ in the company.<sup>1</sup> Well, Zomato is not the first company to sanction such policy in India. Digital Media Start-up Company ‘Culture Machine’ based in Mumbai implemented a similar scheme which allowed women employees to take a day off on the very first day of their menstrual

---

<sup>1</sup> See generally for Period Leave, <<https://www.zomato.com/blog/period-leaves>> last accessed 22<sup>nd</sup> September, 2020.

cycle.<sup>2</sup> Similarly, Gozoop caught up similar women-friendly schemes into their company back in 2017.<sup>3</sup>

The policy was extolled and denounced on varying social media platforms, exacerbating the gulf between those on 'either side of the spectrum'. The Zomato move has been welcomed by many and is celebrated by most. <sup>4</sup>Women rights' activists have marked the move as '*a progressive one which was long overdue*'. Lavanya Ballal, the social media coordinator for the Indian National Congress concurred while referring to the policy "*Most women take pain killers and continue working. Some women find it extremely difficult to work during periods. This won't take away from the hard-won space that women have gained,*"<sup>5</sup>With similar views, Founder of Femme First Foundation which a non-profit organisation is promoting women's political leadership in India, Mrs. Angellica Ariham marked, "*Today one might not be able to wrap their head around Period Leave, like many who protested against maternity leave. But someday in the future, it'll be considered normal and basic.*"<sup>6</sup> Menstrual hygiene and other related topics have always remained a 'closed-

---

<sup>2</sup> See generally, <<https://yourstory.com/2017/07/culture-machine-period-leave>> last accessed 22<sup>nd</sup> September, 2020.

<sup>3</sup> See generally, < <https://www.mansworldindia.com/uncategorized/in-conversation-with-the-pioneers-who-have-implemented-menstrual-leave-policy-in-their-organisations/> > last accessed 22<sup>th</sup> September, 2020.

<sup>4</sup> See generally, <https://www.thehindu.com/news/national/zomato-introduces-period-leave-for-employees/article32308642.ece>

<sup>5</sup>See,

<[https://twitter.com/LavanyaBallal/status/1293217600923525121?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1293217600923525121%7Ctwgr%5Eshare\\_1&ref\\_url=https%3A%2F%2Fwww.aljazeera.com%2Fnews%2F2020%2F8%2F12%2Fzomatos-period-leave-policy-triggers-debate-among-indian-women](https://twitter.com/LavanyaBallal/status/1293217600923525121?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1293217600923525121%7Ctwgr%5Eshare_1&ref_url=https%3A%2F%2Fwww.aljazeera.com%2Fnews%2F2020%2F8%2F12%2Fzomatos-period-leave-policy-triggers-debate-among-indian-women) >

<sup>6</sup>See,

<[https://twitter.com/AngellicaAriham/status/1293260539905191937?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1293260539905191937%7Ctwgr%5Eshare\\_3&ref\\_url=https%3A%2F%2F](https://twitter.com/AngellicaAriham/status/1293260539905191937?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1293260539905191937%7Ctwgr%5Eshare_3&ref_url=https%3A%2F%2F)

door conversation’ in India since time immemorial despite attempts to initiate dialogues and other like measures. Folks are optimistic that such policy change would eventually normalise periods and menstruation, thereby abolishing stigmas around the same, which is still a tabooed issue to talk about, in India. However, critics pose a question as in, is separate menstrual leave the right way to comfort the issue? A report by ‘Slate’ claims that corporations and establishments should set up a ‘gender-neutral sick leave policy’ that accounts for enough days-off for menstruating employees, as an alternative of separately labelling it as ‘period leave’ which might in turn root unnecessary interfering into females’ lives.<sup>7</sup>

However, as every coin has two sides, the Zomato move has also been disparaged by distinguished and prominent figures including women and other feminists. As pointed out by BarkhaDutt, *“The other thing hideous about the idea of period leave is how it turns a normal biological experience into some sort of monumental event, gendering us at the work place when we have fought so hard to not be gendered,”*<sup>8</sup> Similarly, Dr.Sejal Ajmera who is a Senior Gynaecologist and Director of Indian Academy of Vaginal Aesthetics opined that the policy as a blanket is not a good move at any stance. She marked *“For years, we have been trying to bust period myths, and prove that women are fully capable of giving their complete potential physically and mentally during the periods. There is no need for isolation.”*<sup>9</sup>

---

[www.aljazeera.com/news/2020/08/12/zomatos-period-leave-policy-triggers-debate-among-indian-women](http://www.aljazeera.com/news/2020/08/12/zomatos-period-leave-policy-triggers-debate-among-indian-women) >

<sup>7</sup> See generally, < <https://inc42.com/buzz/zomato-revives-the-period-leave-debate-but-will-it-worsen-gender-diversity/> > last assessed on 22<sup>nd</sup> September, 2020.

<sup>8</sup> See generally, < <https://www.aljazeera.com/news/2020/08/12/zomatos-period-leave-policy-triggers-debate-among-indian-women/#:~:text=Zomato%20has%20announced%2010%20days,food%20when%20they%20are%20menstruating.> > Last assessed on 22<sup>nd</sup> September, 2020.

<sup>9</sup> Id.

India ranked 112 out of the 153 countries on the global gender gap index, as portrayed in World Economic Forum's Global Gender Gap Report 2020.<sup>10</sup> Can a separate period leave policy further increase this already existing wide-gap and even appeal HR professionals to ask queries about the Menstrual Cycle in the interviews? Would Companies and Recruiters think twice before offering jobs to women if such leave were made mandatory across all industry? In terms of fashioning an inclusive and gender-sensitive workplace, dedicated menstrual leaves ought to be considered as a progressive move, but how the large-scale application of this policy affects the position of women and others in the workforce and gender pay-gap is a question yet to be answered and further augments threats to the policy.<sup>11</sup> The move is believed to push women back into the outdated thought process with an increase in hiring bias, lesser pay, and slower promotions among other consequences, which outcasts more harm than actual good to women. A Local Circles survey found that 49% surveyed start-ups and SMEs (8,500) hired fewer or no women employees in the last 12 months, owing to the 'financial strain' of extending twenty-six weeks paid maternity leaves. Similarly, additional 'period leave' could become the reason for start-ups preferring to hire men over women. Contrary to the existing unanswered questions, SHEROES CEO Sairee Chahal held that stigmatising period leave is a misguided step and stems from the fact that post the Industrial Revolution, workplaces have been designed for male employees. She marked, "*It's time we redesigned them to accommodate all profiles of people, so we get the best talent to work,*". Up to 70% of the workforce at SHEROES is women and they are eligible to take one day of period leave per month aside from existing leave quotas. There are other examples of start-ups treating such period-related leaves on a case-by-case basis without issuing a blanket policy.<sup>12</sup>

---

<sup>10</sup> Global Gender Gap Report, 2020 < <https://www.weforum.org/reports/gender-gap-2020-report-100-years-pay-equality> >

<sup>11</sup> Supra 7.

<sup>12</sup> Id.



One interesting argument as claimed by the supporters of the move is the ‘alteration of circumstances consequent to the generation gap’. It is imperative to mark that most menstruating people who have had contrasting opinions on the move being progressive in its nature hail from a generation which had to brawl significantly at workplace in order to demonstrate their merit and excellence; thus, might find it unpalatable when the younger generation functions in ease in comparison. This particular idea of equality is flawed as it clearly disregards progress, the sole question being ‘why should more women continue to suffer in silence?’<sup>13</sup> Additionally, people criticising the implementation of the policy fail to consider the stance of others. There exist people who experience excruciating period pain, which in turn renders their working efficacy as conditions viz. Premenstrual Dysphoric Disorder, Polycystic Ovarian Syndrome, Endometriosis can cause extreme Dysmenorrhea, restricts menstruating folks’ movements.<sup>14</sup>

All in all, Zomato’s move is not radical, but it is simply aiming for an attempt to make the workplace amenable to the people who work in it. Maternity leave when introduced, gained significant criticism and disapproval, but has now gained widespread acceptance across organisations and companies solely because people have started realising its importance. Similarly, one can only be hopeful that with changing times and circumstances, Zomato’s move becomes a ‘trendsetter’ and the ‘menstrual leave policy’ gains momentum and acceptance across industries.

---

<sup>13</sup> See generally, < [https://www.buzzfeed.com/sumedha\\_bharpilania/period-leaves-are-a-step-in-the-right-direction](https://www.buzzfeed.com/sumedha_bharpilania/period-leaves-are-a-step-in-the-right-direction) > last assessed on 22<sup>nd</sup> September, 2020.

<sup>14</sup> See generally, < <https://www.healthline.com/health/severe-menstrual-cramps#causes> > last assessed on 22<sup>nd</sup> September, 2020.

# H. CRITICAL ANALYSIS OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 IN THE LIGHT OF THE NALSA JUDGMENT.

AUTHORED BY: VIDHI KHIMAVAT & MANASI BARVE (II BA LL.B)

---

Transgender is an umbrella term for people whose gender identities, gender expressions, and/or behaviours are different from those culturally associated with the sex to which they were assigned at birth<sup>1</sup>. The discrimination based on their class and gender makes the 'transgender' community one of the most disempowered and deprived groups in the Indian Society<sup>2</sup>.

The transgender [TG] community in India has been subject to ostracism, social stigma, and mental and physical abuse. A study by the *National Human Rights Commission (NHRC)*<sup>3</sup> found that about 99% of TGs have to undergo severe hostile social rejections on various occasions. Furthermore, 52% of the community has experienced harassment by their peers and 15% from their teachers, resulting in their dropping out of school.

This abysmal state of affairs was acknowledged by the Supreme Court in its historic judgment of **National Legal Services Authority (NALSA) v Union of India and Others** on 15 April 2014, in which the court recognized the TG community as the third gender and upheld that they have right to self-identified

---

<sup>1</sup>Craig J Forsyth and Heith Copes, *Encyclopedia of Social Deviance* 740 (Sage Publications, 2016)

<sup>2</sup>Government of India, Report: standing committee on social justice and empowerment (sixteenth Lok Sabha, 2016-17)

<sup>3</sup>National human rights commission, Report: a study on human rights of transgender as third gender (February 2017)

gender and also directed the government to take measures to ameliorate the TG community's problems.

After various unsuccessful bills, the bill tabled in 2019 became an act on 5th December 2019 known as the **Transgender Persons (Protection of Rights) Act, 2019**. The Act aims to protect the transgender community's rights and to provide for their welfare and well-being. Further on July 13, The Central Government published the draft '**Transgender Persons (Protection of Rights) Rules, 2020**'. The TG community unanimously opposed the act as well as the rules as they are not just derogatory to the community, but also contradictory to the NALSA judgment. In this article, we will discuss aspects of the act which contradict the NALSA judgment and the principles discussed therein along with few other lacunae of the Act.

The following are the provisions mentioned in the act that contradict the NALSA judgment:

◆ **Exclusion of Shiv Shaktis and Kothis from the definition:**

The court in the NALSA judgment while explaining the term transgender said -

*"In this country, the transgender community comprises Hijras, Eunuch, Kothis, Aravanis, Jogappas, Shiv- Shakhtis, etc."*<sup>4</sup>

The act does not include socio-cultural identities like Shiv Shaktis and Kothis while defining TGs which was included in the definition of the TG community in the NALSA judgment<sup>5</sup>.

◆ **Self-identification:**

a) The court held that -

---

<sup>4</sup> National legal services authority vs. Union of India and others (2014) 5 SCC 438. Pt. 108

<sup>5</sup>The transgender persons (protection of rights) act, 2019, (Act. 40 of 2019), s. 2.

*“Determination of gender to which a person belongs is to be decided by the person concerned....TGs persons' right to decide their self-identified gender is upheld<sup>6</sup>.”*

Though the Act somewhat tries to uphold the right to self- perceived gender identity of the TGs<sup>7</sup>, it also lays out the process of state identification and confirmation by the way of a ‘certificate of identity’ issued by the District Magistrate<sup>8</sup>, thus adding a lot of bureaucratic layers and red-tapism. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed u/art. 21 of the Constitution of India<sup>9</sup>. The certification process is a violation of this right to life, dignity, bodily autonomy, and self-identification which is recognized by the court.

b) The NALSA judgment incorporated that the TGs have the right to equal treatment under art 14. Then why do they have to go through the process of identifying themselves when cisgenders (that is, a person whose gender identity matches their sex assigned at birth) don’t require such certification? This discrimination violates their fundamental right to equality<sup>10</sup>.

◆ **Mandating Sex Re-Assignment Surgery [SRS] :**

The act gives transgender persons the right to self-perceived gender identity. But limits this right only for identification as a transgender. In order to be identified as a male or female, the act mandates them to go through SRS<sup>11</sup>. The court while

---

<sup>6</sup> Supra note 4, pt. 129(2)

<sup>7</sup> Supra note 5, s. 4

<sup>8</sup> Supra note 5, s. 5

<sup>9</sup> Supra note 4, pt. 69

<sup>10</sup> The Constitution of India, art. 14

<sup>11</sup> Supra note 5, s. 7

deciding on the issue of SRS held that "*any insistence for SRS for declaring one's gender is immoral and illegal*<sup>12</sup>."

This 'conditional' recognition of self-perceived gender identity goes against the principle given in the NALSA judgment.

◆ **No provision for Mental health :**

Due to the social stigma and exclusion by society, transgender persons go through various mental health issues. The court directed that the government should seriously address the mental health problems being faced by TG's such as gender dysphoria, depression, suicidal tendencies, etc. However, the act fails to mention these issues of mental health and make provisions for addressing and alleviating them.<sup>13</sup>

◆ **Reservations for the trans persons :**

The court upheld that:

*"The Governments should take steps to treat transgenders as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments*<sup>14</sup>."

The act does not mention the reservation and their inclusion in SEBC. Thus, it fails to protect their rights under art 15(4) & 16(4) of the constitution.

---

<sup>12</sup> Supra note 4, pt. 129(5)

<sup>13</sup> Ibid.

<sup>14</sup> Supra note 4, pt. 129(3)

◆ **Granting of civil rights :**

Article 14 does not restrict the word 'person' only to male or female. Transgender persons fall within the expression 'person' and, hence, are entitled to legal protection of laws in all spheres of State activity, including civil rights, as enjoyed by any other citizen of this country<sup>15</sup>. By not recognizing civil rights like the right to marriage, adoption, inheritance, etc. the act breaches trans person's right to equality before the law under article 14.

The NALSA judgment refers to the Yogyakarta principles which guarantee that everyone has the right to equal recognition as a person before the law<sup>16</sup>.

The other problematic features of the Act are as follows:

◆ **Right of residence :**

Section 12(3) of the Act states that, if immediate family is unable to take care of a Transgender person, the person would be placed in a "rehabilitation center" under the order of a competent court. This act fails to make a distinction between a minor and an adult.

By giving power to the court to make decisions for an adult trans person, the act violates their personal autonomy<sup>17</sup>. Thus it implicitly suggests that a Transgender person is not competent enough to take care of himself/herself.

The act also infringes an adult Transgender's fundamental right to live anywhere in India<sup>18</sup> by giving no third choice.

---

<sup>15</sup> Supra note 4, pt. 54

<sup>16</sup> The Yogyakarta principles art.3

<sup>17</sup> Justice K. S. Puttaswamy (Retd.) v. Union of India, (2019) 1 SCC 1

<sup>18</sup> Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan, (1997) 11 SCC 123

◆ **No remedy against discrimination :**

Section 3 and 9 of the act; aim to eliminate all kinds of discrimination against TGs based on various grounds. However, this section is completely toothless as it does not contain any civil/criminal remedy against any person or establishment for such discrimination against transpersons, thus defeating the entire purpose of having such a provision.

◆ **Inadequate punishment for abuse :**

The act mentions terms like physical, mental, and emotional abuse but does not define what circumstances constitute such offences. Also, sec. 18 of the act clubs dissimilar offences together, and prescribes a common punishment for the same which should “*not be less than six months but which may extend to two years and with fine*”.

Similar offences against binary gender have a higher degree of penalty as compared to the remedy mentioned under this act<sup>19</sup>. This provision of a lower punishment reiterates and strengthens the idea that trans lives are dispensable and of lesser value.

THE WAY FORWARD:

Issues in the act like silence on reservation and civil rights, meagre punishment for discrimination and abuse, violation of art 21 by bringing in criteria of certification, render the act as useful as a chocolate teapot. In order to uplift the status of TGs, the concerns stated above should be revisited and amends should be made in the existing act.

---

<sup>19</sup> The Indian Penal Code, 1860 (Act 45 of 1860), s. 354, 354A, 354B, 354C, 354D, 375, 376, 376C

Few suggestions for the same are:

- Make the definition of transgender exhaustive by adding all socio-cultural gender identities.
- Remove certification of gender identity.
- Not to force transpersons to go through SRS to identify as a male/female, under the right to self-identification of gender.
- Provide measures regarding the mental health of transpersons under sec 15 'Healthcare facilities'
- Recognise the civil rights of the transgender persons as the NALSA judgment clearly states that they have the right to equal treatment before the law.
- Provide adequate reservation to Transgenders in education and employment.
- Define the offences in section 18 and provide adequate and proportionate remedies for the same.

All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights. The consideration of transgender as something unusual or abnormal than that of the pre-existing notion of binary gender and their exclusion from social participation shows how miserably we have failed as a society and the state as the protector of individual rights and autonomy.

It's high time we as a society, start taking concrete steps to uplift their social status. It is thus rightly said by Tiruchi Siva, drafter of the first bill for the protection of rights of transpeople i.e. The Rights of Transgender Persons Bill, 2014 [was known to be the optimum bill for transgender rights] that "It is our



mindset that has imprisoned transgenders and it will require a freeing up of our minds to free them<sup>20</sup>.

---

<sup>20</sup>Anuvinda P; Tiruchi Siva, "No Country for Transgenders?", 51, Economic and Political Weekly (2016)

# I. NEED FOR AN ANTI-DISCRIMINATION FRAMEWORK FOR LGBTQ+ PEOPLE

AUTHORED BY: NAUMAN BEIG AND NEHA DHAVALIKAR, IV BA LL.B

---

*"No one, and we mean no one, must have to push themselves in solitude."<sup>1</sup>*

## INTRODUCTION

In 2018 India took its first step towards being a more inclusive society by decriminalizing sexual acts between consenting adults and thereby decriminalizing the class of LGBTQ+ persons. Until then, members of the LGBTQ+ community were "felons in waiting". However, their fight for justice is anything but over. Social stigma and institutional discrimination continue to throttle one's ability to be a productive and participative member of society. This manifests itself in the form of a forced self-imposition of solitude by LGBTQ+ individuals, hindering their participation in society and preventing them from achieving their fullest potential on account of fear of discrimination. It is time that the community gets apposite space in law, free from fear and discrimination. To protect the fundamental rights of the LGBTQ+ individuals anti-discrimination legislation must be enacted.

## AN ANTI-DISCRIMINATION FRAMEWORK: NEED OF THE HOUR

The absence of anti-discrimination law in and of itself is a violation of the fundamental rights of LGBTQ+ people. The *sine qua non* to understanding the need for an anti-discrimination framework for LGBTQ+ people is to understand the magnitude and impact of the challenges that confront their ability to function as equal citizens. LGBTQ+ persons experience discrimination in practice, in the form of social stigma,

---

<sup>1</sup>Navtej Singh Johar v. Union of India (2018) 10 SCC 1.

exclusion, and bias in public and private life, at work, at home, at school, and in health care.<sup>2</sup>

The physical manifestations of this discrimination paint a bleak picture of the day-to-day reality that LGBTQ+ individuals face. Common experiences include discrimination in securing access to public accommodations, health care facilities, government offices, and transportation. Forms of discrimination include the exclusion and denial of entry, unequal or unfair treatment, harassment, and violence.<sup>3</sup> Social trepidation and stigma around sexual orientation and gender identity also contribute to workplace discrimination. In the UK, a transgender employee was awarded damages for harassment and direct discrimination due to wrongful disclosure of gender reassignment status.<sup>4</sup> Directions were issued to formulate a written policy on dealing with transgender staff, including confidentiality of sensitive data and amendment of the company's harassment and equity policies. This attitude has not been reflected by Indian courts yet. LGBTQ+ individuals consciously make efforts to seek a job where they can be themselves; contrarily they must be "discreet" about their identity. Individuals who do not have the option of being in the closet have few available job opportunities irrespective of their educational qualifications. Even for the "discreet" members of the LGBTQ+ community, their employer can fire them on finding out about their identity.

Availing medical services also poses a significant challenge before LGBTQ+ individuals. The World Health Organization has noted that transgender and gender non-conforming people worldwide experience substantial health disparities and barriers in accessing appropriate health services.<sup>5</sup> These obstacles are prevalent in access to general health

---

<sup>2</sup> United Nations Human Rights Council, *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law*, OHCHR, U.N. Doc. HR/PUB/12/06/Rev.1 (2019).

<sup>3</sup> Equality Act (Bill), 2019-20 (H.R.5 – 116th Congress).

<sup>4</sup> *Souza v Primark Stores Ltd* [2017] 12 WLUK 680.

<sup>5</sup> WHO, "Sexual Health, Human Rights and the Law" 24 (2015).

services, as well as access to gender-affirming care. Trans-womxn may require a prostate examination and trans-men may require cervical smears, denial of which has led to the death of trans people.<sup>6</sup> Even if the treatment is made available to them, there is no promise that it will be appropriate for them. Trans people may not fit into the binary segregation of males and females, which leads to significant barriers due to medical professionals not being trained to account for trans people.<sup>7</sup> Furthermore, insurance policies are unlikely to cover needs specific to LGBTQ+ individuals like sex affirmation treatments, PrEP prescriptions, therapies, etc. For LGBTQ+ people, a breach of confidentiality can greatly increase the risk of exposure to violence and discrimination.<sup>8</sup>

Housing discrimination against LGBTQ+ individuals leads to denial of entry, absence of access to safe spaces, hostile accommodations, and a looming threat of eviction. Court has had to order police protection to a live-in couple who receiving death threats from their parents.<sup>9</sup> Such discrimination against LGBTQ+ individuals has a differential impact on those who come from other marginalized communities. An unmarried womxn, a Muslim, or a caste minority who finds it difficult to get accommodation in Mumbai may be relegated to certain parts of the city where the person may face further difficulty on account of their sexual orientation or gender identity.<sup>10</sup> This discrimination

---

<sup>6</sup> UNDP, "Discussion paper: trans health and human rights" 17 (2013).

<sup>7</sup> Grant, Jaime M., Lisa A. Mottet, et.al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. (National Center for Transgender Equality and National Gay and Lesbian Task Force, Washington, 2011)

<sup>8</sup> Supra note 3 at 16; Supra note 4 at 17; United Nations Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, OHCHR, U.N. Doc. A/HRC/14/20 (April 27, 2010).

<sup>9</sup> Paramjit Kaur v. State of Punjab AIR 2002 P&H 241.

<sup>10</sup> Naresh Kamath, "Housing prejudice: Discrimination rampant in resale and rental flats in Mumbai", *Hindustan Times*, June 03, 2015, available at <<https://www.hindustantimes.com/mumbai/housing-prejudice-discrimination-rampant-in-resale-and-rental-flats-in-mumbai/story->

extends to securing access to public accommodations—including restaurants, senior centers, stores, places of or establishments that provide entertainment, health care facilities, shelters, government offices, youth service providers, and transportation. Additionally, even while enforcing anti-discrimination statutes, some courts allow exceptions based on religious beliefs.<sup>11</sup>

Educational institutions actively minimize the visibility and participation in academia of LGBTQ+ students, who consequently suffer from restrictions on their freedom to self-expression. They are subject to harassment and intolerance by their peers, staff, and the school administration. 9 out of 10 secondary school principals report that their students have been harassed because they are or are perceived to be gay, lesbian, or bisexual.<sup>12</sup>

#### INTERSECTIONAL DISCRIMINATION

Any anti-discrimination statute must be individual-centric to allow a remedy against every single instance of discrimination without having to prove a pattern of class discrimination. This becomes more evident in instances of intersectional discrimination where a person is discriminated against because of an added classification like caste or sex.

In a US Case, black women alleged discrimination by their employer.<sup>13</sup> The employer showed the court that there were many black people he had employed and many

---

2exjyoFnK4oEr15LYOVcwL.html> (September 21, 2020); Saurav Datta, “How Mumbai flat owners keep Muslims out by using a law that embodies openness”, *Scroll.in*, March 09, 2014, available at<<https://scroll.in/article/657941/how-mumbai-flat-owners-keep-muslims-out-by-using-a-law-that-embodies-openness>> (September 21, 2020).

<sup>11</sup> *Lee v Ashers Baking Co Ltd* [2018] UKSC 49.

<sup>12</sup> GLSEN and Harris Interactive, *The Principal's Perspective: School Safety, Bullying and Harassment* (New York, 2008).

<sup>13</sup> *Moore v. Huges Helicopter*, 708 F2d 475 (1983).

women that he had employed. However, these black people were almost all men and the women were almost all white. The court failed to see 'black women' as a class of its own thus leaving them without a remedy.

Similarly, LGBTQ+ people hail from all castes, religions, genders, regions, economic strata, and any other classification imaginable. Therefore, an anti-discrimination statute must declare that it is not inconsistent with any other classification that may tend to disadvantage a person either on its own or when combined with being LGBTQ+.

Interestingly, Article 15 of the Constitution<sup>14</sup> accounts for intersectional discrimination by using the phrase "*or any of them*" after listing the grounds of non-discrimination. This implies that one may not be discriminated against on one or more grounds taken together. The absence of such intersectionality would reduce the spectrum of sexuality and gender identity to a privileged idea, by allowing unique discriminations against people from multiple social groups.

#### SUGGESTED FRAMEWORK

Any anti-discrimination legislation must be inclusive and not exhaustive while protecting various attributes of an individual's identity to ensure that every person is under its purview. It must recognize and provide remedies for both civil and criminal instances of discrimination. The 'beyond reasonable doubt' standard that criminal statutes apply would be burdensome in some instances and therefore significantly reduce access to remedies for aggrieved persons. Moreover, some discriminatory acts create a chilling effect without amounting to discrimination of a criminal nature. For example, some forms of sexual harassment at the workplace, passing disparaging comments that may create unsafe work or social environments for LGBTQ+ people, etc. To criminalize all instances of discrimination would amount to putting LGBTQ+ people into cages in the name of putting them on a pedestal.

---

<sup>14</sup> The Constitution of India, art. 15.

The POSH Act<sup>15</sup> could arguably cover some forms of discrimination given the broad and interpretative meaning of 'women' to cover trans women, intersex, and gender non-conforming people. But a 'broad interpretation' is at the mercy of the Courts since the statute does not directly include these groups within the definition of a 'woman'.

While drafting these anti-discrimination laws, regard must be had to the history and context within which these diverse communities operate; and the autonomy and dignity of LGBTQ+ individuals must be respected. Enacting legislation keeping the aforementioned in abeyance has the effect of patronizing the experiences of LGBTQ+ individuals. The recent Transgender Act<sup>16</sup> is a testament to this phenomenon. The Act criminalizes begging and makes provision for mandatory housing by ignoring the rich *guru-chela* traditions of the *hijra* community that finds endearment in asking for alms in return for blessing (*badhai*) and prefer to live in communal housing arrangements with their *gurus*.

While making criminal anti-discrimination provisions it must be kept in mind that the fulcrum of equalizing criminal legislation is to recognize the inherent imbalance in society and provide equitable measures and procedures to achieve the same. These laws recognize the discouraging effect that application of the standard onus of proof would create in the access to justice. Therefore, to protect vulnerable classes from exploitation, reverse onus clauses are placed in criminal statutes such as POCSO<sup>17</sup> and rape laws. In these clauses, the burden of proving innocence is shifted on to the defendant or the accused after certain foundational facts have been proven by the prosecution.

---

<sup>15</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Act 14 of 2013).

<sup>16</sup> Transgender Persons (Protection of Rights) Act, 2019 (Transgender Persons (Act 40 of 2019)).

<sup>17</sup> The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012).

## CAUTIOUS REALISM

Mere enactment of legislation would be inadequate to bring about the desired change on the ground. Accessibility and effective enforcement of the law are crucial. Its interpretation must be broad, keeping in mind the object and the spirit of the law. This legislation may fall short of creating grassroots awareness to root out implicit biases and end discrimination in its true sense. Policy measures that harbor discourse and a positive attitude towards the LGBTQ+ community must complement the enforcement of anti-discrimination legislation.



# J. RAISING THE AGE FOR MARRIAGE FOR WOMEN: VIEW

Authored: Aditi Mishra & Vaishnavi Jadhav (III BA LL.B)

---

Marriage is one of the oldest social institutions and can be defined as religious or legal bond or commitment between a man and a woman. While this institution is fundamental to most societies around the world its importance in the context of Indian societies is unmatched. The society-instilled idea that an individual is incomplete without marriage is a strong factor that drives a lot of people into it and hence, Indians hold this arrangement in high regards. Marriage has the potential to change people's lives and therefore determining the legal age of marriage is of utmost importance. There is a presumption of capacity in adulthood and a presumption of incapacity in childhood. That is why the setting of minimum ages is the dominant way of determining when people acquire the capacity to make certain decisions. However, it is clearly harder to prove competence than incompetence, and age is an arbitrary way of determining capacity.

## BENEFICIAL FOR WOMEN OF THE COUNTRY

Honourable Prime Minister Narendra Modi, in his Independence Day on August 15<sup>th</sup> 2020 speech emphasized on raising the legal age of marriage for women to 21 years. This was welcomed by many as a progressive and a step towards equality however, like every coin has two sides, this decision may also have a disproportionate impact.

It is important for any given country to have a minimum age of marriage as this legally protects children from abuse, harm, violence and exploitation (especially sexual exploitation). Even though the legal age of marriage for girls was raised from 15 to 18 four decades ago, it remains lower than the legal age of marriage for boys which is, 21. The current disposition is deeply offensive to women because it is based on the idea that women should marry early, rather than study and work to attain financial security.

This idea of security is a thinly - veiled attempt to control women's bodies and choices, as it comes with the unspoken debt of being financially dependent on male providers in their families. As a result, the current law on the legal age of marriage renders men and women as unequal, further perpetuating their respective roles as breadwinners and birth-givers. The girls' guardians merely change from their fathers to husbands once they have attained puberty and given evidence of their fertility, thus becoming one of the fundamental reasons as to why a legal age of marriage was pushed for.

It is an understatement to say that the ages 18 to 21 are among the most formative years in any human being's life. Critically, it is time when one acquires a college degree, a rite of passage to better employment and earning prospects. The law determining the legal age of marriage assumes that women should be exempt from the "drudgery" of having to earn for a living, and instead encouraged to drop out of high school, only to perform unpaid, lifelong labor. As a result, nearly half the women in India are married and have their first child by the age of 20. The average Indian woman is sentenced to a life of Sisyphean tasks, performing repetitive, invisible, and un-quantified work. With no level of income or literacy, she is infantilized into being dependent. In the words of Simone de Beauvoir, *"her wings are cut and then she is blamed for not knowing how to fly."*<sup>1</sup>

The different legal standards for the age of men and women to marry have been a subject of debate since long. The laws are a codification of customs and religious practices which stems from patriarchy. Women are appraised as a burden or liability in Indian families. They are married off as soon as they complete the legal age or in many cases sooner than the legal age, thereupon missing many opportunities coming their way. Upadhyaya, the petitioner in the Delhi High Court case, has challenged the law and rightly so on the grounds of discrimination. He asserts that Articles 14 and 21 of the

---

<sup>1</sup> Mallika Pal , "Will Increasing Legal Age of Marriage For Girls Address Gender Inequity In India"

*Feminism In India*, Aug. 25 , 2020

Constitution, which guarantee the right to equality and the right to live with dignity are violated by having different legal age for men and women to marry.<sup>2</sup>

This law also nourishes the stereotype that wives must be younger than their husbands. The law commission in their report said that the difference in age for husband and wife has no basis in law as spouses entering into a marriage are by all means equals and their partnership must also be of that between equals.

#### EDUCATION

Raising women's legal age for marriage will surely enhance more opportunity to pursue higher education which is also an opportunity to support them, to be financially independent; before burdening them with spousal duties and motherhood. Women are often forced to drop out of schools or college after they are married as the duty of women is no more to educate and empower herself but to bear children and take care of the family. Raising the age of marriage for women will give them a window to complete their education, will add more skills building a foundation to their career so that they don't necessarily have to be financially dependent on the male member of the family.

#### HEALTH

From bringing in gender-neutrality to reduce the risks of early pregnancy among women, there are many arguments in favor of increasing the minimum age of marriage of women. Early pregnancy is associated with increased child mortality rates and affects the health of the mother. Decision to increase the marital age of women will help understand the world with a different more matured viewpoint. It is scientifically proven that the physical growth of a girl is completed by 21 years and hence if she marries after that she is physically and mentally in a better zone.

---

<sup>2</sup> Apurva Vishwanath "Explained: Why is age of marriage different for men and women, the law, the debate" The Indian Express, April 22, 2019.

The decision to increase the minimum age of marriage will also affect the Maternal Mortality Rate and Neonatal Mortality Rate. Mature mother will take mature, informed decisions hence she will plan her pregnancy and take due care and precautions during pregnancy thus, in the long run, we will see a drop in MMR and NMR.<sup>3</sup> A girl's biological clock is best between 25-30 years. If she conceives at this age, chances of medical complications are minimal, the spacing between children is comfortably possible and her health is also not compromised.

#### DIVIDED OPINION OF THE EXPERTS

Supporters of the review say it may help keep the population in check and prevent women from being forced into early motherhood and its multiple complications, while opponents fear it will spell chaos. Critics of the idea cite the example of women who become sexually active at 18, and say any increase in the age of marriage may <sup>4</sup>push more of them out of the formal reproductive healthcare framework, given the stigma sex still courts in India.

It may also lead to an increase in the number of child marriage cases, they say, since the proposal also seeks to bring women aged 18-21 years into the bracket.

In India, child marriages are voidable and not void by default. The apex court, in 2017, had stated that intercourse with a minor wife is rape. Therefore, by this rationale, marriage with a girl of less than 18 years is not illegal, but sex with her is. Increasing the legal age to 21 would only result in confusion.

---

<sup>3</sup>Rudrani Gupta "The Decision to Raise Women's Legal Marriage Age Should be Linked to Eductaion" she the people, August 28, 2020

<sup>4</sup>

## CONCLUSION

The aforementioned assertions add more to the favor of raising the legal age of marriage of girls than to keep it unchanged. It will aid the women of India stand on their own feet, give them more power, and build them more opportunities to be financially independent and hence also decreasing the injustice women face in the holy tie of marriage. Marriage should be between equals. No person should have an upper hand over the other. Raising the legal age for marriage for women will succor women to alleviate their wounded existence and make their voice louder.

# K. RAISING THE AGE FOR MARRIAGE FOR WOMEN: COUNTERVIEW

AUTHORED BY: KRATIKA SAXENA & SANCHITA PATHAK (IV BA LL.B)

---

## INTRODUCTION

Marriages in India are considered as a sacrosanct union of two lives and an important social institution. Since 1978 (after the amendment of The Child Marriage Restraint Act 1929, also known as Sarda Act of 1929), the legal age to marry in India is 18 for females and 21 for males. Prohibition of Child Marriage Act, 2006 defines "child" as a female under the age of 18 and a male under the age of 21 and prohibits marriages where either of the contracting parties is a child<sup>1</sup>. A similar age criterion has been provided under the Hindu Marriage Act, 1955<sup>2</sup>. However, Prime Minister Narendra Modi, in his Independence Day speech on 15th August 2020, announced that the government will soon decide on raising the age of marriage for women from 18 to 21.

Earlier in February, Finance Minister Nirmala Sitharaman during the budget speech proposed the appointment of a task-force that will present its recommendations in a time frame of six months. In June, the Women and Child Development Ministry set up a committee headed by MP Jaya Jaitley for reviewing whether or not the legal age of marriage for women should be increased.

Let us critically analyze the proposed amendment by the Government by, firstly, looking at the major factors due to which women are forced into early marriages.

---

<sup>1</sup>The Prohibition of Child Marriage Act, 2006 (Act 6 of 2007), s. 2(a), 2(b).

<sup>2</sup>The Hindu Marriage Act, 1955 (Act 25 of 1955), s. 5(iii).

- The limited financial conditions of families result in the parents forcing their daughters to get married so that their financial responsibility to maintain them is eliminated.
- Such families tend to discourage their daughters from studying and getting educated. As a result, the families prefer if the girl is married and someone else's responsibility.
- The lack of education hinders women from applying for jobs and earning a living. This makes the women dependent on their families completely and they cannot contribute to the income of the family.
- In some places, it is still a societal tendency to consider girls as a burden to their families and they are often termed as 'liability' to them.

#### CRITICISM TO THE RATIONALE

In the budget session of 2020 while proposing the setting-up of a task force, Smt. Nirmala Sitharaman mentioned the reasons for reviewing the age of marriage for girls. The opportunities of higher education for women, as well as the imperatives of lowering maternal mortality rate and improvement of nutrition levels, are some of the factors that she insisted to be taken into consideration while seeing the issue of the age of a girl entering into motherhood<sup>3</sup>.

However, increasing the age of women for marriage is not sufficient for facilitating the educational opportunities for them. Instead, efforts must be taken to improve the quality of education, and the importance of education of girls should be propagated.

Secondly, the maternal mortality rate can be lowered with the assistance of skilled health professionals, and better health facilities. It is not essentially affected by the

---

<sup>3</sup>Budget 2020: Nirmala Sitharaman's budget speech, available at: <https://www.livemint.com/budget/news/budget-2020-full-text-of-nirmala-sitharaman-s-budget-speech-11580547114996.html> (visited on September 21, 2020)

increase in the age of marriage of girls<sup>4</sup>. There are no statistics that prove a direct relationship between age-specific maternal mortality rate and the demographic of women affected in India. It is, therefore, futile to draw a comparison between the same.

#### RAMIFICATIONS OF THE PROPOSED PLAN

- In India, the child marriage law is misused by parents as a tool to control their eloped daughters and to punish boys/men whom the daughters chose as their husbands. Increasing the age of marriage to 21 years would render such girls to abusive parental control and persecution for a longer period, as they will not have a say in their personal lives.

- According to research conducted by 'Concerned for Working Children'<sup>5</sup>, the fear among families that the girl would develop relationships of her own choice leads them to coerce the girl into marriage with a man of their personal choice. After increasing the age of marriage to 21, if a woman does develop a relationship with someone of her choice, cases of honor killings might increase as the families will not approve of the bond. So merely increasing the age of marriage is not enough as most of the women will still not be given a choice as to whom they want to marry.

- There are regions in the country where having a girl child is still considered a huge burden on the families. The girls who survive female foeticide are not given equal opportunities and are forced into early marriages. Such families would feel more burdened if the marriageable age is increased as they will have to handle her responsibility for 3 more years and this would lead to an increase in female foeticide. It can also be observed that despite child marriages being unlawful, they still are

---

<sup>4</sup>Maternal Health, available at: <https://www.unicef.org/india/what-we-do/maternal-health> (visited on September 22, 2020)

<sup>5</sup>Young Voices- National Report, available at: <http://www.concernedforworkingchildren.org/wp-content/uploads/Final-National-Report-for-submission-to-TF.pdf> (visited on September 22, 2020)



prevalent in some areas and such families would keep on practicing the same to release the burden of the girl child.

#### SUGGESTED ALTERNATIVES

- The Law Commission Consultation Paper on reforming family law of 2018, recommended a uniform age of marriage for boys and girls at 18 years<sup>6</sup>. It can be observed that The Indian Majority Act, 1875 states 18 years of age as the age of maturity<sup>7</sup>. Various legislations give rights to people once they have attained the age of 18. They are allowed to enter into contracts and choose the Government for their country. It shows their competence as an individual and hence, they can also choose to enter into the sacred relation of marriage at the age of 18. The United Nations' CEDAW (Convention on the Elimination of all Forms of Discrimination Against Women) Committee has also recommended 18 years as the age of marriage<sup>8</sup>.
- The quality of education is of great concern for the girls. There is a dire need to make higher education more accessible to women coming from financially weaker backgrounds. Awareness should be created amongst people regarding the education of women. The Government should provide incentives to families or women getting educated to promote literacy and independence among women.
- Employment opportunities should be generated so that women can be financially independent and make use of their knowledge and education. It will also

---

<sup>6</sup>Law Commission of India Consultation Paper on Reform of Family Law, 2018, available at: <http://www.lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf> (visited on September 21, 2020)

<sup>7</sup> The Indian Majority Act, 1875 (Act 9 of 1875), s. 3.

<sup>8</sup>CEDAW, General Recommendation No. 21 (13th session, 1994), available at: <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> (visited on September 22, 2020)

help them to not be considered as a burden. This will promote equality and upliftment of women.

#### CONCLUSION

It can thus be concluded that increasing the age for marriage in itself will not be beneficial to curb the existing problems faced by women. There is a need to incorporate various other societal reforms to uplift women and ensure equality. Initially, the reforms should be implemented and then if the need arises, the age for marriage can be considered for alteration. It is pertinent to note that increasing the age for marriage is not a primary step towards achieving the goal of equality but it might come at a later stage. The focus should be kept on educating women, spreading awareness about the rights they have, and generating employment opportunities to make them financially independent. It is extremely important to understand that the age of 18 years for women to get married is not mandatory and merely a lower limit has been set for the institution of marriage.

# L. OBJECTION YOUR HONOUR! SURENDRA MOHAN VS. STATE OF TAMIL NADU

- AUTHORED BY VISHAKHA PATIL (III BA LL.B)

---

## INTRODUCTION

In light of becoming a signatory to the “ Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region”, India enacted the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter “the Act”) which came into force in February 1996. This act aimed at safeguarding equal opportunities for the disabled in terms of education, employment, infrastructural assistance and right to preserve individual liberty and placed responsibility on the Central government and State Government to ensure this.

To improve the employment opportunities available to the disabled, Section 32 of the Act required the appropriate government to identify posts which can be reserved for persons with disabilities while Section 33 of the Act requires to reserve not less than 3% of seats for those class of persons with a disability, but the government may exempt certain establishments from this provision depending on the type of work carried on.

## FACTS OF THE CASE AND ARGUMENTS ADVANCED

In lieu of section 32 of the Act, the state government of Tamil Nadu vide a government order dated 11.04.2005 identified 117 categories of posts as suitable for reservation. While exempting the post of District Judge (Entry level) and Civil Judge in the Tamil Nadu State Judicial Service for those completely blind and impaired. The Tamil Nadu Public Service Commission (“TNPSC”) receiving a requisition from the State government for filling up 162 posts of Civil Judge (Junior Division), decided that only

those partially blind and deaf will be eligible for the position who fall in the category of the percentage of disability as 40-50. This was approved by the High Court of Madras and State of Tamil Nadu.

The appellant, a practising advocate, Mr V. Surendra Mohan in response to the notification by TNPSC applied online for the post of Civil Judge and in the column of “percentage of disability” selected the category of more than 40%. After completion of the written examination, the appellant was required to submit a self-attested copy of the certificate of physical disability obtained from the Medical Board specifying that his disability would not render him incapable of efficiently discharging official duties for the post of Civil Judge. The disability certificate issued to the appellant mentioned his disability as 70%. Upon omission of his name from the list of selected candidates for the oral rounds, the appellant approached the Madras High Court in the year 2015. The High Court permitted him to take the vivas, however, his results were to remain sealed until further orders were passed. The Commission went ahead with the further proceedings and the appellant was not selected.

The appellant amended the previous writ petition to challenge the letter issued by the State government that approved TNPSC’s decision on fixating the criteria to 40-50% disability. The Madras High Court upheld the validity of TNPSC’s decision and the State Government’s approval and held the appellant as ineligible to appear for the selection on account of his 70% disability. In 2019, as his last resort, he appealed to the Supreme Court of India under Special Leave Petition.

The appellant argued that with 70% disability, he was already functioning effectively as Assistant Prosecuting Officer and was competent to appear for the selection procedure. He had wrongly been declared ineligible as his marks in the written test and the interview entitled him to be selected for the post of civil judge. He relied on the Act for the absence of any provision for such restriction in terms of percentage of disability. The

TNPSC had only exempted the category of complete blind and impaired and 70% disability did not make the appellant completely blind and ineligible for appointment. Further, no Expert Committee was set up to determine that those who suffer 40-50% disability are the only ones capable of discharging functions of the post of civil judge, nor does the High Court have the power to determine such a category as that would be beyond the scope of a High Court to legislate on such a policy.

The Counsel appearing for the state put forward that the appellant only challenged the state's approval without challenging the initial notification by TNPSC regarding the criteria; therefore, the appellant cannot contend that he is eligible. He further submitted that the Medical certificate submitted by the appellant does not indicate that he is qualified to discharge the duties of a civil judge.

Amongst the issues raised by the Supreme Court, the most pertinent one being "Whether the condition of 40%-50% disability for partially blind and partially deaf categories of disabled persons is a valid condition and whether it violated the Act?"

Section 2(t) of the Act defines 'person with disability' as a person suffering from not less than 40% of any disability as certified by a medical authority. This sets the lower limit for who can benefit from reservation under this Act. The Supreme Court highlighted that in the current case there is no issue about complete blindness or impairment as TNPSC had already exempted them under section 33 of the Act. As the concern is regarding those who are partially blind but not completely and the term "partially blind' has not been defined in the Act, the Court considered the context of the situation i.e. the nature of the job. One of the government orders explained the physical requirements for the post of Civil Judges, wherein a judicial officer has to possess a reasonable limit of faculties of hearing, sight and speech to hear cases and write judgements. The Court upheld the condition of a limit of 50% disability in hearing

impairment or visual impairment to be eligible for the post as “a legitimate restriction i.e. fair, logical and reasonable<sup>1</sup>”.

The validity of this condition was justified along with the competence to make such a condition and if the TNPSC, State Government and the High Court have a consensus view regarding it then it must be valid. The Constitution of India gives respective High courts the control over judicial services. The recruitment for the post of civil judges was undertaken according to the Rules 2007, which were framed by the Governor of Tamil Nadu in consultation with the High Court of Madras and TNPSC. As judicial service is part of public service is included in the List II of the 7th schedule of the Constitution, therefore the state has the competence to legislate on state public services (reframe). Thus, the state government was fully competent to take any executive decision concerning recruitment on the post of Civil Judge supplementing the statutory rules, 2007.

#### ANALYSIS

Though the High Courts are well aware of the requirements for the appointment in the judicial services and the Public Commission and State government have the competence to determine the conditions for recruitment, neither party possesses the expertise or the power to determine what percentage of disability entails as partial blindness or impairment. The criterion of 40-50% is an arbitrary figure determined without any basis or justification. The TNPSC also exempted those who are completely blind and impaired under the provision of section 33, on the grounds of the nature of work entailed. But, they have no evidence to support the claim that those who are 50% blind are more competent to discharge the functions. This only creates discrimination between different degrees of disabilities and defeats the purpose of the Act. It also creates the illusion that it is only based on their disability that these people become

---

<sup>1</sup>Paragraph 40 of Civil Appeal No. 83 of 2019

eligible for future employment prospects and not their qualifications or expertise in any field.

We could draw attention to another case of National Association of the Deaf vs. Union of India<sup>2</sup>, which allowed those suffering from hearing impairment to be granted driving licenses. Herein, the petitioner contended that the authorities cannot deny licenses merely on the ground of hearing impairment without any specific medical opinion or aid of any certificate which states how deafness impairs or affects the driving skills of an applicant. Though the court recognised that the reservation for a post and grant of license are two different facets, the issue remains about the nexus between the disability and ability to discharge functions. The Court upheld the statutory requirement of passing the test to acquire a license and whoever satisfies the necessary criteria should be allowed to obtain the license irrespective of if they have a medical certificate or not.

The nexus between the percentage of disability and ability to discharge functions as a judicial officer is irrational. This can be supported with a couple of examples like Justice Zakaria Mohammad Yacoob, who became blind when he was 16 months due to meningitis went on to become a part of the Constitutional Court of South Africa and managed his profession with the help of a very efficient, legally trained Personal Assitant, a talking computer, Braille printer and a note taker that converted text into Braille and vice-versa. Tamil Nadu, itself had their first visually impaired judicial officer, Justice T. Chakkaravarthy in the year 2009 who currently functions as III Additional District Munsif.

#### CONCLUSION

Cases like the current one highlight the lacunae in the objective of the legislation and their practical implementation. They also bring to light the backwardness of the government in terms of infrastructural accommodation of those who are disabled which

---

<sup>2</sup> W.P.(C) 10849/2009

could be one of the reasons for the recruiters to create such conditions and barriers. The reservation of seats should not be to do it for the sake of the statutory provision or find the easiest path to fill up the seats, but should rather focus on encouraging such disadvantaged people to look beyond their disability and receive equal opportunities as those of others. We need a paradigm shift from viewing this issue only through the lens of the medical model and move towards accepting the social model of disability, wherein we don't treat their impairment as a disability and aid in removing the barriers created by disablism.



# M. PUBLIC LAW IN THE NEWS

COMPILED BY: NIHARCHITRE V BA LL.B

---

## SUPREME COURT IN THE NEWS

### 1. STATE OF PUNJAB V. DAVINDER SINGH<sup>1</sup>

While hearing the constitutional validity of Section 4(5) of the Punjab Scheduled Caste and Backward Classes (Reservation in Services) Act, 2006 (for short, 'the Punjab Act'), the 5-judge bench of the Supreme Court noticed that the decision in E.V. Chinnaiah v. State of A.P. In the EV Chinnaiah judgment held that the Scheduled Castes form homogenous classes and there cannot be any sub-division. The judgment will now be revisited by a bench of 7 or more judgment and is placed before the Chief Justice for appropriate action.

### 2. TN MEDICAL OFFICERS ASSOCIATION V. UNION OF INDIA<sup>2</sup>

The 5-judge Constitution bench of Arun Mishra, Indira Banerjee, Vineet Saran, MR Shah and Aniruddha Bose, JJ has held that the Medical Council of India has no power to make any reservation for in-service candidates in Post Graduate Medical Course in States and that only States are allowed to grant the benefit of reservation of seats to in-service doctors in the National Eligibility cum Entrance Test (NEET) postgraduate degree courses.

### 3. MUKESH V. STATE (NARCOTIC BRANCH OF DELHI)<sup>3</sup>

The 5-judge Constitution bench of Arun Mishra, Indira Banerjee, Vineet Saran, MR Shah and S. Ravindra Bhat, JJ has held that the accused under the Narcotic Drugs and

---

<sup>1</sup>2020 SCC OnLine SC 677

<sup>2</sup>2020 SCC online SC 699

<sup>3</sup> 2020 SCC OnLine SC 700

Psychotropic Substances Act, 1985 (NDPS Act) is not entitled to an acquittal as a blanket rule merely because the complainant is the investigating officer.

#### 4. HARI KRISHNA MANDIR TRUST V. STATE OF MAHARASHTRA<sup>4</sup>

The bench of Indira Banerjee and Indu Malhotra, JJ that the Courts are duty bound to issue a writ of Mandamus for enforcement of a public duty. The Court was hearing the case pertaining to a private road in Pune being declared as being owned by Pune Municipal Corporation whilst in the property records, there was no private road. It further said that High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. *Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles.*

#### 5. VINEETA SHARMA V. RAKESH SHARMA<sup>5</sup>

The 3-judge bench of Arun Mishra, SA Nazeer and MR Shah, JJ has held that **daughters have right in coparcenary by birth** and that it is not necessary that the father coparcener should be living when the Hindu Succession (Amendment) Act, 2005 came into force. The Court was dealing with a reference relating to the interpretation of section 6 of the Hindu Succession Act, 1956 as amended by Hindu Succession (Amendment) Act, 2005 in view of the conflicting verdicts rendered in two Division Bench judgments in **Prakash v. Phulavati, (2016) 2 SCC 36** and **Danamma v. Amar, (2018) 3 SCC 343**.

#### 6. NAZIR MOHAMED V. J. KAMALA<sup>6</sup>

---

<sup>4</sup>2020 SCC OnLine SC 631

<sup>5</sup>2020 SCC OnLine SC 641

<sup>6</sup> 2020 SCC OnLine SC 676

The bench of Navin Sinha and Indira Banerjee, JJ has held that when no substantial question of law is formulated, but a Second Appeal is decided by the High Court, the judgment of the High Court is vitiated in law. Formulation of substantial question of law is mandatory and the mere reference to the ground mentioned in Memorandum of Second Appeal cannot satisfy the mandate of Section 100 of the CPC.

It said that for entertaining and deciding a second appeal, whenever a question is framed by the High Court, the High Court will have to show that the question is one of law and not just a question of facts, it also has to show that the question is a substantial question of law.

#### **7. L.R. BROTHERS INDO FLORA LTD V. COMMISSIONER OF CENTRAL EXCISE<sup>7</sup>**

The Court while hearing an appeal from a CESTAT order whereby the customs duty levied upon the appellant on the sale of cut flowers within the Domestic Tariff Area had been confirmed by the Tribunal held that for application of a subsequent legislation retrospectively it is necessary to show that the previous legislation had any omission or ambiguity or it was intended to explain an earlier act. *In absence of the above ingredients, legislation cannot be regarded as having retrospective effect.*

#### **8. DR.JAISHRI LAXMANRAO PATIL V. THE CHIEF MINISTER<sup>8</sup>**

The three judge bench of the Court has stayed the implementation of the Maharashtra State Reservation (of seats for admission in Educational Institutions in the State and for appointments in the Public Services and posts under the State) for socially and educationally Backward Classes (SEBC) Act, 2018. It has referred to the substantial question of the interpretation of the provisions inserted by the Constitution (102nd Amendment) Act, 2018 to a larger bench.

---

<sup>7</sup> 2020 SCC OnLine SC 705

<sup>8</sup> 2020 SCC OnLine SC 727

### **9.ABHILASHA V. PRAKASH<sup>9</sup>**

The three judge bench of the Supreme Court held that an unmarried Hindu daughter can claim maintenance from her father till she is married relying on Section 20(3) of the Hindu Adoptions & Maintenance Act, 1956, provided she pleads and proves that she is unable to maintain herself, for enforcement of which right her application/suit has to be under Section 20 of Act, 1956.

### **HIGH COURT IN THE NEWS**

#### **1. MOHEMMEDBAVA V. STATE OF KERALA<sup>10</sup>**

The Kerala High Court dismissed a writ petition with all interlocutory applications closed. The petitioner filed a writ petition requesting the Court to issue a Writ of Mandamus against the respondent authority to ban the respondent broadcasting from telecasting the TV serial “Koodathai: The Game of Death”. The serial fictionalised the incidents relating to the commission of murder of six people at ‘Koodathai’ in Kozhikode, in which the petitioner is a key eye-witness.

#### **2. SURINDER SINGH V. UNION TERRITORY OF J&K<sup>11</sup>**

The High Court of J&K dismissed the writ petition and set aside the detention order passed by the government of J&K. Dismissing the writ petition the court observed that mere reproduction of police dossier in detention order cannot justify judicial application of mind and is reflective of callous attitude of authorities.

#### **3. RAJNI HARIOM SHARMA V. UNION OF INDIA<sup>12</sup>**

---

<sup>9</sup> 2020 SCC OnLine SC 736

<sup>10</sup> 2020 SCC OnLine Ker 3136

<sup>11</sup> 2020 SCC OnLine J&K 394

In a landmark judgment, the Bombay High Court appointed the wife as the guardian of her comatose husband. With no statutory provision on appointment of guardian, the petitioner invoked art 226 of the Constitution. Granting the partial relief as appointment of guardian under the monitoring of designated authority.

#### **4. DR IMRANA KHAN V. STATE OF U.P.<sup>13</sup>**

While hearing a petition for quashing of FIR, the Allahabad High Court observed that freedom of speech cannot be extended to an extent which might be prejudicial to the national interest. The High Court refused to quash the FIR stating that the allegations against the petitioner are serious.

---

<sup>12</sup>2020 SCC OnLine Bom 880

<sup>13</sup> Criminal Misc. WP No. 8632 of 2020, decided on 03-09-2020

# N. CASES ACROSS THE POND

COMPILED BY: SOHAM BHALERAO (V BA LL.B)

SR NO.	DATE	NAME OF THE CASE AND COURT	JUDGEMENT
1.	24/8/2020	Mohammad Abbas v. The State	<p>In this case, The Petitioner had moved the Supreme Court of Pakistan in appeal against a High Court order holding him guilty for murdering his wife. The Petitioner argued that the murder was committed in the name of honour and hence should deserve lesser punishment as enshrined in the Pakistan Penal Code.</p> <p>The Court held that <i>"the killing of women in the name of honour had never been an honourable practice and that such murders should not be categorised as honour killings."</i></p> <p>It further held that <i>"The Constitution mandates that 'tolerance and social justice, as enunciated by Islam, shall be fully observed' Almighty Allah commends humility, loves kindness and calls upon his slaves to overlook human faults and cultivate gracious forgiveness. One of the Principles of Policy set out in the Constitution requires that, Steps shall be taken to ensure full participation of women in all spheres of national life."</i></p>
2.	15/6/202	<b>Gerald Lynn Bostock Vs Clayton County</b>	In this case, a petition was filed by Gerald

			<p>Bostock who was fired by his employer simply for being homosexual or transgender. The main issue was whether discrimination based on gender identity or sexual orientation was protected by the Civil Rights Act of 1964.</p> <p>The US Supreme Court held in a 6-3 majority that Civil Rights Act of 1964 prohibiting workplace discrimination on the basis of sex also protects employees based on their sexual orientation or gender identity. It was held that "<i>When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision</i>".</p>
3.	30/3/2020	Ong Ming Johnson v. Attorney General	<p>In this case, the Singapore Supreme Court refused to strike down a law criminalizing male homosexual sex as unconstitutional. The court held that the provision continues to serve its purpose of safeguarding public morality by showing societal moral disapproval of male</p>

			<p>homosexual acts. It observed that the provision does not fail the intelligible differentia test as the test in itself had a very low threshold and a law had to be unreasonable as to be illogical and/or incoherent to fail the said test. The differentia in the present case was found to be not unreasonable as it is targeted at homosexual acts between males, as opposed to sexual acts between females or between males and females. Moreover, the Court found it neither under-inclusive or over-exclusive.</p>
4.	14/7/2020	Malik Ubaidullah vs Government of Punjab	<p>In this case, the issue at hand for the Supreme Court of Pakistan was interpretation and applicability of the 'Disability Quota' for employment under the Disabled Persons (Employment and Rehabilitation) Ordinance 1981 (Ordinance).</p> <p>The Court held that <i>"One of the major difficulties faced by persons with disabilities is that employers have the erroneous assumption that these people will probably underperform in most areas of their duties – something which is actually not the case. Another plausible issue is that when the majority of workplaces are not made accessible to people with disabilities, employers will feel that they will have to make</i></p>



			<p><i>an unwarranted investment to provide facilities for people with disabilities, and some do not believe in the employment potential of such people."It further held that" words like disabled physically handicapped and mentally retarded deeply bruise and offend human dignity of persons with different abilities."</i></p>
--	--	--	---





## O. MESMERISING QUOTES

COMPILED BY: SOHAM BHALERAO (V BA LL.B)

---

“Fight for the things that you care about. But do it in a way that will lead others to join you.”

- J. Ruth Bader Ginsberg

“History owes an apology to members of LGBT community and their families for ostracization and persecution they faced because of society’s ignorance that homosexuality is a natural trait; its penal suppression infringes a host of fundamental rights”

- J. Indu Malhotra

“Homosexuality is not a mental disorder, which has been also recognized by Parliament. Centre must give wide publicity to the SC judgement to eliminate stigma attached to the LGBT community”

- J. R.F Nariman

“A woman cannot be asked to think as a man or as how the society desires”

- CJI Mishra, J. Khanvilkar

“A society which perceives women as pure and an embodiment of virtue has no qualms of subjecting them to virulent attack: to rape, honour killings, sex-determination and infanticide.”

- J. D.Y Chandrachud



“In the theatre of life, it seems, man has put the autograph and there is no space for a woman even to put her signature”

- CJI Mishra, J. Khanvilkar

Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.

- J. K.S Radhakrishnan



## P. PUBLIC LAW ON OTHER BLOGS

COMPILED BY: NIHARCHITRE (V BA LL.B)

---

<https://indconlawphil.wordpress.com/2019/05/28/notes-from-a-foreign-field-a-critique-of-the-kenyan-high-courts-homosexuality-judgment/>

<https://indconlawphil.wordpress.com/2019/06/12/notes-from-a-foreign-field-the-time-has-come-the-botswana-high-court-and-the-decriminalisation-of-homosexuality/>

<https://indconlawphil.wordpress.com/2018/09/10/guest-post-navtej-johar-v-union-of-india-what-remains-of-section-377/>

<https://indconlawphil.wordpress.com/2015/09/04/guest-post-women-and-the-constituent-assembly-ii-the-framing-of-the-non-discrimination-clause/>

<https://indconlawphil.wordpress.com/2018/01/05/guest-post-the-trans-bill-and-its-discontents-ii/>



# CONTACT US

---

PUBLIC LAW BULLETIN

---

CENTRE FOR PUBLIC LAW AT ILS LAW COLLEGE, PUNE

## CONTACT US

For any queries, insights, feedback, contributions, suggestions and advice, kindly write to us at [centreforpublic@gmail.com](mailto:centreforpublic@gmail.com). We eagerly look forward to hear from you.

Feel free to reach out to our Student Editors at:

NiharChitre

Rashmi Raghavan

[niharchitre16@ilslaw.in](mailto:niharchitre16@ilslaw.in)

[rashmiraghavan16@ilslaw.in](mailto:rashmiraghavan16@ilslaw.in)