

## **“Ravishment of Virile: Snapping the Quietude”**

*\*Payal Bhatia  
Symbiosis Law School,  
Hyderabad*

*\*\*Soumya Swarup Mohanty  
Symbiosis Law School,  
Hyderabad*

### **Objectives**

The Paper has following objectives:

- a. To achieve Gender Neutral Rape Laws under section 375 of Indian Penal Code i.e. to get perpetrators whether male, female or third gender, punished and deterred for the offences of Rape and Sexual Assault.
- b. The broad objective of this research paper is to achieve Gender Justice and equality enshrined in the Constitution of India.
- c. To reach out to the legislature and recommend as to how Rape laws can be amended to achieve gender justice.

### **Research Methodology**

For Primary research purpose, authors have studied, analyzed and cited many research articles on the current topic. Not only this, Author has also done a survey among 500 men between the age group of 12-25 years in the city of Dehradun, Uttarakhand and has collected various information related to the aforementioned research topic. Various legislations and cases decided by the Supreme Court and various High Courts of India have also been used to support the arguments of the topic. Different books magazines and Articles have been used as a secondary source of research.

### **Research Questions**

- Whether post the landmark judgments of this Hon’ble Court in the case of National Legal Service Authority of India v. Union of India &Ors. ; (2014) 5 SCC 428 and Navtej Singh Johar v. Union of India &Ors. W.P.(Crl) No. 79/2016 any need arises for reviewing and modifying the penal laws of the country to extent of making them gender neutral?
- Whether the absence of gender-neutral definition of rape/sexual assault under Section 375 of the Indian Penal Code, 1860 is violative of Articles 14, 15 and 21 of the Constitution of India?

## **1. Introduction**

In the present modern world, a lot of people believe that a man cannot be raped by a woman. Yet, rape in particular rape is just a non-consensual sex. The patriarchal theory of masculinity forces men to have a mindset that “all kind of sex is good”. However, that concept is just absurd and inhuman. But it should also be taken into consideration that women, who are in a position of power, may be either professionally, physically, or emotionally, are also capable of coercing men as they have an undue advantage over the male. Toxic masculinity forces upon society the idea that men are not vulnerable - only women are. This ideology of society is that men are the ones who use their power to exploit women, and it can never happen the other way round. “Of course, far more men are perpetrators of sexual violence than women. It is also true that victims of sexual violence are more often women than men. Yet, it does not make sense for male victims to not have enough legal recourse.”<sup>1</sup>

According to the Indian constitution, rape is defined as the insertion of a penis, or any foreign object, into a vagina without the consent of the woman or girl. “According to Indian laws, men cannot be raped at all — they can only be “sodomised”, which is covered under article 377 of the Indian Penal Code.”<sup>2</sup> Until about a month ago, the consensual homosexual sex was illegal according to article 377. Recently the Supreme Court has struck down this aspect of the law in a historic verdict on September 6, still there are more amendments which are required in the legal definitions of rape. With the definition of rape being limited to “the penetration of the vagina by a man”, woman cannot be charged for rape. At the most, they can be charged for sexual assault, or forced unnatural sex under Section 377. Similarly, a man cannot be legally raped.

Amending the legal definition of rape to recognise male victims and female perpetrators is essential to equality — indeed; it is what feminism stands for.

## **2. Current Laws under Section 375: A typical Patriarchal law**

Section 375 of the Indian Penal Code stands, rape is something that only a man can do to a woman. There is no room for adult male victims, and absolutely no female perpetrators. Even though child survivors of both sexes are covered by the Protection of Children from Sexual Offences Act 2012, current rape laws leave out a big gap of male victims, who cannot come forward for fear of stigma and a lack of legal protection and laws.

The word rape is derived from the Latin term *rapio*, which mean ‘to seize’. Therefore rape can be defined as forcible seizure. It is stated in lay man’s language, “as the ravishment of a woman without her consent, by force, fear, or fraud” or “the carnal knowledge of a woman by force against her will.” In other words, rape is violation with violence of the private person

---

<sup>1</sup> <https://www.dailyo.in/variety/rape-laws-sexual-assault-section-377-sodomy-men-victims-of-rape-asia-argento-rahul-raj-singh-metoo/story/1/27360.html>

<sup>2</sup> <https://www.dailyo.in/variety/rape-laws-sexual-assault-section-377-sodomy-men-victims-of-rape-asia-argento-rahul-raj-singh-metoo/story/1/27360.html>

of a woman. Thus since the very beginning rape has been defined as an offence only against the women. Men are always considered as culprits rather than victims.

In the Indian Penal Code, Section 375 defines rape:<sup>3</sup>

“ A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following de-scriptions:—

1. against her will.
2. without her consent.
3. with her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
4. with her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be law-fully married.
5. with her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupe-fying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
6. with or without her consent, when she is under sixteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.”

### **3. Major Amendments on Rape over time**

#### **1860: Indian Penal Code**

The first time the word ‘rape’ was stated in our legal system was when the IPC was written in 1860. Section 375 to Section 376E of the Indian Penal Code refers to ‘sexual offenses’. It defined rape as sex without consent, with consent but under the fear of death or with consent but under false pretences. It also explained the ‘statutory rape’ as sex with a woman below the age of 16 years. There was no mention of rape as a crime against a male, since Section 377 – was the law mentioned that gay sex was an criminal offence.

However, Section 377 criminalized both the individuals or the participants involved in gay se, therefore including male victims in Section 375 would have criminalized only the rapist and not the victim. This loophole in our Indian legal system discouraged male rape victims from complaining against their rapists because it would mean opening themselves up to prosecution too.

#### **1983: The Criminal Law (Second Amendment)**

<sup>4</sup>Tuka Ram and Anr v. State Of Maharashtra on 15 September, 1978. In this case a young Adivasi girl named Mathura was raped by two policemen while she was in their custody. Her

---

<sup>3</sup> Section 375, Indian Penal Code (Act 43 of 1860)

<sup>4</sup> Tuka Ram And Anr v. State Of Maharashtra, 1979 AIR 185

family registered a complaint against the two policemen and the trial gradually went to the Supreme Court. The policemen were acquitted by the Supreme Court because Mathura was apparently and was assumed to be 'habituated to sexual intercourse', they proved that she was sexually active therefore she has not been raped. The Supreme Court Justices even mentioned that Mathura had raised no alarm, there were no visible or evident marks of injury on her body or struggle and because she was used or was quiet open to sex, she might have incited the cops to have intercourse with her. This verdict resulted in anger across the country. Legal representatives observed that instead of relying on hard evidence, the Court has let the inhuman culture of pre-marital sex influence its decision. They said that "‘submission’ during the rape had been misunderstood for ‘consent’ just because of this taboo."<sup>5</sup>

Women’s groups held many protests and marches, demanding an amendment in the law. This alteration in the law came in 1983 to Section 114 (A) of the Indian Evidence Act. Until then, rape by public servants was ignored by our legal system. But with this landmark case, a new provision of rape called ‘Custodial Rape’ was included to the rapes of women while in custody of public servants.

### **2002: Amendment to Indian Evidence Act**

Even though the 1983 Amendment prohibited ‘character assassination’, it wasn’t defined to include the cross-examination of a rape victim. This was pointed out in a PIL filed by an NGO named Sakshi, which led to the landmark judgement of <sup>6</sup>Sakshi v. Union of India and Ors. (The Union of India, the Ministry of Law and Justice and the New Delhi Commissioner of Police) They mentioned that women were not comfortable about reporting rape because “the motive of the defence or the opposition in rape trials had become to humiliate and destroy the sexual integrity and personal space of the victim” rather than to handle them as someone who had been through a mental and physical trauma and someone who needed assistance.

Taking this into consideration, the Supreme Court asked the Law Commission to review our rape laws and provisions and recommend amendments. They discovered that Section 155 (4) of the Indian Evidence Act 2002, the defence lawyer could manipulate the facts and take advantage of this provision and could discredit a rape victim’s testimony by proving that she was of ‘immoral character’. This procedure included questioning and cross examining her about past sexual acts. They understood that it was this specific clause that deterred rape victims from filing a case.

So, this clause was amended in 2002. After this amendment, the cross-examination of a rape victim was prohibited. Another reason why women are reluctant from reporting a rape was the dreaded two-finger test, for which the procedure involved a medical examiner inserting

---

<sup>5</sup> Tuka Ram And Anr v. State Of Maharashtra, 1979 AIR 185

<sup>6</sup> AIR 2004 SC 3566, 2004 (2) ALD Cri 504

‘two fingers’ into the vagina to check its laxity. This test made women or the claimed rape victim feel like an object in evidence, violating her privacy and integrity. Since cross-examination was no longer involved with a rape victim, this medical examination became central to the case and therefore, this test couldn’t be prohibited. Therefore, practitioners who would be responsible for conducting the two finger test were to be trained in handling patients who has been through a mental or physical trauma. The victim had to be provided with all the necessary information to the victim and explain why the tests are essential, to not discourage anyone from filing a rape case.

## **2012: Protection of Children from Sexual Offences (POSCO) Act**

A statistics conducted by the Indian government stated that India has witnessed a 336% increase in child rape cases from 2001 to 2011. The National Crime Record Bureau statistics indicated that 48,338 child rape cases were recorded during this period. This alarming trend needed a ‘special legal procedure’ for child victims of sexual offences. Until now, the only mention of sexual offences against children was the ‘statutory rape’ clause mentioned in the IPC that criminalized sexual intercourse with a girl below the age of 16, regardless of consent.

A big loophole was that it did not specifically mention crimes against male-children. This loophole was rectified in 2012 with POSCO or the Protection of Children From Sexual Offences Act. The new Act was gender-neutral and recognized other forms of penetration apart from peno-vaginal penetration. The Act also included the abetment of child sexual abuse as an offence and included non-penetrative assault, sexual harassment and child pornography.

### **4. Limited Relief by way of Section 377**

In India, rape is nothing but the insertion of penis or any other object into the vagina as defined under section 375 of Indian Penal Code. The Patriarchal concept of Masculinity or rather toxic masculinity makes people think that men cannot be raped. This means that only men are capable of using their power of exploiting women sexually and this cannot happen other way round. Because the definition of rape defined by the Indian Constitution is limited to Penetration by a man therefore, under Indian Law women cannot be held liable for rape. At the most they can only be held liable for Sodomy under section 377 of Indian Penal Code. Anti-Sodomy laws are defied under section 377 of IPC.

Section 377 of Indian Penal Code: “Unnatural offences<sup>7</sup>—: Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

---

<sup>7</sup> Section 377, Indian Penal Code, 1860 (Act No 43 of 1860).

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

But there are several problems with this law which need to be amended.

The first and foremost is that, it does not differentiate between consensual and non consensual sexual intercourse between two adults. The section uses the phrase "voluntary carnal intercourse against the order of nature" but nowhere does it talks about non-consensual sex or consent obtained through coercion.

It is a big misconception that only men can force a woman to have sex but there have been several instances where women forced a man for sex taking advantage of her emotional, physical or professional position. But due to the lack of any legal resource or remedy these voices get curbed. There are limited conviction statistics in light of this section due to the limited relief granted under the section, moreover, the victims who were subjected to non-penile violations cannot even seek relief under this section.

Therefore, it is very correct to say that Section 377 of IPC offers limited relief to men as well as third Gender. The best way to address this problem is by amending section 375 and replacing the word "Women" by "any person" so that men and third gender can also seek relief under the same section.

## **5. Arguments for Gender Neutral Rape Law**

According to the author, following mentioned are the reasons as to why Section 375 of the Indian Penal Code should be amended and made gender neutral:

a. Section 10 of IPC defines: Man”, “Woman”<sup>8</sup>—“The word “man” denotes a male human being of any age; the word “woman” denotes a female human being of any age.”

The word Sexual Intercourse is not defined anywhere in the law books. The dictionary meaning of sexual Intercourse is heterosexual Intercourse of the vagina by the penis coupled with the explanation that penetration is sufficient to constitute the sexual intercourse that is necessary for the offence of Rape.

In the case of *Sakshi v. Union of India*<sup>9</sup>, it was held that provisions of section 375 IPC cannot be altered by way of Judicial Pronouncements so as to include "all" forms of penetrations that will also make it gender neutral.

This takes us to the Criminal Law Amendment Bill, 2012 which suggested Gender Neutral definition of Rape by following the recommendations of the 172nd Law Commission. The 172nd Law Commission suggested to replace the word "Rape" with "Sexual Assault" and to replace the word "Women" with "Any person" so that any person who is a victim of any kind of sexual violence can file a case. Following this happened the Delhi Nirbhaya Rape Case and Justice Verma Committee was formed. The committee also suggested to use the word

---

<sup>8</sup> Section 10, Indian Penal Code, 1860 (Act No 43 of 1860).

<sup>9</sup> *Sakshi v. Union of India*, 2004 Cri L.J. 2881 (SC).

"any person" in place of "Women" which was also reflected in the Criminal Law (Amendment) Ordinance, 2013 and was criticized by a number of women and other civil society activists. Following this nationwide criticism, the ordinance was reverted to the gender specific definition which shattered the hopes of Men and transgender community of being free from Sexual Violence.

Finally, with the Criminal Law Amendment Act of 2013, the word penetration included penile-vaginal penetration, finger-vaginal penetration penile-urethral penetration. All these penetrations and other amendments were related to the body of the women and nothing in the amendment made section 375 gender Neutral.

The laws of the country have to survive till ages and to stay just and proper for the society they need to be amended from time to time according to the needs of the society. There have been ample numbers of complaints as well as voices which have been curbed due to the absence of a legal provision for Sexual Violence that happens against men and Transgender community. This is the time to raise our voices for Gender Neutrality in Rape Laws.

**b.** It is in the view of the author that Section 375 of Indian Penal Code is violative of Article 14, 15 and 21 of the Indian Constitution.

Article 14 of the Indian Constitution<sup>10</sup>: "Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth."

Article 15(1) of the Indian Constitution<sup>11</sup>: "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

Article 21 of the Indian Constitution<sup>12</sup>: "Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law."

These three Fundamental Rights are undoubtedly the pillars of the constitution and are guaranteed by the constitution. Article 14 clearly mentions "No discrimination on ground of Sex", i.e. Men are equally entitled to Fundamental Rights enshrined in part III of the Constitution, therefore, equal protection should be given to both men and Women from Sexual Assault. As time changes, law has to change. In the modern world it cannot be denied that men, women and third gender can be victims as well as perpetrators of Sexual Assault. Though the number may differ but there should always be a space for the minimum.

Article 15(1) mention about prohibition of discrimination on grounds of Sex but the same article 15(3) talks about making special provisions for women and children. Thus, the

---

<sup>10</sup> Article 14, Indian Constitution.

<sup>11</sup> Article 15, Indian Constitution.

<sup>12</sup> Article 21, Indian Constitution.

constitutionality of Section 375 of IPC can be challenged because there is an obligation on the state of non-discrimination between its citizens. Article 15(3) permits the state to make "any" special provision for women and children thus taking away rights of other genders. Nonetheless, author's intension in the paper is not to question the constitutionality of section 375 but to point out the inadequacies in Section 375 and how it infringes the rights of men and third gender.

**c. Act of Rape is a violation of Basic Human Right:** Equal protection under the laws of the land is a basic human right given to every citizen of the country irrespective of their Sex, Caste, Creed, Race or Place of birth. This implies that laws of the land must be equal for all whether a male or a female.

It is in the view of the author that act of rape is a violation of the basic human right of the citizen therefore it cannot be gender biased. Universal declaration of Human Rights which was adopted on 10th December 1948, upholds the argument of the author.

**Article 1 of UDHR<sup>13</sup>:** "All human beings are born free and equal in dignity and rights."

**Article 3 of UDHR<sup>14</sup>:** "Everyone has the right to life, liberty and security of person."

**Article 7 of UDHR<sup>15</sup>:** "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

**Article 8 of UDHR<sup>16</sup>:** "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

The Constitution of our country also upholds right to Equality and Right to Life and Personal Liberty under Article 14, 15 and 21 respectively which have been discussed above.

Going by the above-mentioned Articles of Universal Declaration of Human Rights, not only Rape but all the crimes, the victims and the perpetrators should be gender-less, caste-less and race-less. Protection and upholding of Human Rights of the citizens of the country is the fundamental duty of every country and international organisations such as United Nations Organisation, International Human Rights Commission stand as watchdogs.

#### **d. Violation of Transgender Rights:**

Our society stands on such footings that it never realizes or cares to realize the trauma, sufferings and pain which the members of Transgender community undergo, nor appreciates the heartily feelings of the members of the Transgender community. Our society sees the transgender community as ridicule. They are subjected to torture and shame in public places

---

<sup>13</sup> Article 1, Universal Declaration of Human Rights.

<sup>14</sup> Article 3, Universal Declaration of Human Rights.

<sup>15</sup> Article 7, Universal Declaration of Human Rights.

<sup>16</sup> Article 8, Universal Declaration of Human Rights.

like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals. Not only this, they are treated as untouchables. We forget the fact that “the moral failure lies in the society’s unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.” Iterated by Justice K S Radhakrishnan in the case of *NALSA v. Union of India*.<sup>17</sup>

As held in the famous *NALSA Case*<sup>18</sup>, “Gender identity is one of the most fundamental aspects of life which refers to a person’s intrinsic sense of being male, female or transgender or transsexual person. A person’s sex is usually assigned at birth, but a relatively small group of persons may be born with bodies which incorporate both or certain aspects of both male and female physiology.”

In the Case of *Minu B Mehta and Anr. v. Bal Krishna Ram Chandra Nayan and Anr*<sup>19</sup>. it was held by the Hon'ble Supreme Court that "every person has a right to safety and security of his person."

Thus, making of Section 375 of IPC as Gender Neutral will be incomplete if it does not includes within its umbrella the transgender victims.

Despite the multiple amendments and landmark judgements, Indian Penal Code still views Rape as a binary notion where males and females are assigned roles as perpetrators and victims respectively. But apart from the victimization of males it has also not recognised transgender rapes within its ambit even after them being recognised as a Third Gender.

The Hon'ble Supreme Court in the *NALSA Case*<sup>20</sup> held Article 15 and 21 of the Constitution of India includes the right to Gender Identity and Sexual Orientation, thereby recognising transgender as third gender.

When transgender are recognised as third gender their rights should also be recognised not only this, their wounds should also be healed and their voices should also be heard. Since past three years, the Transgender Rights Bill, 2016 has not appeared in the parliament as an issue and has not taken the form of an act.

In total, 63 countries all across the world have Gender Neutral Rape Laws. United kingdom, United States of America, Philippines, Republic of Ireland to name a few. Its time for India to amend and make Section 375 Gender Neutral.

**Statistical Data:** Because of the absence of any legal provisions against sexual assault against men, therefore it becomes difficult to get the statistics of males who have experienced rape or sexual assault. However, in looking at child sexual abuse specifically, the Indian government did find in 2007 that, of surveyed children who reported experiencing severe sexual abuse, including rape or sodomy, 57.3% were boys and 42.7% were girls. More recently, the Delhi-based Centre for Civil Society found that approximately 18% of Indian

---

<sup>17</sup> National Legal Service Authority v. Union of India and Others, (2014) 5 SCC 438.

<sup>18</sup> National Legal Service Authority v. Union of India and Others, (2014) 5 SCC 438.

<sup>19</sup> Minu B Mehta and Anr. v. Bal Krishna Ram Chandra Nayan and Anr, 1977 SCR (2) 886.

<sup>20</sup> National Legal Service Authority v. Union of India and Others, (2014) 5 SCC 438.

adult men surveyed reported being coerced or forced to have sex. Of those, 16% claimed a female perpetrator and 2% claimed a male perpetrator.<sup>21</sup>

Not only this, a survey was also conducted by the authors of this research article among a very small population of 500 men between the age group of 12 and 25. From the survey, the author came to following conclusions:

- a. There are approximately 2 men in a group of 20 who were being forced to have intimate relations. It is important to note here that these men are in the age group of 12-16. Getting them into intimate relations is usually done by pleasing them with fancy gifts and chocolates and sometimes even by fear or torture.
- b. There are approximately 3 men in a group of 20 who have experienced being in a forced sexual relationship by their wives, friends, colleagues etc. Out of these 3, 1 is forced by a male perpetrator. It is important to note here that these men are in the age group of 17-21.
- c. There are approximately 2 men in a group of 12 who are experiencing or who have experienced in their past some kind of sexual violence, sexual assault or rape. It is important to note here that, these men are in the age group of 21-25.

Out of these 500 surveys, only 3 issues were reported under the POCSO Act and those were the cases lying in the first category of Survey. Remaining cases were never reported because of two main reasons as explained by the people who were giving the survey. First and foremost, because of the lack of any legal provision in the Indian Penal Code. And secondly, because there exist a patriarchal belief that men are born strong and women cannot over power them. This belief takes them two steps back to stand against their perpetrators.

## **6. Run through of Major Landmark Judgements**

### **1. National Legal Service Authority of India v. Union of India and Ors:**

#### **MAIN ISSUE: Legal Recognition of Transgender Community as a Third Gender.**

2 Petitions were filed for the recognition of Transgender Community as a Third Gender. First a PIL was filed National Legal Services authority of India and second a Writ Petition was filed by Mata Nasib Kaur Ji welfare society. As explained by the Petitioner, Non recognition of Transgender community as a third gender violates their fundamental rights guaranteed under part III of the constitution of India and therefore the petitioner was prayed for Legal Declaration of Transgender community as a third gender other than the existing binary genders i.e. male and female.

The petitioner also submits evidences from the history of the country as to how transgender community was accorded importance and special status. The petitioner was submitted that

---

<sup>21</sup> <https://scroll.in/article/676510/indias-law-should-recognise-that-men-can-be-raped-too>

various mythologies such as Hindu, Vedic and Purans had also identified Transgender as a Third Gender.

The Right to Equality and equal treatment before the law without any discrimination with regard to Cast, Creed, Race and Gender of a person is guaranteed by Article 14 of the Constitution. Article 19(1)(a) also ensures that Freedom of Free Speech and Expression will be given to all the citizens of the country. Above all this, Article 21 i.e. Right to Life which is the most extensive Fundamental Right is guaranteed not only to citizens but also to Non Citizens. Article 14 uses the word "Person", Article 19(1)(a) uses the word "Citizens" and similarly, Article 21 uses the word 'Persons'. This implies that all these Fundamental rights are given to all the persons irrespective of their gender and thus Transgender community has a fundamental right to enjoy such freedoms and the state has the duty to uphold it.

To, sum it all, petitioner submitted that, Transgender have the right to decide their gender, share and put forth their views, live their life with dignity. Similarly, the state has the duty to ensure that their voices are not curbed and their rights are not violated.

The learned petitioner also pointed out that apart from the above mentioned Fundamental rights, Universal declaration of Human Rights and Yogyakarta Principles were also getting violated and the state has the obligation to ensure that the country does not violate any such international law.

Concluding all, both the judges upheld the above argument and laid down a Psychological test as against the biological test to determine the Sex of the person. They Quoted,

Hon'ble Court in Navtej Singh Johar<sup>22</sup> rightfully observed that:-

"The phraseology of Section 377 is gender neutral and that of Section 375 is female-oriented."

In the absence of equal protection to men and women alike, the provision of Section 375 of the Code is violative of Articles 14, 15 and 21 of the Constitution of India. Thus, the intention behind this petition is to protect the rights of men and women, homosexual or heterosexual, and that of transgender alike, from being physically violated by another person without their consent.

Not only this, they also pronounced the following judgement:

- i. Hijras, Eunuchs are to be treated as "third gender".
- ii. TGs have the right to decide their self-identified gender.
- iii. Take steps to treat TG as socially and educationally backward classes of citizens in cases of admission in educational institutions and for public appointments.
- iv. Governments to operate separate HIV Zero-Surveillance Centres.
- v. Governments to seriously address the problems faced by TGs.
- vi. Provision for separate public toilets and appropriate medical care in hospitals.

---

<sup>22</sup> Navtej Singh Johar and Ors. vs. Union of India (UOI) and Ors, WRIT PETITION (CRIMINAL) NO. 76 OF 2016 , MANU/SC/0947/2018.

vii. Governments to frame various social welfare schemes for the betterment of TG.

## 2. Navtej Singh Johar v. Union of India and Ors.<sup>23</sup>

The Judgement in Navtej Singh Johar's Case has taken forth the concept of Transformative Constitutionalism to a new level.

The Writ Petition was filed on 27<sup>th</sup> April 2016 to challenge the constitutional validity of Section 377 of the Indian Penal Code, 1860 on the sole ground that it criminalises consensual sexual intercourse between two adult persons having same sex. The petition was filed by some members of the LGBT Community which included dancer Navtej Singh Johar, journalist Sunil Mehra, Chef Ritu Dalmia, hoteliers Aman Nath and Keshav Suri and businesswomen Ayesha Kapur.

The petitioners argued that, homosexuality and bisexuality are natural phenomenon occurring at certain ages of some persons and sexual intercourse between two persons of same sex whether homosexual or bisexual is equally natural as between two persons of different sex. They are based on consent of persons who are adults and competent to give such consent. And making it a criminal offence is against individual dignity, right to reputation, right to choose a partner of one's choice, sexual orientation and right to privacy under Art 21 of the Constitution. Not only this, Sec 377 is also violative of Article 14 and Article 15 as the section does not define 'carnal intercourse against the order of nature and the section discriminates on the basis of sex of the sexual partner. Under section 376, men are prosecuted for forced sexual intercourse with women without her consent but under section 377, a person is prosecuted for a sexual intercourse with another person even with the consent. Therefore, section 377 violates the right of the LGBT persons under Article 19(1)c that denies them the right to form associations.

The judgment was delivered on 6<sup>th</sup> Sep, 2018. The judgments declared that:

"In so far as Sec 377 criminalizes consensual acts of adults (i.e., persons above the age of 18 years who are competent to consent) in private, is violative of Art 14,15, 19 and 21 of the Constitution. It was however, clarified that such consent must be free consent, which is completely voluntary in nature, and devoid of any duress or coercion."

The Supreme Court also pronounced that "there can be situations which influence the emotional behaviour of an individual to seek intimacy in the same gender that may bring two persons together in a biological pattern. It has to be treated as consensual activity and reflective of consensual choice."

This Judgement after reverting **Suresh Kumar Kaushal v. Naz Foundation**<sup>24</sup> case was very successful in building the confidence of the public, on Judiciary as it has set forth an example

---

<sup>23</sup> Navtej Singh Johar and Ors. vs. Union of India (UOI) and Ors, WRIT PETITION (CRIMINAL) NO. 76 OF 2016 , MANU/SC/0947/2018.

<sup>24</sup> Suresh Kumar Kaushal v. Naz Foundation, (2014) 1 SCC 1.

that however minute the population is, the Judiciary is always there to protect their interest and uphold their fundamental rights.

Thus, the direct effects of the landmark judgement was that the consensual Carnal intercourse between same sex adult was decriminalised under Section 377 of IPC as violative of Articles 14, 15 and 21 of the Constitution of India, but the judgment did not classify non-consensual carnal intercourse against the order of nature between two adults as sexual assault, and continued to view it as an unnatural offence.

## **7. Conclusion**

**Justice Krishna Iyer in the case of Rafiq v. State of U.P.<sup>25</sup> remarked that, “a murderer kills the body, but a rapist kills the soul”.** When the judiciary and Legislature deny recognising an act of rape committed on a male or a transgender victim, we are denying the fundamental principles of Natural Justice on which our Constitution proudly stands.

There is enough evidence to prove that women suffer the most when it comes to sexual violence and sexual assault. This cannot be denied. The current crime rate against women gives them a preferential treatment over men and transgender community who in turn gives us Section 375 and its gender neutral definition. But, at the same time, we cannot ignore the sexual violence and sexual assault faced by Men and Transgender Community, even though they are very less in number when compared to their counterparts.

To resolve this issue and for upholding the Principles of Natural Justice, it is recommended that suggestions should be taken from the Criminal Law (Amendment) Ordinance, 2013 which kept the offence gender-neutral with regard to both perpetrator and the victim.

As it is for a woman, it takes a lot of courage for a rape survivor to stand up against the wrong done to his body and denying him justice because this offence does not come under the picture of rape as viewed by our country is completely inhuman.

After 2013 amendment, the offence of rape was extended from penile-vaginal penetration to finger-vaginal penetration and penile-urethral penetration. If the Law can understand that a women can be raped broadly, can the law not understand that men and transgender can be raped too?

---

<sup>25</sup> 1981 AIR 559