
AN ANALYSIS ON RAPE WITH LGBT COMMUNITY/MEN

Sakshi Jain, Researcher

ABSTRACT

Many individuals in the modern world today think that a woman cannot rape a guy. However, rape, in instance, is just an unwanted sexual encounter. Men are required under the patriarchal idea of masculinity to believe that "all sex is wonderful." But that idea is simply arbitrary and unhuman. However, it should be remembered that women who hold positions of power—whether they be professionally, physically, or emotionally—are also capable of coercing males because they possess an unfair edge over men. Sexual assault/rape can happen to anyone regardless of their race, caste, age, appearance or sexual orientation, lesbian, gay men, bisexual & transgender. The rape law suffers from serious deficiency. The whole law speaks about women. The essence of section- 375 of IPC revolves around women, Therefore there is a need for an amendment of rape law to include this marginalized section of the society .Under the ambit of the protection of our rape law. This article discusses in detail the law the current situation and Limited Relief by way of the same.

Keywords: Rape, Homosexuality, Assault, Section -375, Cis-Gender

Introduction

Our culture has a strong anti-homosexuality bias, which is well-known. LGBTQ community people frequently experience violence, sexual assault, marginalisation, discrimination, and name-calling. It is vital to alter our heterosexual preference, which overrides our impression of homosexuality, in order to bring about a positive shift. In order to completely eradicate this crime, strict legislation, effective enforcement measures, and court collaboration are essential.

The concept that males are not susceptible and that only women are is imposed on society by toxic masculinity. According to society's worldview, it is always men who use their position of authority to oppress women and never the other way around. Of course, significantly more males than women commit acts of sexual violence. It is also true that women are more frequently the victims of sexual assault than men. However, it is absurd that male victims have limited legal options.

The introduction of a penis or any other foreign object into a vagina without the consent of the lady or girl is considered rape, according to the Indian constitution. Men cannot be raped under Indian law; instead, they can only be "sodomised," which is prohibited by article 377 of the Indian Penal Code. The introduction of a penis or any other foreign object into a vagina without the consent of the lady or girl is considered rape, according to the Indian constitution. Men cannot be raped under Indian law; instead, they can only be "sodomised," which is prohibited by article 377 of the Indian Penal Code.

Current Laws under Section 375¹

As things stand, rape can only be committed by a male against a woman, according to Section 375 of the Indian Penal Code. Adult male victims have no place, and female abusers have no place at all. The Protection of Children from Sexual Offences Act of 2012 ²covers child survivors of both sexes, however current rape laws exclude a significant number of male victims who are afraid to come forward due to shame and a lack of legal protection.

The Latin word *rapio*, which means "to seize," is the source of the English word rape. Rape is therefore a form of forced seizure. In plain language, it is defined as "the carnal knowledge of

¹ The Indian Penal Code, 1860, § 375, No. 45 Of 1860, Acts Of Parliament, 1860, (India)

² The Protection of Children from Sexual Offences Act of 2012, No. 32, Acts Of Parliament, 1860, (India)

a woman by force against her will" or "the ravishment of a woman without her consent, by force, terror, or trickery." Rape, then, is the violent violation of a private person. In other terms, rape is the violent invasion of a woman's private person. Therefore, rape has always been regarded as a crime only committed against women. Men are typically seen as perpetrators rather than victims.

Limited Relief by way of Section 377³

According to section 375⁴ of the Indian Penal Code, rape in India only refers to the introduction of the penis or any other object into the vagina. People believe that males cannot be raped because of the poisonous masculinity promoted by the patriarchal ideology of masculinity. This means that only men can use their ability to sexually exploit women; it cannot be done the other way around. Women are not subject to rape liability in India since the Indian Constitution's definition of the crime only covers penetration by a man. They can only be charged with sodomy under section 377 of the Indian Penal Code, at most. Under section 377 of the IPC, anti-Sodomy statutes are disobeyed.

According to Indian Penal Code Section 377, "Unnatural offences—: Whoever voluntarily engages in sexual activity with any man, woman, or animal in a manner that is contrary to the laws of nature shall be punished with life imprisonment or with imprisonment of either description for a term that may extend to ten years, and shall also be liable to a fine." However, there are a number of issues with this law that require amendment. First and foremost, it does not distinguish between sexual activity between two adults that is consensual and that is not.

The phrase "voluntary carnal intercourse against the order of nature" is used throughout the passage, although it doesn't mention coerced or non-consensual sex anywhere. It's a common myth that only males can force a woman to have sex, but there have been many occasions where women have done so by abusing their power over the man—either physically, emotionally, or professionally.

However, these voices are muted because there is no legal recourse or support for them. Due to the limited relief provided by this provision and the fact that victims of non-penile offences cannot even apply for relief under this section, there are few convictions based on this section.

³ The Indian Penal Code, 1860, § 377, No. 45 Of 1860, Acts Of Parliament, 1860, (India)

⁴ The Indian Penal Code, 1860, § 375, No. 45 Of 1860, Acts Of Parliament, 1860, (India)

Therefore, it is accurate to argue that Section 377 of the IPC provides third gender as well as some limited remedy. The most effective solution to this issue is to alter section 375, changing the word "Women" to "any person," allowing men and third gender to also seek remedy under the same law.

Gender neutral rape law

There is need to change and gender-neutralize Section 375 of the Indian Penal Code: IPC Section 10⁵ defines "Man" and "Woman" "Man" refers to a male human being of any age, and "woman" refers to a female human being of any age," according to verse eight. Nowhere in the legal literature is the term "sexual intercourse" defined. The definition of sexual intercourse according to the dictionary is heterosexual penetration of the vagina by the penis, with the justification that this is enough to form the sexual intercourse required for the crime of rape.

In *Sakshi v. Union of India*⁶, it was determined that the terms of section 375 IPC cannot be changed by judicial pronouncements to encompass "all" sorts of penetrations and make it gender neutral. This brings us to the Criminal Law Amendment Bill, 2012, which proposed a gender-neutral definition of rape in accordance with the 172nd Law Commission's recommendations. The 172nd Law Commission recommended changing the phrase "Rape" to "Sexual Assault" and the word "Women" to "Any person" so that anyone who has been the victim of sexual violence of any sort may file a claim.

Following this, the Justice Verma Committee and the Delhi Nirbhaya Rape Case were established. The Criminal Law (Amendment) Ordinance, 2013, which was adopted by the committee and was condemned by a number of women and other civil society organisations, also suggested using the word "any person" in place of "Women." Following widespread criticism, the ordinance was changed back to its original gender-specific meaning, shattering the hopes of the transgender community and men that they would be protected from sexual assault.

The Criminal Law Amendment Act of 2013 added penile-vaginal penetration, finger-vaginal penetration, and penile-urethral penetration to the definition of the word penetration. Nothing

⁵ The Indian Penal Code, 1860, § 10, No. 45 Of 1860, Acts Of Parliament, 1860, (India)

⁶ *Sakshi v. Union of India*, 1999 CriLJ 5025

in the amendment made section 375 gender neutral because all of these penetrations and other changes related to the female body.

The nation's laws must endure for all time, yet in order to remain fair and appropriate for society, they must occasionally be modified to meet those demands. Due to the lack of a legal provision for sexual violence against men and the transgender community, there have been numerous complaints and voices that have been muted. Now is the time to speak up in favour of gender-neutral rape laws.

The author believes that Articles 14⁷, 15⁸, and 21⁹ of the Indian Constitution are violated by Section 375 of the Indian Penal Code. Article 14 of the Indian Constitution states: "Equality before the law: The State shall not deny to any individual within the territory of India, equality before the law or the equal protection of the laws." Discrimination against people based on their birthplace, ethnicity, caste, religion, or gender is forbidden. The Indian Constitution's Article 15(1) prohibits discrimination on the basis of "religion, race, caste, sex, or place of birth."

The State is prohibited from discriminating against any citizen solely on the basis of their religion, race, caste, sex, or place of birth. Protection of life and individual freedom is guaranteed by Article 21 of the Indian Constitution. No one may be deprived of their life or personal freedom other than in accordance with legal procedures.

These three fundamental rights are without a doubt the foundation of the constitution and are protected by it. Men are equally entitled to the Fundamental Rights entrenched in Part III of the Constitution, as stated in Article 14, which means that equal protection from sexual assault should be provided to both men and women. Law must evolve as time does. There is no denying that sexual assault can happen to men, women, and people of any third gender in the current world. Even though the total may vary, there should always be room for the bare minimum.

Although the same article's 15(3)¹⁰ discusses establishing particular arrangements for women and children, article 15(1) mentions the prohibition of discrimination on the basis of sex. Because the state is required to prevent discrimination against its residents, Section 375 of the

⁷ INDIA CONST. art. 14

⁸ INDIA CONST. art. 15

⁹ INDIA CONST. art. 21

¹⁰ INDIA CONST. art. 15

IPC may not be lawful. According to Article 15(3), the state may remove the rights of other genders by making "any" particular provisions for women and children.

The Acts of rape are against fundamental human rights. Every citizen of the nation is entitled to equal protection under the law, regardless of their gender, caste, religion, race, or place of birth. This indicates that everyone must be treated equally under the law, regardless of gender. Since rape, in the author's opinion, violates a citizen's fundamental human right, it cannot be motivated by a person's gender.

All humans are born free and equal in rights, according to Article 1¹¹ of UDHR. Everyone has the right to life, liberty, and personal security, according to Article 3¹² of the UDHR. All people are entitled to equal protection under the law and equality before the law, according to Article 7¹³ of the UDHR. Everyone has a right to equal protection from any kind of discrimination that violates this Declaration as well as from any instigation to such discrimination. According to Article 8¹⁴ of the UDHR, everyone has the right to an adequate remedy by the appropriate national tribunals for acts that violate the fundamental rights provided to him or her by the constitution or by law.

Our nation's Constitution defends the rights to equality, life, and personal freedom under Articles 14, 15, and 21, respectively. According to the aforementioned articles of the Universal Declaration of Human Rights, not only should rape be gender-, caste-, and race-neutral, but other crimes should be as well. Every nation has a fundamental responsibility to protect and uphold the human rights of its residents, and international organizations like the International Human Rights Commission and the United Nations Organization serve as watchdogs in this regard.

Rape with LGBT

The past 20 years have seen an increase in awareness of sexual and gender-based violence against women and girls in conflict settings, which has resulted in significant advancements in research and the creation of interventions to identify survivors and meet their health and protection needs. However, studies and the UN policy agenda have not fully addressed the

¹¹ Article 1, Universal Declaration of Human Rights

¹² Article 3, Universal Declaration of Human Rights

¹³ Article 7, Universal Declaration of Human Rights

¹⁴ Article 8, Universal Declaration of Human Rights

health of men, boys, lesbians, gay men, bisexuals, transgender, and other non-binary people subjected to sexual violence in conflict.

Sexual assault can happen to anyone and can be perpetrated by anyone, although it is typically carried out by individuals we know in settings where we should feel protected. Additionally, for members of LGBTQ communities, acts of verbal and physical homophobia, biphobia, and transphobia may coexist alongside sexual assault. LGBTQ individuals are occasionally specifically targeted due to their identity. When people undervalue and disregard others, sexual harassment, abuse, and assault flourish.

According to a recent study by the Williams Institute at UCLA School of Law, LGBT people are almost four times more likely than non-LGBT people to be victims of violent victimisation, such as rape, sexual assault, and aggravated or simple assault. Additionally, LGBT people are more likely to suffer violence at the hands of a stranger than from a known aggressor.

Experiential abuse of boys and men has frequently been labelled as torture, mutilation, or degrading treatment, ignoring the gendered and sexual components of these abuses. Anal and oral rape as well as other forms of victimisation, such as gang rape, forced sterilisation, mutilation, castration, blunt genital trauma, forced nudity, forced masturbation, forced rape perpetration, and forced witness to sexual violence against family members or peers, are all examples of sexual violence committed against men and boys. During and after a crisis, this sexual assault can happen in a variety of places, including detention facilities, military locations, refugee camps, and private residences.¹⁵¹⁶¹⁷

Sexual assault can be used as a type of torture in a war to cause psychological harm, terrorise, degrade, weaken, and destroy the identity of political prisoners or perceived opponents. Sexual assaulters who target men frequently use their actions to establish dominance, authority, and control. Sexual violence against women and children also exhibits prevailing gender norms that are present in sexual violence against men and boys.

¹⁵ Myrntinen H, Khattab L, Naujoks J. Re-thinking hegemonic masculinities in conflict-affected contexts. *Critical Military Studies*. 2017;3(2):103–19.

¹⁶ Dolan C, editor *Into the mainstream: Addressing sexual violence against men and boys in conflict*. Briefing paper prepared for a workshop held at the Overseas Development Institute, London; 2014.

¹⁷ Carlson ES. The hidden prevalence of male sexual assault during war: observations on blunt trauma to the male genitals. *Br J Criminol*. 2005;46(1):16–25

The United Nations has recognised violence against LGBT persons as a kind of gender-based violence that frequently stems from homophobic and transphobic sentiments and is directed at those who are seen as opposing dominant gender norms. LGBT individuals frequently encounter discrimination in post-conflict environments and are forced to conceal their sexual orientation or gender identity. Security personnel, members of the neighbourhood community, and other refugees or asylum seekers frequently employ abuse and violence. In addition, LGBT people may be the target of "honour killings". Homophobic sentiments can also lead to exclusion from employment chances or from receiving services.

LGBT people who survive sexual assault could also struggle with a greater sense of vulnerability because of their sexual orientation or gender identity. This kind of hate crime may also cause LGBT people to feel intimidated and under pressure to conceal their sexual orientation or gender identity in order to avoid being attacked, which would worsen mental health symptoms.

The perspective of the LGBTQ+ community has been absent from the discussion about gender-neutral sexual violence laws for adults. For an LGBTQ+ individual, violence and mistreatment are a part of everyday existence. Even though these communities are frequently targeted by the legal system, laws must change to account for gender fluidity and the wide range of people who may exist who do not correspond to the predetermined gender frameworks.

A fair and impartial gender-neutral law won't have much of an impact on the day-to-day experiences of LGBTQ+ people without acknowledging the power imbalances currently in place in society and engaging in open talks with all parties involved. The ideal situation would be to have one sexual assault statute that covers all genders. But first, 377 can be revised to serve as a second set of laws for sex offences committed against people whose sexual orientations are not heterosexual.

Violation of Transgender Rights

Our culture is built on a foundation that prevents it from understanding or caring about the trauma, suffering, and grief that transgender people go through, or from appreciating their deeply felt emotions. The transgender group is mocked in our society. In public venues like train stations, bus stops, workplaces, malls, theatres, and hospitals, they are tortured and humiliated. They are also considered like untouchables. We fail to recognize that "society's

moral failure resides in its refusal to contain or embrace multiple gender identities and expressions, an attitude which we have to change." Justice K S Radhakrishnan repeated it in the matter of *NALSA v. Union of India*¹⁸.

According to the decision in the well-known *NALSA Case*, "Gender identity is one of the most essential parts of existence, referring to a person's intrinsic sense of being male, female, transgender, or transsexual." The sex of a person is typically determined at birth, but a very small percentage of people may have bodies that include all or specific parts of both male and female physiology.

The Hon'ble Supreme Court ruled in *Minu B. Mehta and Others v. Bal Krishna Ram Chandra Nayan and Ors*¹⁹ that "every person has a right to protection and security of his person." As a result, if transgender victims are not covered by Section 375 of the IPC, it cannot be considered gender neutral. The Indian Penal Code continues to regard rape as a binary concept where males and females are assigned roles as perpetrators and victims, respectively, in spite of numerous modifications and landmark rulings. But in addition to victimizing men, it has also failed to include transgender rapes within its purview, even after Trans people were acknowledged as a Third Gender.

The Hon'ble Supreme Court recognized transgender people as a third gender when it ruled in the *NALSA Case* that Articles 15 and 21 of the Indian Constitution encompass the right to one's gender identity and sexual orientation.

In addition to having their rights recognized, transgender people should also have their wounds healed and have their voices heard when they are acknowledged as a third gender. The Transgender Rights Bill, 2016, has not been discussed in parliament for the past three years and has not yet materialized as an act. In today's date, 63 nations worldwide have gender-neutral rape laws in total. United Kingdom, Philippines, Republic of Ireland, and United States of America are a few examples. India needs to change Section 375 to be gender neutral.

¹⁸ National Legal Services Authority (Nalsa) Vs. Union Of India, AIR 2014 SC 1863

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

Major Landmark Judgements

National Legal Service Authority of India v. Union of India and Ors²⁰

For the transgender community to be recognized as a third gender, 2 petitions were submitted. First, the National Legal Services Authority of India filed a PIL, and then the Mata Nasib Kaur Ji Welfare Society filed a Writ Petition. According to the petitioner not recognizing the transgender community as a third gender violates their fundamental rights which are protected by Part III of the Indian Constitution. For this reason, the petitioner requested that the transgender community be legally recognized as a third gender distinct from the two binary genders that are currently recognized, namely male and female. The petitioner also provides historical data showing how the transgender community has received unique treatment and importance throughout the nation's history. The petitioner claimed that other mythologies, including Hindu, Vedic, and Puranic literature, have also recognized transgender people as belonging to a third gender.

Article 14 of the Constitution guarantees everyone's right to equality and equal treatment under the law without any discrimination based on a person's caste, creed, race, or gender. All of the nation's people are guaranteed freedom of speech and expression under Article 19(1)(a). Above all else, Article 21, or the Right to Life, the most comprehensive Fundamental Right, is guaranteed to everyone, including those who are not citizens. People are referred to as "Person" in Article 14, "Citizens" in Article 19(1)(a)²¹, and "Persons" in Article 21²².

This suggests that all of these essential liberties are accorded to all people, regardless of gender, and that the transgender population has a fundamental right to enjoy these freedoms, which the state is obligated to protect. The provision of Section 375 of the Code violates Articles 14, 15, and 21 of the Indian Constitution since men and women do not have equal protection under the law. Therefore, the purpose of this petition is to safeguard the rights of men and women, whether they are homosexual or straight, as well as transgender people, against being physically violated by someone else without their consent.

²⁰ National Legal Services Authority (Nalsa) Vs. Union Of India, AIR 2014 SC 1863

²¹ INDIA CONST. art. 15

²² INDIA CONST. art. 21

Navtej Singh Johar v. Union of India and Ors.

The concept of transformative constitutionalism has advanced to a new level as a result of the judgment in the Navtej Singh Johar case. On April 27, 2016, a Writ Petition was filed to challenge Section 377 of the Indian Penal Code, 1860 as unconstitutional on the grounds that it criminalizes consensual sexual activity between two adults who are of the same sex. Several LGBT individuals, including dancer Navtej Singh Johar, writer Sunil Mehra, chef Ritu Dalmia, hoteliers Aman Nath and Keshav Suri, and businesswoman Ayesha Kapur, filed the petition.

They are predicated on the permission of people who are adults and have the legal capacity to do so. Additionally, making it a crime would violate the Constitution's Article 21's protections for sexual orientation, privacy, reputation, and the right to choose a partner. Not only that, but Sec. 377 also violates Articles 14 and 15 since it discriminates based on the sex of the sexual partner and lacks a definition of "carnal intercourse against the order of nature." Men who engage in forced sexual activity with women without getting their consent face prosecution under section 376, but even with consent, sexual activity with another person is still illegal under section 377.

Since section 377 prohibits LGBT people the ability to organize groups, it breaches their freedom under Article 19(1) c. The verdict was handed out on September 6, 2018. According to the rulings, Sec. 377's criminalization of private, voluntary activities between adults (defined as those over the age of 18) is in violation of Art. 14, 15, 19, and 21 of the Constitution. However, it was made clear that such permission had to be given freely, voluntarily, and without fear of reprisal or other forms of pressure.

The Supreme Court further stated that "there can be circumstances which encourage an individual's emotional behaviour to seek intimacy with others of the same gender that may bring two people together." It must be viewed as a voluntary action that reflects a consensual decision. After the *Suresh Kumar Kaushal v. Naz Foundation*²³ case was overturned, this judgment was tremendously successful in restoring the public's faith in the judiciary since it demonstrated that regardless of how small the population, the judiciary is always there to uphold and defend their fundamental rights.

²³ *Suresh Kumar Kaushal v. Naz Foundation*, (2014) 1 SCC 1.

As a result, the landmark decision resulted in the decriminalization of consensual sexual contact between adults of the same sex under Section 377 of the Indian Penal Code as a violation of Articles 14, 15, and 21 of the Indian Constitution. However, the decision did not define non-consensual sexual contact between adults as sexual assault and instead maintained the status quo.

Conclusion and a way forward

In the case of *Rafiq v. State of U.P.*²⁴, Justice Krishna Iyer made the observation that "a murderer destroys the body, but a rapist kills the spirit." When the judiciary and legislature refuse to recognize a rape committed against a man or a transgender victim, we are rejecting the core ideas of Natural Justice, which are firmly rooted in our Constitution. There is sufficient evidence to demonstrate that women experience sexual violence and sexual assault to a greater extent than men. This is unavoidable. The gender-neutral definition of Section 375 and the present crime rate against women give them preference over men and the transgender population.

While they are significantly less prevalent than their counterparts, sexual violence and sexual assault against men and the transgender community cannot be ignored. It is advised that ideas be drawn from the Criminal Law (Amendment) Ordinance, 2013, which kept the offence gender-neutral with regard to both the perpetrator and the victim, in order to remedy this problem and uphold the Principles of Natural Justice.

As it is for a woman, it takes a lot of fortitude for a rape victim to speak up against the harm done to his body, and it is utterly barbaric to deny him justice because this offence does not fit the definition of rape as it is understood in our society. While they are significantly less prevalent than their counterparts, sexual violence and sexual assault against men and the transgender community cannot be ignored. It is advised that ideas be drawn from the Criminal Law (Amendment) Ordinance, 2013, which kept the offence gender-neutral with regard to both the perpetrator and the victim, in order to remedy this problem and uphold the Principles of Natural Justice. As it is for a woman, it takes a lot of fortitude for a rape victim to speak up against the harm done to his body, and it is utterly barbaric to deny him justice because this offence does not fit the definition of rape as it is understood in our society. Following a 2013

²⁴ *Rafiq v. State of U.P.*, 1981 AIR 55

modification, the definition of rape was expanded to include finger- and penile-urethral penetration as well as penile-vaginal penetration. If the law can recognize that a woman can be sexually assaulted in general, why can't it recognize that men and transgender people can also be sexually assaulted?

The rape of women by men will be subject to the current rape laws. However, Section 377 could be amended to cover non-heterosexual individuals, such as women on women, women on transgender persons, and men on men who have sexually abused women. Only the victim's definition needs to be changed from "man, woman, or beast" to "person and beast" because language of section 377 language is already gender neutral for the perpetrator. Furthermore, as opposed to the victim as it is now, the onus of proof for proof of consented sexual conduct would fall on the perpetrator.

All Indian citizens have equal status under the Constitution. Therefore, all gender identities, including men, women, and the transgender community, need to be protected by the laws against sexual violence, including rape, stalking, assault, and sexual harassment. However, experts noted that there is a legitimate concern that any modifications to the rules pertaining to sexual violence must not harm the most vulnerable group in society, namely women.

Women have historically been the targets of rape. Therefore, if we can't make the legislation completely gender neutral without taking into account specific historical and gender prejudices that are actually applied to assault women, These modifications to India's sexual violence legislation will make them more gender-just, gender-sensitive, but not gender-neutral.

References

- Heidt JM, Marx BP, Gold SD. Sexual revictimization among sexual minorities: A preliminary study. *Journal of Traumatic Stress*. 2005
- Herek GM, Gillis JR, Cogan JC. Psychological sequelae of hate-crime victimization among lesbian, gay, and bisexual adults. *Journal of Consulting and Clinical Psychology*.
- Hughes TL, Haas AP, Avery L. Lesbians and mental health: Preliminary results from the Chicago Women's Health Survey. *Journal of the Gay and Lesbian Medical Association*, 1997
- Carlson ES. The hidden prevalence of male sexual assault during war: observations on blunt trauma to the male genitals. *Br J Criminol*. 2005;
- Onyango MA, Hampanda K. Social constructions of masculinity and male survivors of wartime sexual violence: an analytical review. *Int J Sex Health*. 2011;
- Chynoweth S. Sexual violence against men and boys: in the Syria crisis. Geneva: United Nations High Commissioner for Refugees (UNHCR); 2017. <https://data2.unhcr.org/es/documents/download/60864>.
- Apperley H. Hidden victims: a call to action on sexual violence against men in conflict. *Med Conflict Survival*. 2015
- Krugg E, Dahlberg L, Mercy J, Zwi A, Lozano R. Violence—a global public health approach. *World report on violence and health*. Geneva: World Health Organization; 2002