

An Evolution of Anti-Rape Laws in India after Nirbhaya's case: An Analysis

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In difficult times it is natural for any civil society to demand more security, more stringency, and for the fulfilment of the two, more laws. But the question arises - what is 'more'? And whether 'more' is the right answer? The history of legal responses to sexual violence in India indicates that a law enacted in the wake of any 'highlighted' incidence could be predicated on a hasty understanding of the problem, which is often flawed, and impregnated with ambiguities. The approach of law makers in India towards law reform process, especially criminal laws relating to sexual offences, has been piecemeal rather than comprehensive and holistic. The 'mobocratic' nature of law reforms undertaken in India is evident from the fact that political leadership might rush rigorous laws in order to capitalise on sympathy or escape public backlash. Such laws often lack scientific and logical assessment of facts and a robust debate among law makers. The political class is pushed to pass certain laws at a breakneck speed without proper research or deliberation on their implications. In other words, a hurried legislation is reflective of a buried discussion. Those piecemeal 'stringent' measures might satisfy society's collective desire to see that something is being done. But a symbolic satisfaction of society has a counterproductive and cascading effect on the criminal justice system. A perfunctory law reform exercise often misses out on intricate nature of legislative drafting and ends up in an ambiguous piece of legislation with a want for judicial interpretation. The laws of rape have undergone vast changes all over the globe. Different Legal Systems have dealt with the concept of rape and its ingredients in different manner. One set of legal system has taken the traditional approach and focused on the patriarchal understanding of what constitutes rape, while in other legal systems attempt has been made to develop new approach which places greater emphasis on the sexual violence suffered by the victim. Almost all countries have attempted to strengthen the provisions of their laws so as to afford the highest level of protection to the hapless victims of this crime.

The Criminal Law (Amendment) Act, 2013

Almost thirty years after the 1983 Amendment, another heinous incident of gang-rape came to light on the night of 16 December 2012, in which a 23-year-old, middle-class girl, a [physiotherapy intern](#), was beaten up and [gang raped](#) in [Delhi](#). She had been vaginally and anally penetrated by a group of men using their hands, their penises, and an iron rod. She did not survive the assault. She died from her injuries thirteen days later, despite receiving treatment in India and Singapore. The incident generated international outrage and was condemned by the [United Nations Entity for Gender Equality and the Empowerment of Women](#), who called on the [Government of India](#) and the [Government of Delhi](#) "to do everything in their power to take up radical reforms, ensure justice and reach out with robust public services to make women's lives more safe

and secure". The incident took over the news cycle and agitated the middle class like never before. Protesting masses demanded a strict and more comprehensive legislation, since the law's understanding of rape had thus far been limited to penile-vaginal intercourse.

Six days after the incident, on 22 December 2012, the Central government appointed a Judicial Committee headed by [J.S. Verma](#), a former [Judge of Supreme Court](#), to suggest amendments to criminal law to deal sternly with [sexual assault](#) cases. The Committee, which also included retired judge [Leila Seth](#) and a leading advocate [Gopal Subramaniam](#), was given a month to submit its report. The Committee submitted its Report within 29 days, on 23 January 2013, supposedly after considering the 80,000 suggestions and petitions received by them during that same period from the public in general and particularly from jurists, lawyers, Non-Governmental Organisations and women's groups. The Report indicated that failure on the part of Government and Police was the root cause of crimes against women. Major suggestions of the Report included the need to review [AFSPA](#) in conflict areas, maximum punishment for rape as life imprisonment and not death penalty, and removed ambiguity over control of Delhi Police, etc.

On 1st February 2013, the Cabinet Ministers gave approval for bringing into being an Ordinance, for giving effect to the changes in law as suggested by the Justice Verma Committee Report. According to former Minister of Law and Justice, [Ashwani Kumar](#), 90 percent of the suggestions given by the Verma Committee Report had been incorporated in the Ordinance. The Ordinance was subsequently replaced by a Bill with several changes, which was passed by the Lok Sabha on 19 March 2013 and by the Rajya Sabha on 21st March 2013, which provided for the amendment of provisions of the [Indian Penal Code](#), [Indian Evidence Act](#), and [Code of Criminal Procedure, 1973](#) dealing with [sexual offences](#). The Bill received assent of the President on 2nd April 2013 and came into force on 3rd April 2013.

Changes in the Law:

The most important change had been introduced in definition of word '[rape](#)' under Indian Penal Code. Although the Ordinance sought to replace the word 'rape' with the word 'sexual assault', yet the word 'rape' was retained in Section 375 of IPC, and its meaning extended to include acts in addition to vaginal penetration. The definition was broadly worded with acts, like, penetration of [penis](#), or any object or any part of body to any extent, into the [vagina](#), [mouth](#), [urethra](#) or anus of another person or making another person to do so, applying mouth or [touching private parts](#) also constituted the offence of sexual assault. The Section 375 also made it clear that penetration meant "penetration to any extent" and lack of physical resistance was immaterial for constituting the offence. Except in certain aggravated situations, the punishment would be imprisonment not less than seven years but which might extend to imprisonment for life, and was also liable for fine. In aggravated situations, punishment would be rigorous imprisonment for a term which shall not be less than ten years but which might extend to imprisonment for life, and was also liable for fine.

A new section, 376A had been added which stated that if a person committing the offence of sexual assault, "inflicted an injury which caused the death of the person or caused the person to be in a **persistent vegetative state**, was to be punished with rigorous imprisonment for a term not less than twenty years, but which could extend to imprisonment for life, which meant the remainder of that person's natural life, or with death." In case of "gang rape", the persons involved regardless of their gender, were to be punished with rigorous imprisonment for a term not less than twenty years, but which could extend to life imprisonment besides paying reasonable compensation to the victim to meet her medical expenses and rehabilitation. The **age of consent** had been raised to 18 years, meaning thereby that any sexual activity irrespective of presence of consent with a woman below the age of 18 was to constitute **statutory rape**.

Certain changes had been introduced in the Cr.P.C. and Evidence Act, viz., the process of recording the statement of the victim had been made more victims friendly and easy with the two critical changes:

1. the 'character of the victim' had been rendered totally irrelevant, and
2. there was a presumption of 'no consent' in a case where sexual intercourse was proved and the victim stated in the court that she did not consent.

The Criminal Law (Amendment) Act, 2013,¹ was brought into effect within five months of the incident. The amended provisions were highly progressive. The understanding of 'consent' embodied by the statute clearly conveyed the intention to shift focus away from the actions and sexual history of the victim, and onto the actions of the accused. Hence, a lack of resistance, or submission, was distinguished from overt agreement or consent. Further, consent was required, not as a one-time *carte blanche*, but for specific sexual acts. Although it could be conveyed in words, gestures or other forms of verbal or non-verbal communication, the fact that consent must be unequivocal, left little room for victim-blaming, if judges stayed true to the philosophy and purpose of the provision. Similarly, the amendment took into account the vitiating effect of unequal power relations on consent, prescribing a harsher sentence for a broad range of circumstances in which the victim was in a disadvantaged position as compared to the perpetrator.

The definition of rape had also been made more comprehensive. But, as with the 1983 Amendment, the changes made to the conceptualisation of rape seem geared to respond to the problems highlighted by the incident that prompted the amendment. Thus, rape after the amendment included, beyond penile-vaginal penetration, penetration of the mouth, anus, urethra, or any other part of a woman's body by a penis, by manipulation, by 'applying the mouth', or by an object.

The scope of the law in terms of identity of the 'victims' or 'perpetrators' still remained severely gendered and constrained. The proposal to make the law gender neutral was opposed by most feminist groups, citing the patriarchal social reality of the country. It was argued that, given the power structures of Indian society, the perpetrators of rape were almost always male, and the victims, female. The offence of rape, to reflect those conditions, would have to be gender specific.² However, that did not explain as to why homosexual rape (of men by other men, or of women by other women), and the rape of/by transgender

persons was not included. The reason could not be that Section 377 already covered those acts because, by that logic, the expansion of the definition to include acts beyond penile-vaginal intercourse amongst heterosexuals would also be redundant.

The 2013 Act could be viewed as a mere placeholder in the ongoing struggle against sexual and gender-based violence in India. The most overwhelming prospect was the overhaul of prevailing attitude to rape and sexual offenses in a populace ostensibly grappling with moral “confusion,” as economic modernization necessitated far-reaching changes in gender roles while social attitudes remained steeped in moral conservatism and misogyny.

There were already ample laws prescribing deterrent punishment for offences against women. What was actually required was a concrete legislation, which was, however, partially achieved through the Criminal Law (Amendment) Act, 2013 to infuse sensitivity, understanding and more significantly a change in the mind-set among police and executive to implement the law more in spirit than in letter. Only then deterrent punishment could be awarded in crimes against women.

The Criminal Law (Amendment) Act, 2018:

The recent incidences of rape in Kathua³ and Unnao⁴ have re-ignited the fading memories of 16 December 2012. Despite stringent laws passed post-Nirbhaya, the collective conscience of the society was taken aback with Kathua rape case, where an 8 year old girl fell prey to the savage lust of a gang, faced brutal sexual assault and got murdered, to give vent to their pervert sexual appetite and sadistic pleasure of the perverts. Those horrific incidents and the alleged political support to the perpetrators were reminder of the fact that rape culture in India had not only failed to wane but loomed large in our society where such crimes were committed with impunity. As a consequence, to the extensive press reporting and public uproar, the government was prompted to take ‘corrective measures’. The cabinet approved the Criminal Law (Amendment) Ordinance, 2018⁵ (the Ordinance). The Ordinance was signed by the President of India and it came into force on 21st April 2018. The Ordinance enhanced punishments (including capital punishment) for offenders convicted of raping minors, and wide ranging changes were introduced in procedural laws as well. As a law reform exercise, the state adopted the same methodology based on impulses rather than sound legal propositions and deliberations. The overdrive shown by the Government in rushing the Ordinance was also questioned by the Delhi High Court where it’s Acting Chief Justice Gita Mittal, while issuing notice to the Centre, asked for relevant scientific assessment or research considered by the Government before promulgating the Ordinance. In the meanwhile, to fulfil the Constitutional requirement, the Criminal Law (Amendment) Bill, 2018 (hereinafter the Bill) was introduced in the Parliament to replace the Ordinance with an Act of Parliament. The Bill was passed by *Lok Sabha* on 30th July 2018 and *Rajya Sabha* on 06th August 2018. Thereafter, it received the assent of the President on 11th August 2018 and came into force as the Criminal Law (Amendment) Act, 2018⁶ on 21st April 2018. The Act which replaced the Ordinance with a retrospective effect, amended four Central legislations namely: The Indian Penal Code, 1860;⁷ the Code of Criminal Procedure, 1973 (Cr.P.C);⁸ the Indian Evidence Act, 1872 (IEA);⁹ the Protection of Children from Sexual Offences Act, 2012 (POCSO)¹⁰. Appearing to be a knee jerk reaction to public protests, the

legislation so enacted suffered from several drafting ambiguities which had left an ample scope for the exercise of judicial discretion while interpreting the law in future.

Changes in Law

The Amendment Act of 2018 had amended the Indian Penal Code in two ways: Firstly, by amending the existing provisions of IPC; secondly, by inserting new provisions which had created new offences in the penal Code. Those amendments aimed at deterring the increasing trend of sexual violence against minors. However, the 'deterrence' which the law sought to bring had been brought about at the cost of proportionality and reasonableness of criminal laws. On a bare perusal of the provisions, one can make out the manifold increase in the sentences which the State believed would act as a deterrent to such acts of sexual violence. However, the law failed to reconcile itself with the ground realities of gender related sexual violence in India, and the established principles of Criminal Law.

On a careful perusal of Sections 375 and 376 of IPC, one can identify a classification of rape-rape *simpliciter* punishable under Section 376(1), and aggravated form of rape punishable under Section 376(2). The former class of rape lays down the general offence of rape and invites a lighter punishment. Whereas, the latter class of rape provided under Section 376(2) prescribed down 14 circumstances where under the nature of rape was considered more serious due to the presence of an aggravating factor and, therefore, had higher punishment. Any man who committed an aggravated form of rape was liable for prosecution under Section 376(2) which prescribed a minimum punishment of 10 years which could extend to life imprisonment. Whereas a man who committed rape on a woman, which was covered in the definition provided under Section 375 of the Penal Code, was liable for prosecution under Section 376(1), provided it did not fall in any of the clauses of Section 376(2). Prior to the Criminal Law Amendment Act of 2018, the minimum punishment for rape *simpliciter* was 7 years which could extend to life imprisonment. However, the Amendment Act of 2018 had increased the minimum sentence from 7 years to 10 years. On the face of it, the amendment appeared to be a strong provision against rape but on a careful look, one could appreciate its real implications.

The worrisome aspect of the new law was the fact that it obliterated the distinction between rape *simpliciter* and aggravated form of rape. Logically speaking, the presence of any aggravating factor, as enumerated in 376(2) from clauses (a) to (n), should have warranted a greater punishment, but under the Amendment Act of 2018, both kinds of rape would invite same punishment. There appeared to be no rational basis as to why the punishment awarded in aggravated forms of rape should be the same as awarded in rape *simpliciter*. Moreover, when the scheme of IPC itself recognised the classification based on aggravated nature of offence, then punishment should also be in proportion to such classification. Whether that oversight was intentional or result of a ham-fisted drafting was difficult to say but had wide and serious ramifications. With regard to rape of a woman under 16 years of age, Section 376(2) clause (i) had been deleted and sub-section (3) had been inserted which provided a minimum punishment of 20 years which could extend to life imprisonment (which means the remainder of that person's natural life). However, the constitutional validity

of the minimum imprisonment of 20 years provided under Section 376(3) was questionable when judged on the ground of proportionality.

At a time when sexual experimentation among adolescents was not an uncommon phenomenon, the severity of the minimum 20 years' imprisonment, transcended the limits reasonableness and fairness. Let's assume a girl who was under 16 years of age entered into a consensual physical relationship with a man of 18 years in age. That being a case of statutory rape, once the fact that the prosecutrix was below the age of consent of 18 years in India, was proved, the question of consent would become irrelevant and sexual intercourse with her would amount to rape irrespective of her consent.¹¹ But a sentence of '20 years' imprisonment to the boy, in the absence of judicial discretion, which existed prior to 2013,¹² appeared to be unreasonable and too harsh. The judge would be mandatorily required to sentence the man to 20 years' imprisonment, who would eventually get released at the age of 38 years or may never get released in the event of life imprisonment. The law would also create counter-productive results in case of minor offenders. For instance let's assume that the offender was 17 years of age, after the enactment of the Juvenile Justice Act (Care and Protection of Children), 2015¹³ (hereinafter called JJA), who might be tried as an adult¹⁴ and awarded imprisonment under the provisions of IPC, except death and life imprisonment.¹⁵

In view of the lacunas in the practical implementation of the Juvenile Justice Act, 2015 and shoddy compliance by law enforcement agencies was always a cause of concern. Various experts had red flagged ambiguities in the JJA, which resulted in denial of justice to juveniles in conflict with law. In such cases, a juvenile in conflict with law might be awarded a sentence of 20 years resulting in injustice to the juvenile and, thereby, frustrating the very objective of reformation. The amendment Act of 2013 had introduced a mandatory minimum sentence of 10 years, while the Act of 2018 substantially increased the mandatory sentence to 20 years without any credible research or justification. Senior Advocate Indira Jai Singh had argued that "the mandatory nature of the offence takes away the discretion of the judge. Every sentence must fit the crime." Absence of judicial discretion would make sentencing process more rigid and static. A straight jacket sentencing policy without any scope for judicial discretion in awarding a sentence would hamper individualisation of sentencing.¹⁶

New offences for rape and gang-rape of minors

The Criminal Law Amendment Act of 2018 created three new offences under Sections 376AB, 376DA and 376DB of IPC. Those offences catered specifically to the increased number of rape against minors. Those new offences made gradation in terms of severity and punishment for raping minors. Section 376AB created a new offence where minimum punishment for raping a woman under 12 years of age was 20 years imprisonment, which could extend to life imprisonment, meaning the remainder of that person's natural life, and maximum sentence could be that of death. Whereas, Sections 376DA and 376DB were the extension of provisions relating to gang rape.

Those provisions had been carved out so as to deal with the increased incidence of gang rape where a victim was under 16 years or under 12 years of age. Section 376DA of the IPC had introduced a mandatory sentence of life imprisonment for gang raping of a girl under 16 years of age, whereas, Section 376DB dealt

with the gang rape of a girl under 12 years of age, and prescribed enhanced punishment of life imprisonment, meaning the remainder of that person's natural life, or even death. The concept of mandatory sentence provided under Section 376DA was a curious case. The propriety of mandatory life imprisonment prescribed under the said Section was questionable on the grounds of proportionality. Firstly, mandatory sentence of life imprisonment, in the absence of judicial discretion would curtail individualisation of justice based on circumstances of the offender and the offence so committed. Secondly, judges in view of mandatory nature of sentence may demand a higher standard of proof before awarding a conviction, leading to a negative impact on conviction rates. The stringent punishment introduced by the Criminal Law Amendment Act of 2018 for those new offences might run counter-productive to the reportage of child marriages in India. In other words, no married girl under the age of 16 or even 12 would file a rape case against her own husband, since the punishment in such cases might lead to life imprisonment or even death. It would have been appropriate to take into consideration the practical issues prevalent in Indian society before deciding on the quantum of punishment.

Another problem which the Amendment Act of 2018 created was with respect to its implications on various provisions of the Juvenile Justice Act, 2015. The mandatory sentencing under Sections 376DA and 376DB might run counter to Section 21 of the Juvenile Justice Act, which prohibited the award of life imprisonment and death sentence to a juvenile in conflict with law. Section 376DA prescribed a mandatory sentence of life imprisonment, including the remainder of person's natural life; while as Section 376DB provided the sentence of life imprisonment or even death. In any such case, a juvenile in conflict with law could not be awarded the mandatory punishment either under Section 376DA or 376DB of IPC by virtue of the prohibition contained in Section 21 of Juvenile Justice Act, 2015. In such a scenario, the question that rattled the mind was that what would be the nature and quantum of punishment prescribed and under what law as the Amendment Act of 2018 was silent with regard to the imposition of punishment? The provisions of gang rape of minors were the reiteration of the general provisions of gang rape provided under Section 376D of the Penal Code. Those provisions were worded in gender-neutral terms with respect to the perpetrator. Thus, on the basis of literal interpretation, it was possible to convict a woman of raping a minor as part of a gang. However, a woman who happened to be a member of a group and had facilitated the commission of rape, could not be held guilty of gang rape, as she could not commit the offence of rape. The Supreme Court in *Priya Patel's case*¹⁷ had held that the expression 'in furtherance of their common intention' in gang rape related to intention to commit rape and it was inconceivable that a woman could rape another woman.¹⁸ Such a narrow interpretation by the Supreme Court disregarded the rule of joint liability which imputed culpability on the 'associates' of the wrong-doer by mere participation in the commission of the offence regardless of their nature or extent of participation. The gender neutral culpability in gang rape cases also found support in Justice Verma Committee Report,¹⁹ which recommended that in cases of gang rape, the punishment shall be awarded to each perpetrator regardless of gender.²⁰ However, no such change was incorporated by the Amendment of 2013. Similarly, the Criminal Law Amendment Act of 2018 had also failed to plug that loophole in the law. In light of the existing SC judgments on the issue, it had to be seen as

to what nature of liability was attributed to the woman perpetrator who had assisted in the commission of gang rape.²¹

Capital punishment for new offences

Capital punishment for new offences: Really a deterrent in rape cases? The most drastic and striking feature of the Amendment Act of 2018 was the provision of death penalty in cases related to rape of minors. Prior to the promulgation of the Ordinance and enactment of this Act, the scope of death penalty in rape cases was limited to a few aggravated cases of rape. Earlier, only Sections 376A and 376E of the Indian Penal Code had a death penalty as the maximum sentence in cases of rape. Section 376A dealt with cases where the death or vegetative state of the victim was caused in the course of the commission of rape and Section 376E covered cases of habitual offenders. The Criminal Law Amendment Act of 2018 has extended the death penalty to all cases of rape where the age of the victim was under 12 years. From a long time, there had been a consistent demand from public that rape being a heinous crime should have death penalty so that it would create a deterrent effect on growing incidents of sexual assault. In a country, where death penalty was perceived as a *sine qua non* to deterrence, the misplaced perceptions about the deterrent nature of death penalty found support in the legislative enactments on Criminal law in 2013 and the recent Amendment of 2018. At a time when studies across the world have questioned the efficacy of capital punishment in deterring crimes and evolving global consensus towards its abolition, the retention and extension of death penalty in India was a matter of distress. The Supreme Court despite upholding the constitutional validity of death penalty had in plethora of cases limited its scope to rarest of rare cases.²² The support for the retention and extension of death penalty to rape cases should have been objectively analysed. Before advocating for death penalty or any other stringent punishment under criminal law, it is important to understand and objectively appreciate the utility and implication of such a punishment. The solutions offered by the state in penal statutes should be a kind of remedy which was not worse than the disease. It must be kept in mind that death penalty is permanent in nature and cannot be reversed. "One wrong decision of a judge would lead to extinguishment of the accused's life. Since any liberal or flexible appreciation of evidences would lead to grave consequences on accused's life. In such an event, judges are likely to expect a much higher standard of proof, which might result in further lowering the rate of conviction." "Besides, if the rapist knew that rape carried death penalty, he might be tempted to kill the victim so that she will not be available to give evidence against him." The Malimath Committee also rejected the idea of death penalty for rape cases and called for procedural amendments which resulted in certainty of punishment rather than quantum of punishment as a real deterrent.²³ Unfortunately, a large number of rape cases ended up in acquittal of the accused.²⁴

Another practical aspect which perhaps the law makers either chose to overlook or were oblivious about, was the fact that in substantial number of rape cases involving minors, the perpetrators were either from family or the neighbourhood. The NCRB data had revealed that there was an increasing trend of rape cases where the rapist was known to the victim. For example, the crime statistics of NCRB revealed that out of 38,947 cases of rape reported in 2016, in 3891 cases, the perpetrator of crime was either the father/brother/ grandfather/son, or any other close family member or a relative.²⁵

The Criminal Law Amendment Act of 2018 had incorporated some progressive provisions in the domain of compensatory jurisprudence. All the substantive provisions relating to rape of minors under IPC, as amended by the Criminal Law Amendment Act, 2018, provided a mandatory clause of compensation for the victim. The provisions laid down that any fine imposed on the convict should be paid to the victim and it had to be just and reasonable to meet the medical expenses and rehabilitation of the victim. Prior to the Amendment Act of 2018, there was no such rehabilitative provision for minor rape victims, except in cases of gang-rape. Similar amendments had been made in the Cr.P.C., where the benefit of compensation had been extended to cover rape and gang rape of minor girls below 12 years and 16 years of age.

Amendments to Cr.P.C: Issues and concerns

For any successful conviction, investigation is an important component in the criminal justice system. But apart from the pre-eminent position of investigation in a criminal trial, speedy investigation is also a significant part of the criminal justice system. Apathy of law enforcement agencies towards investigating rape cases often leads to delays in filling charge sheet, which was often a reflection of faulty investigation. Delay in investigation might lead to tampering of evidence, witness intimidation and subsequently acquittals in trial owing to want of evidence. Prior to the enactment of Criminal Law Amendment Act, the Cr.P.C provided a 3-month period for the completion of investigation in rape cases involving minor. The said Amendment Act reduced the period of investigation from 3 months to 2 months. Further, it had also reduced that time limit in all offences of rape, including rape, gang rape, and rape of minors under the age of 12 or 16 years. That was another appreciable step towards strengthening the speedy investigation in rape cases, which often suffered due to delayed investigation by the police. No doubt that delay caused in the investigation process and disposal of appeals were a cause of major concern which diluted the effect of any stringent law. The Criminal Law Amendment Act, 2018, by fixing a statutory time limit for the investigation and appeals in rape cases was a welcome step.

Section 438 of the Cr.P.C. contained provision for anticipatory bail. Such a bail was available to persons who were under the apprehension of being arrested for a non-bailable offence. The amended Act had incorporated a stringent sub-section which made provision of anticipatory bail 'not applicable' to the offences of rape and gang rape where the prosecutrix was below 16 years of age. Thus, no court had the power to grant an anticipatory bail to a person who was apprehending arrest in a rape case related to minor. Despite legislature putting blanket restriction on the rights of the accused to access anticipatory bail, the courts have been wary of such legislative actions. Since *Maneka Gandhi's* case,²⁶ constitutional courts have been invoking the doctrine of proportionality for advancing fairness and reasonableness in procedural laws. At a time, when misuse of law has come under the strict scrutiny of judiciary, the constitutional courts by way of interpretation have devised alternative remedies for providing relief to the person accused in such cases.

The Act of 2018 had also inserted amendment in the POCSO Act of 2012, by amending Section 42 of the Act. The purpose of Section 42 was to give the general law contained in IPC an overriding effect over POCSO in the matters of punishment, since IPC provided for enhanced punishment for rape. The amendment in POCSO was necessitated due to the inclusion of new offences in IPC, added by the Amendment Act 2018. In order to extend the enhanced punishments in IPC to the cases falling under POCSO, Section 42 of POCSO was amended and newly created offences under Sections 376AB, 376B, 376DA and 376DB were substituted. But in the process, the Criminal Law Amendment Act of 2018 had failed to take into account the fact that POSCO was a gender-neutral law, whereas the legal framework of rape under IPC was gender-specific. To put it in context, POCSO used the word 'person' in its reference to victim and perpetrator; whereas, Sections 375, 376 and other successive provisions used the word 'woman' and 'man' in reference to victim and perpetrator, respectively. This would create a situation where those guilty of committing penetrative sexual assault on a girl below 12 years would get minimum life imprisonment or the capital punishment, by virtue of Section 376AB read with Section 42 of POCSO Act. But a lesser punishment of 10 years or life imprisonment would be awarded for committing penetrative sexual assault on a boy, since there was no parallel provision for rape of men in IPC. Same inconsistency would also prevail over gang rape related provisions, where the same offence committed against a boy and a girl would be treated differently. The Criminal Law Amendment Act to the extent that it discriminated between sexes in the matter of punishment, failed to satisfy the equal protection clause and was, therefore, violative of Article 14 of the Constitution of India. Moreover, it was also important to note that it was in the interest of justice that a public discourse be initiated for introducing gender neutral criminal laws with respect to sexual offences, with appropriate mechanism to check their misuse. Countries around the world have made suitable amendments in their criminal statutes in order to incorporate gender neutral provisions. There was an emerging consensus about the high prevalence of male and transgender victims of sexual offences.

The criminal law was one of the most vital links which defined the relationship between a State and its citizens. Therefore, it was desirable if that relationship was defined precisely and clearly in the penal statutes. The criminal law which was seen as the most potent State instrument restricting individual's fundamental right to life and personal liberty, must be free from inconsistencies and ambiguities. Apparent inconsistencies in criminal laws of India made it difficult for ordinary citizens and even legal experts to understand the scope of a particular provision. On the one hand, IPC and its amendments continued to be subject to constant judicial interpretation border-lining law making due to slow progress in law reforms. While on the other hand, the Legislature and the Executive continued to sleep on crucial law reform recommendations made by Expert Bodies and Committees. Thus, the IPC and its recent anti-rape amendments continued to ail from ambiguities, inconsistencies and legislative apathy towards its reformation. A hasty legislation, drafted with an intent to calm public impulse, may augur well for optics and political rhetoric. However, in the hindsight it compromises the quality of law reforms, and clogs the judicial system with petitions praying for an authoritative declaration on the law. The Parliament which could have brought necessary changes in the IPC, left untouched by 2013 Amendment Act, had missed yet another

opportunity. By bringing superficial reforms, the State appeared to have washed its hands, from addressing the more pressing need for a comprehensive revision of the Penal Code. Moreover, the State narrative of deterrence was nothing but a misguided institutional aggression, detached from ground realities. What was expected from any government was not mere passing of laws but to conduct thorough research, assess its findings and apply reason before making any law. In the absence of a holistic research oriented approach, the legislature would continue to pass ambiguous and omnibus laws which disregarded cardinal principles of Criminal Law Jurisprudence, and Constitutional values. It served well to all stakeholders in a Criminal Justice System to bear in mind that respect and adherence to laws could only be achieved when the law makers recognised the necessity of reconciling individual rights with that of the society, along with the State interest in maintaining law and order.

Foot Notes:

1. Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India).
2. Flavia Agnes, Law, "Ideology and Female Sexuality: Gender Neutrality in Rape Law," *Economic and Political Weekly*, 37(9), at pp. 844 and 847 (2002).
3. The Kathua rape case refers to the abduction, rape and murder of an 8 year old girl in Rasana village near Kathua (Jammu & Kashmir) in January 2018. The victim, who belonged to the *Bakarwal* community, disappeared for a week before her dead body was discovered by the villagers. Owing to political patronage to the accused and possibility of political influence on the trial in Kathua (Jammu & Kashmir), the trial of the case was transferred by the Supreme Court to the District and Sessions Court, Pathankot in Punjab. See, *State of Jammu Kashmir v. Deepak Khajuria @ Deepu* (Case registration no. 34/2018)
4. The Unnao rape case refers to the alleged rape of a minor 17 year old girl on 4 June 2017. The main accused was Kuldeep Singh Sengar, MLA of Uttar Pradesh and a member of the ruling BJP party. The case was transferred to CBI owing to public pressure. The Allahabad High Court vide its judgment, *Re: An Unfortunate Incident in Unnao of Rape and Murder Published in Various Newspaper v. State of U.P.* (W.P [Cri.] 1 of 2018, 21 May 2018) stayed the trial at Unnao Sessions Court and transferred the same to a Special CBI Court at Lucknow (POCSO). For details see, *C.B.I v. Kuldip Singh Sengar*, (Cri. Case No. 1228/2018).
5. The Criminal Law (Amendment) Ordinance, 2018 (2 of 2018).
6. The Criminal Law (Amendment) Act, 2018 (22 of 2018).
7. Indian Penal Code, 1860 (Act 45 of 1860).
8. Code of Criminal Procedure, 1973 (Act 2 of 1974).
9. Indian Evidence Act, 1872 (Act 1 of 1872).
10. Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012).
11. K.I. Vibhute, *PSA Pillai's Criminal Law*, p. 824, Lexis Nexis, New Delhi, 2017.
12. Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India*, p. 112, Cambridge University Press, England, 2016.
13. Juvenile Justice Act (Care and Protection of Children), 2015 (Act 2 of 2016).
14. Under the Juvenile Justice Act of 2015, a child in conflict with law (16-18 years of age) could be tried as an adult for heinous offences if the Juvenile Justice Board (under Section 15 and 18) and the Children's Court (under Section 19) decided that there was a need for trial of the child as an adult as per the provisions of the Cr.P.C.
15. By virtue of Section 21 of the Juvenile Justice Act of 2015, a child cannot be sentenced to death or life imprisonment.

16. Indira Jai Singh, "Stringent Punishment to Score Political Points," *Deccan Herald*, 28 April 2018.
17. Priya Patel v. State of Madhya Pradesh, (2006) 6 SCC 263.
18. State of Rajasthan v. Hemraj, (2009) 12 SCC 403.
19. Justice J.S. Verma, *et.al.*, Report of the Committee on Amendments to Criminal Law (2013).
20. *Id.*, at p. 444.
21. Om Prakash v. State of Haryana, (2015) 2 SCC 84.
22. Bachan Singh v. State of Punjab, (1980) 2 SCC 684; Machhi Singh v. State of Punjab, (1983) 3 SCC 470; and Sangeet v. State of Haryana, (2013) 2 SCC 452.
23. Government of India, Ministry of Home Affairs, *Committee on Reforms of Criminal Justice System*, p. 193, March 2003.
24. National Crime Records Bureau, *Report on Crime in India, 2016*, Ministry of Home Affairs, 2017, p.153. As of 2016, the conviction rate in rape cases stood at 25.5 per cent.
25. *Id.*, at pp. 146-147.
26. Maneka Gandhi v. Union of India, (1977) 1 SCC 248.

