

# DECODING ‘DETERRENCE’: A CRITIQUE OF THE CRIMINAL LAW (AMENDMENT) ACT, 2018

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## Abstract

In the wake of public resentment over *Kathua* and *Unnao* rape cases the laws dealing with sexual assault and rape underwent a major change with the promulgation of the Criminal Law (Amendment) Ordinance, 2018. The Ordinance was replaced by an Act of Parliament when it was passed by both the Houses of Parliament and received the Presidential assent. However, circumstances surrounding the hasty promulgation of laws lend credence to the fact that the process of law reforms in penal statutes has been propelled by a knee jerk reaction to public backlash rather than sound legal propositions. In this article, the author has endeavoured to critically examine various provisions of the recent anti-rape law and point out ambiguities and inconsistencies. The author also made a threadbare analysis into the much acclaimed stringency of the law and red-flagged concerns of constitutional and legal significance. The article while endorsing Macaulay’s view on good code, argues that the existing status of IPC has become an anti-thesis to Macaulay’s good code, and poorly drafted amendments will eventually end up at the doorsteps of judiciary. This vicious circle is potentially the root cause of a dysfunctional criminal justice system. The article is an attempt to highlight these issues in context of the recent amendments in criminal laws.

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## I Introduction

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 toward 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 a criminal justice system. A perfunctory law reform exercise often misses out on intricate nature of legislative drafting and ends up an ambiguous piece of legislation with a want for judicial interpretation. Macaulay, the architect of the Indian Penal Code (IPC) was of the view that a good code should have three qualities – Precision (free from ambiguities), Comprehensibility (easily understandable by ordinary citizens), and Product of legislative law making (minimum judicial interference).<sup>1</sup> However, over a period of time, the voluminous IPC, as amended from time to time, along with judicial pronouncements has become an anti-thesis to abovementioned qualities.

The recent incidences of rape in *Kathua*<sup>2</sup> and *Unnao*<sup>3</sup>, have re-ignited the fading memories of December 16, 2012. The gruesome and one of the most repulsive incident of

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<sup>1</sup> Stanley Yeo, Barry Wright *et. al*, *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* 4-5 (Routledge, 2011).

<sup>2</sup> 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 Jan. 2018. The victim belonged to the *Bakarwal* community. She disappeared for a week before her dead body was discovered by the villagers. Owing political patronage to the accused in the case and possibility of political influence on the trial in Kathua (J & K), the trial of the case was transferred by the SC to Pathankot District & Sessions court (Punjab). See, *State of Jammu Kashmir v. Deepak Khajuria @ Deepu* (Case registration no. 34/2018).

<sup>3</sup> The Unnao rape case refers to the alleged rape of a 17 year old girl (minor) on June 4, 2017. The main accused is Kuldeep Singh Sengar, a MLA of Uttar Pradesh, and a member of the ruling BJP. The case was

gang rape of a 23 years old physiotherapy student marked a watershed development in the post-independent India, when the society came in direct confrontation with the mighty 'system'. In a country where rape culture was not only tolerated but also patronised, the civil society not only expressed its anguish at the existing *status-quo*, but aggressively rallied to battle the 'system'. The massive public outcry and agitation post-*nirbhaya*, not only ensured radical amendments<sup>4</sup> in the criminal laws but also awakened the State, society and individual to recognise rape and crime against women as a mainstream societal issue. 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 murdered, to give vent to their pervert sexual appetite, and sadistic pleasure. These horrific incidences and the alleged political support to the perpetrators were reminder of the fact that rape culture in India has not only failed to wane but looms large in our society where such crimes are 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, 2018<sup>5</sup> (the Ordinance). The Ordinance was signed by the President of India and it came into force on April 21, 2018. The Ordinance enhanced punishments (including capital punishment) for offenders convicted of raping minors, and wide ranging changes were introduced in procedural laws. As a law reform exercise the state adopted the same methodology based on impulses rather than sound legal prepositions and deliberations. The overdrive shown by the Govt. in rushing the Ordinance was also questioned by the Delhi High Court where its Acting Chief Justice Gita Mittal, while issuing notice to the centre, asked for relevant scientific assessment or research considered by the Govt. before promulgating the Ordinance.<sup>6</sup> 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

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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, Date of decision: May 21, 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).

<sup>4</sup> The public outrage forced Government to reconsider the criminal policy and legislative framework with respect to rape. For reviewing the rape laws in India, Government of India appointed a high level committee under Justice J.S. Verma. In the meantime, the Govt. of India promulgated the Criminal Law (Amendment) Ordinance, 2013. The Ordinance was soon replaced and repealed by the Criminal Law (Amendment) Act, 2013.

<sup>5</sup> The Criminal Law (Amendment) Ordinance, 2018 (2 of 2018).

<sup>6</sup> Available at: <http://www.thehindu.com/news/cities/Delhi/was-any-study-done-before-bringing-out-rape-ordinance/article23651748.ece> (last visited on April 25, 2018).

Act of Parliament. The Bill was passed by *Lok Sabha* on July 30, 2018 and *Rajya Sabha* on August 6, 2018. Thereafter it received the Presidential assent on August 11, 2018 and came into force as the Criminal Law (Amendment) Act, 2018<sup>7</sup> (CLAA) from April 21, 2018. The CLAA, which replaced the Ordinance with a retrospective effect, amends four central legislations namely: The IPC, 1860;<sup>8</sup> the Code of Criminal Procedure, 1973 (Cr.P.C);<sup>9</sup> the Indian Evidence Act, 1872 (IEA);<sup>10</sup> the Protection of Children from Sexual Offences Act, 2012 (POCSO)<sup>11</sup>. Appearing to be a knee jerk reaction to public protests, the present legislation suffers from several drafting ambiguities which has left a ample scope for the exercise of judicial discretion while interpreting the law in future. The paper seeks to examine various provisions of the CLAA in the light of ground realities of the existing criminal justice system. The author through this paper has tried to conduct an objective inquiry about the engagement of law with social problems relating to sexual offences, and critique the nature of solutions offered by the state (with reference to CLAA). Further the author has also tried to look into the hyped state narrative of deterrence sought to be created by extending death penalty to new offences, and changes in the procedural laws.

## II Amendments to IPC: Issues & concerns

The IPC is one of the most important piece of criminal legislations in India. It consists of an elaborate code of offences with their definition and punishments. Prior to the CLAA, IPC was last amended by the Criminal Law (Amendment) Act, 2013 which introduced several reforms in the realm of sexual offences. The CLAA has amended the IPC in two ways – *Firstly*, by amending the existing sections of IPC; *secondly*, by inserting new sections which have created new offences in IPC. The recent amendments aim at deterring the increasing trend of sexual violence against minors. However, the ‘deterrence’ which the law seeks to bring has 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 believes would act as a deterrent to such acts of sexual violence. However, the law fails to reconcile itself with the ground realities of gender related sexual violence in India, and the established principles of criminal law.

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<sup>7</sup> The Criminal Law (Amendment) Act, 2018 (22 of 2018).

<sup>8</sup> Indian Penal Code, 1860 (Act 45 of 1860).

<sup>9</sup> Code of Criminal Procedure, 1973 (Act 2 of 1974).

<sup>10</sup> Indian Evidence Act, 1872 (Act 1 of 1872).

<sup>11</sup> Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012).

## Enhanced punishment & blurring classification of rape

On a careful perusal of section 375 and 376 one can identify a classification of rape – rape *simpliciter* punishable under section 376 (1), IPC and aggravated forms of rape punishable under section 376 (2), IPC. The former class of rape lays down the general offence of rape and invites a lesser punishment. Whereas, the latter class of rape provided under section 376 (2) lays down 14 circumstances where the nature of rape is considered more serious due to the presence of an aggravating factor<sup>12</sup> and therefore, has higher punishment. Any man who commits an aggravated form of rape is liable for prosecution u/s 376 (2) which has a minimum punishment of 10 years which may extend to life imprisonment. Whereas any man who commits an act, on a woman, which falls within the definition provided under section 375, IPC is liable for prosecution u/s 376 (1), provided it doesn't fall in any of the *clauses* of section 376 (2). Prior to the CLAA, minimum punishment for rape *simpliciter* was 7 years, whereas maximum punishment was life imprisonment. However, the CLAA has increased the minimum sentence from 7 years to 10 years.<sup>13</sup> On the face of it the amendment appears to be a strong provision against rape. However, on a careful look, one can appreciate its real implications. The worrisome aspect of the new law is the fact that it obliterates the distinction between rape *simpliciter* and aggravated form of rape. Now logically speaking the presence of any aggravating factor, as enumerated in 376 (2) from *clause (a)* to (n), should have warranted a greater punishment. But, post-CLAA, both classes of rape will invite same punishment. There appears to be no rational basis as to why rape *simpliciter* should have the same punishment as awarded in aggravated forms of rape. Moreover, when the scheme of IPC itself recognises classification based on aggravated nature of offence, then punishment should also be in proportion to such classification. Whether this oversight is intentional or result of a ham-fisted drafting is difficult to say but has wide and serious ramifications.

With regard to rape of a woman under 16 years of age, section 376 (2) *clause (i)*<sup>14</sup> has

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<sup>12</sup> See, *supra* note 8 at s.376 (2) *clause (a)* to (n).

<sup>13</sup> *Supra* note 7, s. 4:

In section 376 of the IPC—

in sub-section (1), for the words “shall not be less than 7 years, but which may extend to imprisonment for life, and shall also be liable to fine”, the words “shall not be less than 10 years, but which may extend to imprisonment for life, and shall also be liable to fine” shall be substituted;.....

<sup>14</sup> *Supra* note 8, *clause (i)*: commit rape on a woman when she is under 16 years of age.

been deleted; and sub-section (3)<sup>15</sup> has been inserted which provides a minimum punishment of 20 years which may 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) is questionable when judged on the ground of proportionality. At a time when sexual experimentation among adolescents is not an uncommon phenomenon, the severity of the minimum 20 years' imprisonment, transcends the limits reasonableness and fairness. Let's assume a girl who is under 16 years of age enters into a consensual physical relationship with a man (18 years' age). This being a case of statutory rape, once the fact that the prosecutrix is below the age of consent (18 years in India), is proved, the question of consent becomes irrelevant and sexual intercourse with her amounts to rape irrespective of her consent.<sup>16</sup> But a sentence of '20 years' imprisonment to the boy, in the absence of judicial discretion (which existed prior to 2013<sup>17</sup>) appears to be unreasonable and too harsh. The judge will be mandatorily required to sentence the man 20 years' imprisonment, who will eventually get released at the age of 38 years or may never get released in the event of life imprisonment. The law will also create counterproductive results when the offender is a minor. For instance let's assume that the offender is 17 years of age, after the enactment of the Juvenile Justice Act (Care and Protection of Children), 2015<sup>18</sup> (*hereinafter* JJA) a juvenile may be tried as an adult<sup>19</sup> and may be awarded imprisonment under the provision of IPC (except death and life imprisonment)<sup>20</sup>. In view of the lacunas in

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<sup>15</sup> *Ibid.*

In section 376 of the IPC—

Whoever, commits rape on a woman under 16 years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine...

<sup>16</sup> Dr. K.I. Vibhute argues that such notion of incapacity to consent rests presumable on the ground that a woman under 16 years of age is incapable of thinking rationally and plausibly the presumption of the legislature of the gullibility of woman to be lured into consensual sexual intercourse without appreciating its implications. See, K.I. Vibhute, *PSA Pillai's Criminal Law* 824 (Lexis Nexis, 13<sup>th</sup> edn. 2017).

<sup>17</sup> Mandatory minimum sentence was introduced in 2013 with a view to effectively combat sexual crimes against women and eliminate judicial discretion in sentencing of rape convicts. Prior to the 2013 amendment, wide sentencing discretion was conferred on the Courts for meeting exceptional situations. The consequential effect of the *proviso* under IPC, 1860 (prior to 2013 amendment) appended to different sections of rape was that it empowered the courts to award a below minimum sentence on adequate and special reasons, and diluted the effect of minimum prescribed sentence for rape convicts. See generally, Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (Cambridge University Press, 2016).

<sup>18</sup> Juvenile Justice Act (Care and Protection of Children), 2015 (Act 2 of 2016).

<sup>19</sup> Under the JJA, a child in conflict with law (16-18 years of age) may be tried as an adult for heinous offences if the Juvenile Justice Board (u/s 15, 18) and the Children's Court (u/s 19) decides that there is a need for trial of the child as an adult as per the provisions of the Cr.P.C.

<sup>20</sup> By virtue of section 21 of the JJA, a child cannot be sentenced to death or life imprisonment.

the practical implementation of the JJA and shoddy compliance by law enforcement agencies is always a cause of concern. Various experts have red flagged ambiguities in the JJA which is resulting in abrogation of justice in cases pertaining to juveniles in conflict with law.<sup>21</sup> In such cases, a juvenile in conflict with law may be awarded a sentence of 20 years. This sentence, which is not a short period of time, may cause injustice to a juvenile and frustrate the object of reformation. While the amendment of 2013 also introduced a mandatory minimum sentence of 10 years, from there to mandatory sentence of 20 years as introduced by the CLAA, without any credible research or justification is a substantial increase. Senior Advocate Indira Jai Singh argues that “*the mandatory nature of the offence takes away the discretion of the judge. Every sentence must fit the crime*”.<sup>22</sup> 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 sentences would hamper individualisation of sentencing.

### **New offences for rape and gang-rape of minor’s**

The CLAA creates three new offences (ss. 376AB, 376DA, 376DB, IPC). These offences cater specifically to the rising cases of rape against minors. These new offences make gradation in terms of severity and punishment for raping minors. Section 376AB creates a new offence where minimum punishment for raping a woman under 12 years of age is 20 years imprisonment which may extend to life imprisonment (which means the remainder of that person's natural life) and maximum sentence may be that of death.<sup>23</sup> Whereas, section 376DA<sup>24</sup> and 376DB<sup>25</sup> are the extension of provisions relating to gang rape.

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<sup>21</sup> E.g. Interview with Prof. Ved Kumari, Dean Faculty of Law, University of Delhi, April 3, 2017 *available at:* <http://www.lawyerscollective.org/the-invisible-lawyer/dr-ved-kumari-on-her-new-book-juvenile-justice-act-2015-in-the-aftermath-of-nirbhaya> (last visited on April 30, 2018).

<sup>22</sup> Indira Jai Singh “Stringent punishment to score political points” *Deccan Herald*, April 28, 2018 *available at:* <https://www.deccanherald.com/national/sunday-spotlight/stringent-punishments-score-political-points-667220.html> (last visited on May 15, 2018).

<sup>23</sup> *Supra* note 7 at s.5 which corresponds to IPC, s. 376AB:

Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death...

<sup>24</sup> *Ibid.* s.6 which corresponds to IPC, s. 376DA:

Where a woman under 16 years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine...

<sup>25</sup> *Ibid.* s.6 which corresponds to IPC, s. 376DB:

Where a woman under 12 years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of

These provisions have been carved out as to deal with incidences of gang rape where a woman is under 16 years of age or under 12 years of age. Section 376 DA of the IPC has introduced a mandatory sentence of life imprisonment for gang raping of a girl under 16 years of age. Whereas, section 376DB of the IPC which deals with gang rape of a girl under 12 years of age, comes with enhanced punishment of life imprisonment (which means the remainder of that person's natural life) or even death.

The concept of mandatory sentence provided under section 376DA is a curious case. Section 376DA has been added to the IPC by CLAA to deal with cases of gang rape of a girl under 16 years of age, and it provides for a mandatory sentence of life imprisonment. The propriety of mandatory life imprisonment is questionable on the grounds of proportionality. *Firstly*, mandatory sentence of life imprisonment, in the absence of judicial discretion will curtail individualisation of justice based on circumstances of the offender and the offence. *Secondly*, judges in view of mandatory nature of sentence may demand a higher standard of proof before awarding a conviction, this might have a negative impact on conviction rates.

The stringent punishment introduced by the CLAA for these new offences may run counterproductive to the reportage of child marriages in India. For instance, it is a well known fact that child marriage is a common phenomenon in India. Despite being illegal, incidences of child marriage (10-17 years age group) in Rajasthan, Haryana, Bihar, and West Bengal; North East states like Tripura, Meghalaya and Assam remain alarmingly high.<sup>26</sup> Moreover, a sizeable percentage of child marriages fall under the age group of 10-14 years. According to 2011 Census, 2.9% of the national population (girl) was married in the age group of 10-14 years, with highest incidence in Rajasthan (4.2%), Maharashtra (4.2%), Goa (3.9%), and Gujarat (3.7%)<sup>27</sup> With the introduction of capital punishment in rape cases of woman under 12 years of age and ground reality of prevalent child marriage of girls under 12 years of age, there is a likelihood of underreporting of rape cases where a victim is married. 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 may lead to life imprisonment or even death. It would have been desirable hope that practical issues prevalent in Indian society were taken into consideration before deciding the quantum of punishments.

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rape and shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death...

<sup>26</sup> Census of India, 2011: *As quoted in*: National Commission for Protection of Child Rights "A Statistical Analysis of Child Marriage in India Based on Census 2011" (2017) p.42-43.

<sup>27</sup> *Id.* at 42.



Another problem which the CLAA possess is with respect to its implications on various provisions of the JJA. The mandatory sentencing under section 376DA and 376DB may run counter to section 21 of the JJA. Section 21 of the JJA prohibits the award of life imprisonment and death sentence to a juvenile in conflict with law. Whereas, section 376DA provides for a mandatory sentence of life imprisonment (which shall mean the remainder of person's natural life); section 376DA provides the life imprisonment as its minimum and death sentence as is maximum sentence. In such a case, a juvenile cannot not be sentenced either under section 376DA or 376DB since both provisions have a mandatory minimum sentence which cannot be given to a juvenile in conflict with law by virtue of section 21, JJA. Then the question arises if not under IPC then what will be the quantum of sentence, that too, in the absence of any law? The CLAA is silent on this point.

The provisions of gang rape with regard to minors are the reiteration of the general provision of gang rape provided under section 376D, IPC. The provisions of gang rape are worded in gender-neutral terms with respect to the perpetrator. Thus it is possible, on the basis of literal interpretation, 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 has facilitated the commission of rape, cannot be held guilty of gang rape, as she cannot commit the offence of rape.<sup>28</sup> The Supreme Court in *Priya Patel* case<sup>29</sup> held that the expression 'in furtherance of their common intention' in gang rape relates to intention to commit rape and it is inconceivable that women can rape another woman.<sup>30</sup> Such narrow interpretation of Supreme Court disregards the rule of joint liability which imputes 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,<sup>31</sup> which recommended that in cases of gang rape, the punishment shall be awarded to each perpetrator regardless of gender.<sup>32</sup> However, no such change was incorporated by the 2013 amendment. Similarly, the CLAA has also failed to plug this loophole. Soon after the promulgation of the Ordinance one such case was

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<sup>28</sup> *Supra* note 16 at 829.

<sup>29</sup> *Priya Patel v. State of Madhya Pradesh* (2006) 6 SCC 263.

<sup>30</sup> Also see, *State of Rajasthan v. Hemraj* (2009) 12 SCC 403.

<sup>31</sup> Justice J.S. Verma, Justice Leila Seth, *et.al.* Report of the Committee on Amendments to Criminal Law (2013).

<sup>32</sup> *Id.* at 444.

reported in newspaper, where a woman helped her boyfriend rape her 13 year old niece.<sup>33</sup> In light of the existing SC judgments on the issue it's to be seen as to what nature of liability is attributed to the woman perpetrator who assisted in the commission of gang rape.<sup>34</sup>

### **Capital punishment for new offences: Really a deterrent in rape cases?**

The most drastic and striking feature of the CLAA is the provision of death penalty in cases related to rape of minors. Prior to the promulgation of the ordinance and enactment of CLAA, the scope of death penalty in rape cases was only limited to a few aggravated cases of rape. Earlier, only section 376A and 376E, IPC had a death penalty as the maximum sentence in cases of rape. Whereas, 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 CLAA,<sup>35</sup> has extended the death penalty to all cases of rape where the age of the victim is under 12 years of age. From a long time, there has been a consistent demand from public that rape being a heinous crime should have death penalty so that it will create a deterrent effect on growing incidences of sexual assault. In a country, where death penalty is 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 CLAA. 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 is a matter of distress. The Supreme Court despite upholding the constitutional validity of death penalty has in plethora of cases limited its scope to *rarest of rare* cases.<sup>36</sup> The support to the retention and extension of death penalty to rape cases should be objectively analysed. Before advocating for death penalty or any other stringent punishments under criminal law it is important to understand and objectively appreciate the utility and implication of such punishment. The solutions offered by the state in penal statutes should be a kind of remedy which is 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

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<sup>33</sup> See, Woman forces 13-year-old niece to drink, lets her boyfriend rape the child in Delhi, *available at*: <https://www.hindustantimes.com/delhi-news/woman-forces-13-year-old-niece-to-drink-lets-her-boyfriend-rape-the-child-in-north-west-delhi/story-Ci6w90DViuEH9RCTLzkTbN.html>. (last visited on May 2, 2018).

<sup>34</sup> In *Om Prakash v. State of Haryana* (2015) 2 SCC 84, the SC held that the woman who facilitated the commission of gang rape by her husband and another man, guilty of abetting the rape by intentional aid under section 109, IPC.

<sup>35</sup> *Supra* note 7 at ss. 5, 6 which corresponds to IPC, ss. 376AB, 376DB.

<sup>36</sup> See, *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, *Machhi Singh v. State of Punjab* (1983) 3 SCC 470, *Sangeet v. State of Haryana* (2013) 2 SCC 452.

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 proof of standard of proof. This may result in further lowering the rate of conviction. Besides if the rapist knows that rape carries death penalty he may 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 results in certainty of punishment rather than quantum of punishment as a real deterrent.<sup>37</sup> Unfortunately, large number of rape cases end up in acquittal.<sup>38</sup>

Another practical aspect which perhaps the law makers either chose to overlook or are oblivious about, is the fact that in substantial number of rape cases involving minors the perpetrators are either from family or the neighbourhood. The NCRB data has revealed that there is an increasing trend of rape cases where the rapist is known to the victim. For example, the crime statistics of NCRB reveals that out of 38,947 cases of rape reported in 2016, in 3891 cases the perpetrator were either the father/ brother/ grandfather/son, any other close family member or a relative.<sup>39</sup> Providing death penalty in such cases will only lead to underreporting of the crime. Senior advocate Indira Jaisingh has argued that given that most child abuse occurs within the family by a known person, a victim will either be reluctant to report the crime or forced to withdraw the complaint, knowing it could result in death, especially in cases where a family member is involved.<sup>40</sup>

### **Conundrum of life imprisonment: One punishment two phrases!!**

Another issue which deserves mention is the no less ambiguous phraseology – *'imprisonment for life which shall mean imprisonment for the remainder of that person's natural life'*. Introduced in 2013 by the amendment act, the phraseology creates a doubt while interpreting the scope of 'life imprisonment' under section 53, IPC. Section 53, *secondly*, IPC provide, life imprisonment as a form of punishment. The Supreme Court of India on several occasions has reiterated that life imprisonment means sentence of imprisonment running throughout the remaining period of a convict's natural life.<sup>41</sup> However, with the introduction

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<sup>37</sup> Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System (Mar. 2003) p.193.

<sup>38</sup> National Crime Records Bureau, Report on Crime in India 2016 (Ministry of Home Affairs, 2017) p.153. As of 2016, conviction rate in rape cases stands at 25.5%.

<sup>39</sup> *Id.* at 146-147.

<sup>40</sup> *Supra* note 22.

<sup>41</sup> See, *Gopal Vinayak Godse v. State of Maharashtra* AIR 1961 SC 600, *Maru Ram v. Union of India* (1981) 1 SCC 107: The constitution benches in both the cases have ruled the law that life imprisonment meant

of new phraseology the interpretation of the legislative intent with respect to life imprisonment under section 53 becomes problematic and confusing. If the legislature intended to mean that life imprisonment means imprisonment for convict's remaining natural life, then what was the need to qualify the term 'life imprisonment' with the use of the phrase *'remainder of that person's natural life'* in 2013? It may be argued that in 2013, the legislative intent was to clearly and unambiguously declare the 'unlimited nature' of life imprisonment in cases of crime against women. Had this been the case and the legislative intent was indeed to clarify the meaning of life imprisonment then why no corresponding amendments were made in section 53, IPC? As a consequence, such apparent inconsistencies in law gives way to judicial law making, where the Courts have to devote considerable amount of time deliberating upon the scope and meaning of an ambiguous provision. Macaulay, who declared law as a reflection of legislative will with minimum judicial interference,<sup>42</sup> in a letter to Lord Auckland, then Governor-General of India, said "*a loosely worded law is no law, and to whatever extent a legislature uses vague expression, to that extent it abdicates its functions, and resigns power of law making to the Courts of Justice*".<sup>43</sup> At a time when, when the parliament jealously guards its functional turf against the judicial encroachment, the argument of parliamentary supremacy over law making falls flat in the light of ambiguous laws passed by it.

### **Compensation for minor rape victims**

The CLAA has made some progressive provisions in the domain of compensatory jurisprudence. All the substantive provisions relating to rape of minors under IPC, as amended by the CLAA, provide a mandatory clause of compensation for the victim. The provisions provide that any fine imposed on the convict shall be paid to the victim and it shall be just and reasonable to meet the medical expenses and rehabilitation of the victim. Prior to the Ordinance and its enactment as CLAA there was no such rehabilitative provision for minor rape victims, except in cases of gang-rape. Similar amendments have been made in the

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imprisonment for the remainder of convict's natural life, unless its shortened or curtailed by any act of the state by way of commutation, remission or reprieve granted under any law. Also see: *Ashok Kumar @ Golu v. Union of India* (1991) 3 SCC 498, *Subhash Chander v. Krishn Lal* (2001) 4 SCC 458, *Union of India v. V. Sriharan @ Murugan* (2016) 7 SCC 1, *Muthuramalingem v. State* (2016) 8 SCC 313. For elaborate discussion see *supra* note 16 at 328.

<sup>42</sup> See, Stanley Yeo, Barry Wright "Revitalising Macaulay's Indian Penal Code" in Wing-Cheong Chan, Stanley Yeo *et. al.* (eds.) *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* 4-5 (Routledge, 2011).

<sup>43</sup> See, Thomas Babington Macaulay, J.M. Macleod *et. al.*, *A Penal Code*, (Lawbook Exchange Ltd, Reprint edition, 2002).

Cr.P.C where the benefit of compensation has been extended to cover rape and gang rape of minor girls below 12 years and below 16 years of age. However, a report document of Ministry of Law & Justice, which conducted a case study on rape prosecutions in Delhi, reported that despite adequate compensatory remedies available, there was inadequate guidance and lack of awareness among prosecutrix about their right to avail compensation.<sup>44</sup> It further reported that in the entire case study there was only one case where the victim was directed by the court to the Delhi Legal Services Authority for compensation and she was unable to proceed owing to lack of guidance.<sup>45</sup>

### **III Amendments to Cr.P.C: Issues & concerns**

The Cr.P.C is essentially a procedural law which lays down the procedure for administering substantive criminal laws in India. It was enacted in 1973 and came into force on 1 April 1974. Prior to the enactment of CLAA, the Cr.P.C was last amended by the 2013 amendment Act, which included a few procedural amendments with regard to sexual offences.

#### **Time-bound investigation and disposal of appeal: Who checks compliance?**

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 lead to delays in filling chargesheet, which is often a reflection of faulty investigation. Delay in investigation may lead to tampering of evidence, witness intimidation and subsequently acquittals in trial owing to want of evidence. Prior to the enactment of CLAA, the Cr.P.C provided that 3-month period for the completion of investigation in rape cases involving minor. The CLAA has reduced this period of investigation from 3 months to 2 months. Further, the CLAA has also reduced this time limit in all offences of rape (including rape, gang rape, and rape of minors under the age of 12 years and 16 years). This is appreciable in a sense that it is another step towards strengthening speedy investigation in rape cases, which often suffer due to delayed

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<sup>44</sup> See, Study conducted by Partners for Law in Development with the support of Department of Justice, Ministry of Law & Justice Government of India And United Nations Development Programme, "Towards Victim Friendly Responses and Procedures for Prosecuting Rape: A Study of Pre-Trial and Trial Stages of Rape Prosecutions in Delhi (Jan 2014-March 2015)" available at: <http://doj.gov.in/page/towards-victim-friendly-responses-and-procedures-prosecuting-rape-study-pre-trial-and-trial> (last visited on July 31, 2018).

<sup>45</sup> *Id.* at 30.

investigation by the police. No doubt that delay caused in the investigation process and disposal of appeals are a cause of major concern and dilutes the effect of any stringent law. The CLAA, by giving a statutory time limit for investigation and appeals in rape cases is a welcome step. However, the CLAA is silent on the consequences which will follow in case the appeal is not disposed of within 6 months or investigation is not completed within 2 months. If the statistics of NCRB are considered, in 2016 there were 55,071 cases for investigation out of which 16,124 cases investigation are still pending from the previous year and 38,947 new cases were reported for investigation.<sup>46</sup> As of 2016, with a pendency percentage of 30.3%, there were 16,678 cases which are pending investigation at the end of the 2016.<sup>47</sup>

Every conviction related sentence passed by the trial court is generally appealable to the High Court. Section 374, Cr.P.C which governs the provision of appeals in case of convictions didn't lay down any specific provisions for disposing of the appeals. The appellate process was often cited as a major impediment in the achievement of speedy justice.<sup>48</sup> Need for streamlining appeals in a time bound process with regard to rape cases was long demanded by the legal experts and Law Commission.<sup>49</sup> With the promulgation of CLAA, a sub-section has been inserted in section 374, Cr.P.C which mandates that an appeal against a sentence in rape cases must be disposed within 6 months. Despite the establishment of Fast Track Courts (FTCs) for trying crime against women (esp. offences like rape) there is a huge gap in the cherished objective of FTCs and actual ground realities. The NCRB report of 2016, indicates a high pendency percentage of 87.7% in rape cases, with national conviction rate at modest 25.5%.<sup>50</sup> In 2016 there were 1, 52,165 cases for trial, out of which 1, 18,537 are cases in which trial is still pending from the previous year and 33,628 new cases were sent for trial in 2016.<sup>51</sup> The rising number of vacancies in judiciary, inadequate budgetary allocation for infrastructure development, and unrealistic disposal targets for judicial officers, have raised grave questions on judicial capacity to ensure fair and speedy

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<sup>46</sup> *Supra* note 38 at 148.

<sup>47</sup> *Id.* at 148-149

<sup>48</sup> See generally, Neha Tara Mehta, The slow road to justice for India's rape victims *Al-Jazeera*, Aug. 18, 2016 available at: <https://www.aljazeera.com/indepth/features/2016/08/slow-road-justice-india-rape-victims-160817095526223.html> (last visited on May 16, 2018).

<sup>49</sup> See generally, Law Commission of India, 172<sup>nd</sup> Report on Review of Rape Laws, (March, 2000); Law Commission of India, 84<sup>th</sup> Report on Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence (1980).

<sup>50</sup> *Id.* at 153.

<sup>51</sup> *Id.* at 152.

justice in India. The case study conducted by *Partners for Law in Development*, also underlined the inconsistencies in procedures and practices of FTCs presently working in Delhi post-*nirbhaya*. Many lawyers, academicians and experts from time to time have raised serious concerns about procedural irregularities and miscarriage of justice in the proceedings of FTCs. Another problem which lies with the mandatory worded nature of amendments is the absence of any legal consequences for their infraction. In other words, violation of any of such mandatory provisions would not entail any legal or penal consequences either on police or judicial officers. In the absence of any punitive action against judicial and police officers for failing to adhere to such time limits, these 'time bound' provisions may be rendered nugatory.<sup>52</sup> Therefore, it is incumbent upon the legislature that while making 'time bound' provisions they should also enact consequential provisions to deal with the cases of non-compliance or infraction.

### **Amendments in bail provisions: Legislative intervention v. Judicial interpretation**

Section 438, Cr.P.C lays down the provision of anticipatory bail. Such bail is available to persons who are under the apprehension of being arrested for a non-bailable offence. The CLAA has amended the provision by incorporating a stringent subsection which makes provision of anticipatory bail inapplicable to the offences of rape and gang rape where the prosecutrix is below 16 years of age. Thus, no court shall have the power to grant an anticipatory bail to a person who is 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* case,<sup>53</sup> 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 the judiciary, the constitutional courts by way of interpretation have devised alternative remedies for providing relief to the accused person. For instance in the state of Uttar Pradesh the provision of anticipatory bail has been made inapplicable since

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<sup>52</sup> Recently, a two Judge bench of the SC in *State of Bihar v. Bihar Rajya Bhumi Vikas Bank Samiti* (2018) SCC OnLine SC 966 read down a mandatory worded provision of the Arbitration & Conciliation Act, 1996 as directory, since the infraction of impugned provision attracted no legal or penal consequences. Also see, *Topline Shoes v. Corporation Bank* (2002) 6 SCC 33, *J.J. Merchant (Dr.) v. Shrinath Chaturvedi* (2002) 6 SCC 635, *Salem Advocate Bar Association v. Union of India* (2005) 6 SCC 344 at para. 20, *State of Kerala v. Alaserry Mohd.* (1978) 2 SCC 386, *Jaswantsingh Mathurasingh v. Ahmadabad Municipal Corp.* (1992) Supp. 1 SCC 5.

<sup>53</sup> *Maneka Gandhi v. Union of India* (1977) 1 SCC 248.

1976.<sup>54</sup> In the absence of such provisions in Uttar Pradesh, applications are filed before the Allahabad High Court, for invoking inherent powers of the court under section 482 Cr.P.C., praying to put a stay on arrest or quashing of the FIR. Apart from invoking High Court's inherent powers under Cr.P.C, the writ jurisdiction under article 226 of the Constitution is also invoked for seeking same relief. The full bench of the Allahabad High court in *Amarvati* case,<sup>55</sup> while interpreting section 2(c), 41, 157(1), 437 and 439 of the Cr.P.C. observed that the arrest of the accused was not necessary even after the FIR of a cognisable offence has been lodged.<sup>56</sup> It further ruled that the court, in view of the facts and circumstances of the case, may grant interim bail till the bail application is finally disposed. The decision of *Amravati* case was approved by the SC in *Lal Kamendra Pratap Singh v. State of Uttar Pradesh*,<sup>57</sup> where it directed all courts in Uttar Pradesh to follow it in letter and spirit, since the provision for anticipatory bail was not available in Uttar Pradesh. Even the Supreme court in several cases has categorically ruled that despite statutory bar against the grant of anticipatory bail, a constitutional court cannot be barred from exercising its jurisdiction to grant relief to the accused.<sup>58</sup> Thus, exclusionary provisions introduced by the CLAA with respect to anticipatory bail are not absolute in nature. The record has shown that whenever courts have found any abuse of state power or absence of *prima facie* case against the accused, they have exercised their judicial powers to grant interim bail to the accused, regardless of statutory dictums. Therefore, there is no certainty that removal of anticipatory bail provision would necessarily lead to the exclusion of judiciary from exercising its powers conferred by the constitution or any other law. Also, removing anticipatory bail provision will further burden the constitutional courts with petitions seeking bail in anticipation of arrest, under their writ jurisdiction.

CLAA also places limitations on the powers of courts while granting regular bail

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<sup>54</sup> The Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (Act 16 of 1976), s. 9.

<sup>55</sup> *Amaravati v. State of U.P.* (2005) Cr. L.J 755.

<sup>56</sup> Allahabad High Court placed reliance on the SC judgement in *Joginder v. State* (1994) 4 SCC 260.

<sup>57</sup> (2009) 4 SCC 437.

<sup>58</sup> See, *Hema Mishra v. State of Uttar Pradesh* (2014) 4 SCC 453 at para 21, 34-36, *Kartar Singh v. State of Punjab* (1994) 3 SCC 569 at para 369 (17), *Subhash Kashinath Mahajan v. State of Maharashtra* (2018) 6 SCC 454 at para. 50, 52, 66. It is also pertinent to note that in *Subhash Kashinath Mahajan* case the Central govt. promulgated an Ordinance which was replaced by an Act of Parliament, to overturn the SC judgement. The Act known as the SC/ST (Prevention of Atrocities) Amendment Act, 2018 (Act 27 of 2018) nullified the SC judgment and to protect it from judicial review, in future, was placed in the Ninth schedule of the Constitution of India. However, soon after the law came into effect a PIL (*Prathvi Raj Sharma & Priya Sharma v. Union of India*, W.P. (C) No. 001016/2018) was filed before the SC challenging its constitutional validity.



under section 439, Cr.P.C (in rape cases of minors) by requiring them to give a prior notice to the public prosecutor within 15 days from the date of receipt of the bail application.<sup>59</sup> The new provisions will entitle the prosecution to give representation and oppose the bail application of the accused, thereby safeguarding the interest of rape victims. The right of representation to prosecution in bail matters is a welcome step in the light of incidences of witness tampering and political patronage to sexual offenders in *Kathua* and *Unnao* rape cases.

#### **IV Amendments to IEA: Issues & concerns**

By virtue of section 53A and 146 of the IEA, while deciding the question of legality or quality of consent, the past sexual experience or character of the prosecutrix is disregarded. This provision has been extended to the rape and gang rape of minor girls below 12 years of age and below 16 years of age.<sup>60</sup> However, the CLAA has failed to take into account another provision which, if remain un-amended, may have an adverse impact on convictions in child rape cases. Section 114A, IEA is a protective provision which creates a presumption, in favour of the prosecutrix, as to the non-consent for sexual intercourse in certain cases of rape.<sup>61</sup> The provision was last amended in 2013 which brought the amended clauses of section 376 (2) within the ambit of section 114A. But call it poor drafting, the 2013 amendment excluded the gang rape prosecutrix from getting the benefit of the statutory presumption.<sup>62</sup> Therefore, today non-consent in sexual intercourse by prosecutrix is not presumed by courts during trials of gang rape cases. Failing to correct this apparent anomaly, the CLAA has made serious oversight which will further exclude the benefit of presumption to aggravated cases of rape involving minors. By deleting clause (i) of section 376 (2), IPC, the CLAA has replaced it with a new subsection (3)<sup>63</sup> which creates a separate and stringent offence of rape where the victim is under 16 years of age. As a natural corollary to this amendment, section 114A should have been amended so that the benefit of presumption could be extended to a prosecutrix under 16 or 12 years of age. But the CLAA failed to take

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<sup>59</sup> *Supra* note 10, s.439 (1) proviso 2.

<sup>60</sup> *Supra* note 7, s.8.

<sup>61</sup> Section 114A, IEA (inserted in 1983) has brought about a radical change in the Indian Law relating to rape cases. Formerly, the rule was that corroboration of the victim's version was not essential for a conviction, but as a matter of prudence, it would have to be established if the mind of the judge, unless circumstances were strong enough to make it safe to convict the accused without such corroboration. S. 114A raises a presumption in favour of the rape victim. See, *Tukaram v. State of Maharashtra* AIR 1979 SC 185.

<sup>62</sup> Gang rape was made a separate class of offence under section 376D, IPC.

<sup>63</sup> *Supra* note 8 at s. 376.

note of this ambiguity and has excluded the prosecutrix from the purview of statutory presumption. Moreover, the newly carved provisions for gang rape - section 376DA, 376DB also suffers from same infirmity. At a time when consent/non-consent of the prosecutrix, forms the fulcrum of rape trials, section 114A provides a crucial tool to the prosecution in cases of aggravated rape. But the repeated legislative oversight caused by exclusion of aggravated gang rape cases from the purview of section 114A is a matter of grave concern and detrimental to the evidentiary value of prosecutrix statement as to the non-consent in rape cases.

## **V Gender neutrality: An inherent conflict between POCSO & IPC**

The CLAA has also brought amendment in the POCSO by amending section 42 of the Act. The purpose of section 42 is to give the general law of IPC an overriding effect over POCSO in the matters of punishment, since IPC provides for greater punishment for rape.<sup>64</sup> The only caveat being that the act or omission must constitute an offence under IPC as well as the POCSO. For instance, for penetrative sexual assault the minimum punishment prescribed under POCSO is 7 years' imprisonment, whereas the parallel provision under IPC prescribes a punishment 10 years (if woman is between 16-18 years) or 20 years (if woman is under 16 years of age). In such cases, the offender will be sentenced in accordance with the punishment prescribed by IPC. The amendment in POCSO was necessitated due to the inclusion of new offences in IPC, added by the CLAA. 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 (section 376AB, 376B, 376DA, 376DB) were substituted. But in the process, the CLAA has failed to take into account the fact that POSCO is a gender-neutral law, whereas the legal framework of rape under IPC is gender-specific. To put it in context, POCSO uses '*person*' in its reference to victim and perpetrator; whereas, section 375, 376 and other successive provisions uses the word '*woman*' and '*man*' in reference to victim and perpetrator respectively. This will 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, POCSO . But a lesser punishment (10 years or life imprisonment) will be given for committing penetrative sexual assault on a boy, since there is no parallel provision for rape of men in IPC. Same inconsistency will also prevail over gang rape related provisions, where the same offence

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<sup>64</sup> *Supra* note 11 at s. 42.

committed against a boy and a girl will be treated differently. The CLAA to the extent that it discriminates between sexes in the matter of punishment fails to satisfy the equal protection *clause* and is, therefore, violative of article 14 of the constitution. Moreover, it is also important to note that it is in the interest of justice that a public discourse be initiated for introducing gender neutral criminal laws with respect to sexual offences, with appropriate mechanisms to check their misuse. Countries around the world have made suitable amendments in their criminal statutes in order to incorporate gender neutral provisions. There is an emerging consensus about the high prevalence of male and transgender victims of sexual offences.

## VI CONCLUSION

The criminal law is one of the most vital link which defines the relationship between a state and its citizens. Therefore, it is desirable if this relationship is defined precisely and clearly in the penal statutes. The criminal law which is seen as the most potent State instrument restricting individual's fundamental right to life and personal liberty, must be free from inconsistencies and ambiguities. However, of late vagueness and ambiguity appears to be the first hand rule of the present day legislative interventions. The three aforementioned qualities of a good code<sup>65</sup> which Macaulay valued have been given a go by when it comes to legislative drafting. The ambiguous phraseology used in criminal laws reflect their want for precision. Apparent inconsistencies in criminal laws of India makes 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 continue to be subject to constant judicial interpretation borderlining law-making due to slow progress in law reforms. Whereas, on the otherhand, the legislature and the executive continues to sleep on crucial law reform recommendations made by expert bodies and committees. Thus, the IPC and its recent anti-rape amendments continue 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, has missed yet another opportunity. By bringing superficial reforms, the State appears to have washed its hands, from addressing the more pressing need for a

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<sup>65</sup> *Supra* note 1.

comprehensive revision of the penal code. Moreover, the State narrative of deterrence is nothing but a misguided institutional aggression, detached from ground realities. What is expected from any government is not mere passage 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 will continue to pass ambiguous and omnibus laws which disregards cardinal principles of criminal law jurisprudence, and constitutional values. It serves well to all stakeholders in a criminal justice system to bear in mind that respect and adherence to laws can only be achieved when the law makers recognises the necessity of reconciling individual rights with that of society, along with the State interest in maintaining law & order.