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Criminal Law Amendment Act 2018 Niti, not Nyaya

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ABSTRACT

'Rape' is an antonym of human rights. The Indian justice system has enacted strict laws that aim to act as a deterrent against this heinous crime. However, lawmakers have time and again felt that the existing laws are inadequate. Thus, amendments have played a pivotal role to aid continuous development to make India safer for women. One such amendment was enacted in 2018 to strengthen the laws against rape. This article is a critique of the Criminal Law (Amendment) Act, 2018.

The Amendment has modified laws related to rape under the Indian Penal Code, Code of Criminal Procedure, Indian Evidence Act and the Protection of Children from Sexual Offences Act to ensure that its effects trickle down to every relevant legislation. However, innumerable gaps, conflicting and impractical provisions obliterate its intended purpose. We argue against the provisions that seem game-changing to a layman who is oblivious to its convoluted intricacies.

The article, towards the end, equips the reader with the analysis of the Act through the lenses of various theories of justice. We deduce that the Act looks at 'justice' with a victim-centric perspective only, thereby ignoring the fact that all accused are not guilty. It appears that lawmakers have legislated the Act behind the veil of ignorance and neglected its consequences. Thus, concluding that this failure to transform Niti i.e., policies into Nyaya i.e., their social realisation, goes against Amartya Sen's concept of justice. Unless policies are converted into justice, they are meaningless.

I. INTRODUCTION

New Delhi has often been referred to as 'the rape capital of India'. The largest democracy in the world is also the weakest when it comes to the safety of women and for that, we must blame every citizen of India, the lawmakers and those entrusted to do justice.

A crime under the Indian Penal Code, 1860, 'Rape' is not just an act against a women's body but is a psychological trauma that stays with the woman her entire life. The Indian Judiciary

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has spoken about this unimaginable trauma in a plethora of cases and has used the medical term ‘Rape Trauma Syndrome’ to define the mental agony faced by rape survivors.³ The Supreme Court had elaborated upon the mental state of a rape survivor using the following words:

“Rape is not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21.”⁴

Though rape was referred to as the ‘most hated crime’ even back in 1996 and its gruesome ramifications were recognised,⁵ the Legislature and Judiciary until very recently have felt that the laws relating to it are inept. Therefore, India has witnessed a series of amendments that aim at providing justice and acting as a deterrent in society. However, as every amendment was rubbished by the perpetrators of this heinous crime, the lawmakers legislated amendments after amendments in desperation to see improvement. The last amendment was brought in 2018 after the eye-opening *Kathua*⁶ and *Unnao*⁷ rape cases that introduced significant changes in the laws dealing with sexual assault and rape.

The story of the 2018 amendment began when the Indian Society witnessed the *Mohd. Akhtar v. State of Jammu and Kashmir* rape case,⁸ where a mere eight-year-old girl was abducted, raped and murdered in a village, Rasana near Kathua (Jammu and Kashmir) in January 2018. The victim was a part of the Bakarwal community. She had allegedly ‘disappeared’ until the villagers discovered her dead body a week later. The accused belonged to a politically influential family, and the Supreme Court suspected the possibility of the accused influencing trial. Therefore, the trial was transferred to Pathankot District and Sessions Court (Punjab). The case concluded when Parvesh Kumar, Sanji Ram and Deepak Khajuria, who were the accused

³ *Kanjara v. State of Uttar Pradesh*, (2016) 6 All LJ 691.

⁴ *Bodhisattwa Gautam v. Subhra Chakraborty (Ms.)*, (1996) 1 SCC 490.

⁵ *Id.*

⁶ *Mohd. Akhtar v. State of Jammu and Kashmir*, (2018) 5 SCC 497 (“*Kathua*”).

⁷ *In Re.- An Unfortunate Incident in Unnao of Rape and Murder Published in Various Newspaper v. State of UP* (2018) SCC OnLine All 603; *CBI v. Kuldeep Singh Sengar* Criminal Case No. 1228/2018 (“*Unnao*”).

⁸ *Supra* note 4.

were sentenced to twenty-five years of imprisonment and three others were sentenced to five years of jail for destroying evidence in the case.

Another such scarring tale was told to the Indian masses in the *Unnao* rape case. A seventeen-year-old girl was brutally raped on June 4, 2017. Kuldeep Singh Sengar, the main accused, was an MLA in Uttar Pradesh and a member of the party in power. The political ties of the accused made everyone question the fairness of the trial. Thereafter, due to pressure from the public and media, the Allahabad High Court stayed the trial at the Unnao Sessions Court and transferred the case to the Central Bureau of Investigation (CBI).⁹

These incidents were only a few years after the 2013 amendment, and it made the citizens question law and order in the country once again. Just when India had begun recovering from the gruesome *Nirbhaya* case, where a twenty-three-year-old physiotherapy intern was beaten, gang-raped, and tortured in a private bus in South Delhi, the *Kathua* and *Unnau* rape cases shook everyone. The *Nirbhaya* case had seen candle marches, protests at the India Gate, the enactment of the Criminal Law (Amendment) Act, 2013 and the fast pace trial in the Indian Courts. The agony of Indian citizens compelled some progress in the case and even though the end of the trial culminated in the four accused getting death penalty, this process took seven long years, which was described as ‘fast track’ by the Indian Judiciary.

While the laws related to rape were apparently stricter after the *Nirbhaya* case, India was dumbstruck once again when the eight-year-old innocent girl fell prey to this unfortunate crime. The terrifying incidents which continued to grow in India and the political support enjoyed by the accused, forced the Indian legislature to amend the laws related to sexual offences once again. Thus, the Criminal Law (Amendment) Ordinance of 2018 was approved by the Cabinet, signed by the Indian President and subsequently, it came into force on April 21, 2018.

Sadly, the number of rape cases even post the enactment of the Criminal Law (Amendment) Act, 2018 has not seen much tapering. Even when India was in complete lockdown due to the Covid-19 pandemic, twenty three rape cases were reported in Delhi itself within a span of twenty days, from March 22 to April 12, 2020.¹⁰ While some took pride in saying that this figure was approximately 83 percent less than the past year, we failed to realise that this number has been reported when India was not allowed to step out of their homes unless it was absolutely ‘essential’.

⁹ *Supra* note 5.

¹⁰ Hemani Bhandari, “83% drop in rape cases in Delhi during lockdown”, *The Hindu*, April 14, 2020, available at <https://www.thehindu.com/news/cities/Delhi/83-drop-in-rape-cases-during-lockdown/article31342419.ece> (last visited on June 17, 2021)

However, the discussion does not end here. If we think in hindsight, all our concerns surrounding rape and the deplorable condition of justice in India pertains only with respect to *her*. On the other side, everyone including the lawmakers almost always forgets about justice to the accused who is not guilty. While the Supreme Court has time and again spoken about how both, the accused and the victim equally deserve a fair trial,¹¹ it is only natural for the layman to sway in his emotions and look at the accused with glasses tainted with biases. However, the lawmakers and those entrusted with doing justice cannot afford such biases, which may cost many innocents their life. Wrongful accusations of rape against men is not an unknown phenomenon, and the low conviction rates are a testament to that fact. Therefore, in our analysis, we must not evaluate ‘justice’ as a victim-centric need only.

This article analyses the changes brought about in the Indian Penal Code, 1860 (‘IPC’), Indian Evidence Act, 1872 (‘IEA’), Code of Criminal Procedure (‘CrPC’) and The Protection of Children from Sexual Offences Act, 2012 (‘POCSO’) by the Criminal Law (Amendment) Act, 2018 (‘CLAA’). The authors aim to evaluate the amendments through the parameters of effectiveness and need in the backdrop of the ground realities of society, existing frameworks and the aspired end goal.

II. AMENDING IPC: A FAÇADE

IPC is India’s official criminal code. This comprehensive code was drafted in the year 1860 on the recommendation of the First Law Commission under the Chairmanship of Lord Thomas Babington Macaulay and it intends to cover all substantive aspects of criminal law.

IPC has undergone several amendments. Before the CLAA, it was last amended by the Criminal Law (Amendment) Act, 2013. As this last amendment was inextricably linked to the *Nirbhaya* Gang Rape in Delhi, it got named the ‘*Nirbhaya Act*’.

The CLAA has amended the provisions relating to sexual offences in the IPC, in two ways: [1] by amending the existing Sections, and [2] by inserting new sections-creating new offences.

A. Blurred classification of ‘rape’

CLAA has increased the minimum sentence of rape from seven years to ten years. *Prima facie* the amendment appears to be a stringent measure against rape. However, this law obliterates the distinction between rape *simpliciter* and aggravated forms of rape as there is no greater punishment for the presence of any aggravating factor u/s 376(2) from *clauses (a) to (n)*. Post-CLAA, both classes of rape will invite the same punishment. However, it seems that there

¹¹ *Nirmal Singh Kahlon v. State of Punjab* (2009) 1 SCC 441.

exists no rational basis to award the same punishment to rape *simpliciter* and the aforementioned aggravated forms of rape. Therefore, the Act also removes the gradation of offences as present in the IPC.

In matters of rape of a woman under sixteen years of age, Section 376(2)(i) IPC (commits rape on a woman when she is under sixteen years of age) has been omitted, and sub-section (3) has been inserted, which now provides a minimum of twenty years punishment that may extend to life imprisonment as well (which means, the remainder of that person's natural life). Such a straitjacket sentencing policy without any scope for judicial discretion would hamper the individualisation of sentencing. The above-stated punishment exceeds the boundaries of reasonableness and fairness.

For example, if a girl aged 15 years enters into a consensual sexual relationship with a man (aged 18 years). Once it is established in the Court of law that the prosecutrix is below the age of consent (18 years as per POCSO), this becomes a case of statutory rape. The *sine qua non* of this offence, 'consent' becomes somewhat irrelevant and irrespective of the fact that sexual intercourse with the prosecutrix was consensual, it amounts to rape. Dr K.I. Vibhute argues that this is based on the notion that a woman below the age of sixteen years is incapable of thinking rationally and plausibly. It is the presumption of the legislature in this regard that her consent is her gullibility to be lured into consensual sexual intercourse and her inability to appreciate its implications.¹²

The boy's conviction will follow a twenty years' sentence of imprisonment in the absence of judicial discretion. This mandatory minimum sentence introduced in 2013, was aimed at effectively combatting sexual crimes against women and eliminating judicial discretion in the sentence for rape convicts. Before the 2013 amendment, the Courts were conferred with wide sentencing discretions for meeting exceptional situations. The consequence to the proviso under IPC (before the 2013 amendment) appended to different Sections of rape was that it gave power to Courts to award a sentence, below the minimum sentence when there are adequate and special reasons. This diluted the effect of the minimum prescribed sentence for rape convicts.¹³ This appears to be arbitrary and incriminating as the very foundation of rape, which is the absence of consent is no more the basis for conviction.

The newly added Section 376(3) will also conflict with the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJA) if the offender is a minor. After the enactment of JJA,

¹² Dr Vibhute, *PSA Pillai's Criminal Law* (LexisNexis, India, 13th edn, 2017).

¹³ Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (CUP 2016).

a juvenile who is aged sixteen to eighteen years may be tried as an adult for committing heinous offences if the Juvenile Justice Board u/s 15 and 18 and the Children's Court u/s 19, holds that there is a need to try the child as an adult under the provisions of the CrPC. The juvenile can be awarded imprisonment under the provisions of IPC but cannot be given death sentence and life imprisonment.¹⁴ In such cases, a sentence of twenty years will be awarded to the juvenile in conflict. This sentence, which involves a colossal period will frustrate the reformatory theory of justice.

A differentia cannot be used to discriminate against persons who are similarly situated.¹⁵ This unintelligible differentia is observable in the substantive effect of Section 376(3) which prescribes a mandatory minimum punishment of twenty years for the rape of a minor girl below the age of sixteen. According to Section 376AB, the mandatory sentence for the rape of a minor girl below the age of twelve shall also be twenty years.¹⁶ However, this offence may also be punishable by death. This differentiation is not logical because it is substantively unfair. Based upon the latest reports of the National Crime Record Bureau (Ministry of Home Affairs) ('NCRB') victims in the age group of fourteen to eighteen are the most vulnerable group with over 8,800 cases reported each year.¹⁷ The classification of age in the Act ignores rape of minors in the age group of sixteen to eighteen and prescribes the death penalty for rape of minors below the age of twelve. These factors reflect that the differentia is not based upon identifiable distinctions and hence, is invalid.

B. New Provisions of Rape

CLAA has created new criminal offences through Sections 376AB, 376DA & 376DB in the IPC. These laws advocate greater punishment for severe crimes like raping minors. Section 376AB states that the minimum punishment for rape of a woman under the age of twelve years is twenty years imprisonment, which may also extend to life imprisonment (translating into the remainder of that person's natural life) and extending to death penalty, which can be the maximum sentence.¹⁸

Sections 376DA and 376DB of the IPC¹⁹ are extensions to the provision of gang rape. Section 376DA of the IPC propounds a mandatory sentence of life imprisonment for gang-raping a girl

¹⁴ Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016), s. 21.

¹⁵ *Madhu Limaye v. Superintendent, Tihar Jail, Delhi* AIR 1975 SC 1505.

¹⁶ Criminal Law (Amendment) Act, 2018 (Act 22 of 2018).

¹⁷ National Crime Records Bureau, "Victims of rape under different age groups-2013" (Open Government Data Platform India, 2015), available at <<https://data.gov.in/resources/state-ut-wise-victims-rape-cases-incest-other-and-total-under-different-age-groups-during>> (last visited on June 10, 2021).

¹⁸ Criminal Law (Amendment) Act, 2018 (Act 22 of 2018), s. 5.

¹⁹ *Id.*, s. 6.

under sixteen years of age. Whereas, Section 376DB of the IPC deals with gang rape of a girl under twelve years of age, which comes with enhanced punishment of life imprisonment (which means the remainder of that person's natural life) or even death.

The punishment of mandatory life imprisonment under Sections 376DA and 376DB is questionable on the grounds of proportionality. The mandatory life imprisonment sentence coupled with the absence of judicial discretion will have the following effects: [1] it will curtail individualisation of justice based on circumstances of the case, and [2] the judges may demand a higher degree of proof beyond reasonable doubt for convicting the accused which might reduce the conviction rate altogether.

Even though the intention to deter criminals is visible in these stringent punishments, it may not be completely effective on account of the widespread existence of illegal child marriages in India. Instances of child marriages (below eighteen years of age for females) are most common in states of Rajasthan, Haryana, Bihar, West Bengal, Assam etc.²⁰ With the introduction of capital punishment as the extreme penalty and life imprisonment in rape cases, no married female under sixteen or twelve years of age would file a rape case against her husband knowing the consequences. Prevalent traditions in Indian society should have been taken into consideration while framing the punishments for the above crime.

The mandatory sentencing under Sections 376DA and 376DB are also conflicting with Section 21 of the JJA. While Section 376DA states compulsory life imprisonment; Section 376DB provides life imprisonment as its minimum and death sentence as its maximum sentence. Hence, a juvenile can neither be punished u/s 376DA nor 376DB. The CLAA is silent on this aspect.

C. Amended Provisions of Gang-Rape

The amended provisions dealing with gang rape of minors are simply a repetition of the general provision of gang rape u/s 376D, IPC. The language of the provisions of gang rape is neutral concerning the gender of the offender. Hence, as per the language of the provisions, a female, who is part of the gang can also be held guilty of raping a minor.

Au contraire, the Supreme Court has stated that a woman cannot have an intention to commit rape due to which she cannot be punished 'in furtherance of common intention' in cases for gang rape.²¹

²⁰ Dr Renu Singh, *A Statistical Analysis of Child Marriage in India- Based on Census 2011*, (Young Lives and National Commission for Protection of Child Rights, New Delhi, 2017).

²¹ *Priya Patel v. State of Madhya Pradesh* (2006) 6 SCC 263; *State of Rajasthan v. Hemraj* (2009) 12 SCC 403.

Supreme Court's narrow interpretation disregards the rule of joint liability. The rule of Joint liability imputes culpability on all 'associates' of the culprit by their mere participation in the commission of the offence, irrespective of their nature or extent of participation. These judgements are contrary to the Justice Verma Committee report, which propounded that in cases of gang rape, each perpetrator shall be punished regardless of their gender.²² The Criminal Law Amendment of 2013, as well as 2018, have failed to plug this loophole.

D. Capital Punishment

Before CLAA, the punishment of death penalty could be given only under two forms of rape. Sections 376A and 376E, IPC had a death penalty as the maximum sentence in cases of rape. They were that, *first*, when during the course of rape, a vegetative state was caused, or murder was committed and *second*, in cases of habitual rape offenders, respectively. The CLAA has also included death penalty in cases where the age of the victim is under twelve years. India has consistently demanded that death penalty should be awarded to the people who commit rape. Some argue that capital punishment while pretending to support reverence for human life, tends to destroy it instead.²³ At a time where the world has questioned the efficacy of capital punishment in deterring crimes and evolving global consensus towards its abolition, India has revived it for new offences.

Though the Supreme Court has upheld the constitutional validity of death penalty, it has opined in many cases that the extension of such harsh punishment must be thoroughly analysed.²⁴ Death Penalty being permanent and irreversible, judges are likely to expect a very high degree of proof for awarding the same. It is challenging to collect evidence at such a level due to which the conviction rate will automatically reduce, going against the basic concept of rape laws.

Furthermore, in almost 94 percent of rape cases in India, the perpetrators are known to the victim. For example, the NCRB has said that out of 33,356 rape cases in 2018, in 15,972 cases, the offenders were either family friends or neighbours or employers or other known people while in 12,568 cases, the offenders were friends or online friends or live-in partners on the pretext of marriage or separated husbands. In 2,780 cases, the victims were violated by their family members, while only in 2,036 cases, the offenders were unknown to them, according to the statistics.²⁵ Therefore, the provision for death penalty in such cases will lead to

²² Justice J.S. Verma and others, "Report of the Committee on Amendments to Criminal Law" 444 (2013).

²³ Arthur Koestler, *Reflections on Hanging* (University of Georgia Press, Reprint Edition 2019).

²⁴ *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.

²⁵ National Crime Records Bureau, "Report on Crimes in India 2018" (Ministry of Home Affairs, 2020), available at <<https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201.pdf>> (last

underreporting as the victim will either be forced to withdraw the complaint or be reluctant to report the crime.

E. Compensation for minor rape victims

The CLAA has also made some progressive amendments concerning compensatory jurisprudence. All provisions involving the rape of minors provide for mandatory compensation for the victim. This compensation must be just and reasonable to meet medical and rehabilitation expenses. Before this Act, such a rehabilitative provision was only present in cases of gang rape. Amendments have also been made to the CrPC to extend the benefit of the compensation and rehabilitation to the minor victims of rape. However, the Ministry of Law & Justice, in its report document in 2015 stated that even though adequate compensatory remedies are available, there was insufficient guidance and lack of awareness among prosecutrix about their right to avail compensation.²⁶ Thus the present amendment is indeed a progressive one, however, if those who may benefit from the same remain unaware of its existence like in the past, the purpose of its existence will obliterate.

The focus of the lawmakers has been to increase the punishments and make the provisions stricter. However, the flaws in the amendments to the IPC make CLAA seem like a façade that portrays an opposite picture of the laws. The common man who is oblivious to the nuances of each law and its implications seems to get dazzled with the increased punishments and lack of application of the judicial mind that may lead to uncountable injustices.

III. GAPS IN THE INDIAN EVIDENCE ACT

The IEA that was passed by the Imperial Legislative Council, contains a set of rules that govern the admissibility of evidence in the Indian Courts.

This enactment was a path-breaking judicial measure, which changed the entire system of concepts pertaining to the admissibility of evidence. Prior to this legislation, rules of evidence were not uniform and differed according to caste, community, faith, and social positions of different people in the society, which is now uniform for all.

The CLAA has extended the scope of the Indian Evidence Act to make it compliant with the amendments in the substantive laws.

visited on June 19, 2021).

²⁶ Partners for Law in Development, "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)" (Department of Justice, Ministry of Law & Justice Government of India and United Nations Development Programme, 2015), available at <<http://doj.gov.in/page/towards-victim-friendly-responses-and-procedures-prosecuting-rape-study-pre-trial-and-trial>> (last visited on June 19, 2021).

Increased ambit of provisions related to evidence in rape cases

According to Section 53A IEA, during the prosecution of offences where consent is in question, including rape, the evidence relating to the character of the victim, or their previous sexual experiences is not relevant to decide the issues of consent or the quality of consent.

Section 146 IEA bars adducing evidence or cross-examination of the victim regarding general immoral character, or previous sexual experience to decide the question of consent and its quality in rape cases.

Both these provisions now include victims of rape who are below twelve or sixteen years and gang-rape victims. Thus, extending the immunity to these categories of victims during the trial stage.

However, Section 114A IEA, which enlists a presumption of non-consent in favour of the victim in certain rape cases, remains un-amended. Though the 2013 amendment included Section 376(2) IPC within the ambit of this benefit, the section continues to exclude victims of gang-rape under Section 376D IPC. As the question of consent is not material when the prosecutrix is a minor, an amendment to section 114A to include minor victims is not needed. However, precluding victims of gang-rape from the statutory presumption under Section 114A IEA is indeed a serious lacuna. The question of consent forms the centre of rape trials, and this presumption plays a major role in trials of aggravated forms of rape. Therefore, it wouldn't be wrong to say that the amendments to the Indian Evidence Act have failed to fill the gaps that have existed for a long time now.

IV. AMENDMENTS TO CRPC: A WORK OF FICTION

CrPC is the procedural law governing criminal trials. It lays down procedures to administer substantive criminal laws in India including the Indian Penal Code. Prior to the enactment of CLAA, the CrPC was last amended by the 2013 Amendment Act, which incorporated procedural amendments regarding sexual offences.

The Sections of the CrPC that have been amended by the enactment of the Criminal Amendment Act, 2018 are Sections 173, 374, 377, 438 and 439. Though the amendments aim to strengthen the system and make it more victim sympathetic, some of them are merely dreams of a utopian society in the absence of requisite infrastructure. This has created an unusual scenario, where the law is overambitious and thus, unfit for today's India.

A. Speedy Investigation and Trial

Investigation is an integral part of the criminal justice system because, without it, conviction

of the accused is not possible. In *Nirmal Singh Kahlon v. State of Punjab*,²⁷ the Hon'ble Supreme Court held that 'fairness of the investigation is meant not only for the accused but even for the victim'. In the judgement, the Supreme Court expounded that:

"An accused is entitled to a fair investigation. Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India. But the State has a larger obligation i.e. to maintain law and order, public order and preservation of peace and harmony in the society. A victim of a crime, thus, is equally entitled to a fair investigation."²⁸

In addition to this, a speedy investigation is also an integral part of the criminal justice system. In this regard, the Apex Court in *Hussainara Khatoon's case*,²⁹ held that a speedy trial is the essence of criminal justice, and there can be no doubt that delay in trial is synonymous with denial of justice.

The Supreme Court further in the case of *P. Ramachandra Rao v. State of Karnataka*,³⁰ held that a speedy trial would encompass within its sweep all its stages including investigation, inquiry, trial, appeal, revision and re-trial. Briefly, it includes everything commencing with an accusation and expiring with the final verdict.

Delay in investigation can cause tampering of evidence, intimidation of essential witnesses as well as the acquittal of a guilty accused in trial attributed to the want of evidence. Before the enactment of CLAA, CrPC consisted of a provision that lays down a three-month period for the completion of investigation in rape cases involving a minor. This has now been reduced to two months. Furthermore, the time limit in all offences of rape has also been significantly reduced.

Therefore, by adding provisions that reduce the investigation time, a step has been taken towards ensuring speedy trials in cases of rape. However, the figures of pending investigations that are carry forwarded each year are a testament to the fact that implementation of this amendment is not just hard, but rather impossible. Even though the amendment tries to push for strengthening the system and lays down an ideal scenario based on the principle of 'justice delayed is justice denied', it is not fit for the current Indian scenario, which is already overburdened with pending investigations. In 2016, there were 55,017 cases to be investigated,

²⁷ (2009) 1 SCC 441.

²⁸ *Id.*

²⁹ *Hussainara Khatoon v. Home Secretary, State of Bihar, Patna*, AIR 1979 SC 1360.

³⁰ (2002) 4 SCC 607.

out of which 16,124 cases were pending since the previous year.³¹ The data clearly shows the large numbers of cases where investigation is pending that are carried forward to the next year due to the paucity of time. Thus, even though this provision shortens the period of investigation, an efficient investigation technique to properly implement the same is yet to be found.

However, a big drawback in this regard is that the CLAA is silent on the consequences of not disposing of the appeal within the six-month time frame, which has been prescribed or the two-month time frame given for concluding the investigation. The absence of a consequence related to the same decreases the impact of the provision, and there are chances it might go unheard. In this regard, attention is brought to the interpretation of a provision lacking legal and penal consequences by a two-judge bench of the Supreme Court in the case of *State of Bihar v. Bihar Rajya Bhumi Vikas Bank Samiti*.³² While interpreting the Arbitration and Conciliation Act, 1996, the Hon'ble Court held that a provision was merely directory, though it was worded as mandatory. The reasoning attributed to this decision was the lack of legal or penal consequences attached to it. Thus, there is a high risk of the same happening to the amendment, rendering it futile as there exist no legal consequences of not completing the investigation and trial within the prescribed time frame.

B. Provisions regarding Bail

Section 438(4) CrPC lays down the provision for anticipatory bail. Anticipatory bail is available to persons under the apprehension of getting arrested for non-bailable offences. The CLAA has added a provision that bars the accused from obtaining an anticipatory bail in cases of rape and gang rape where the prosecutrix is below the age of sixteen years. Hence, precluding the Court to exercise its power to grant anticipatory bail to a person who is apprehending arrest in a case of rape that is related to a minor.

However, the Supreme Court in a variety of cases has held, that although the accused related to certain offences are not permitted to get anticipatory bail, the Constitutional Courts cannot be barred from exercising their jurisdiction to grant relief to the accused.³³ Therefore, this dominant power of the Constitutional Court decreases the impact of the amended provision. The inherent powers of the Court under Section 482 CrPC that allow for the stay on arrest and High Court's writ jurisdiction under Article 226 of the Constitution, are a few alternatives available to the accused. The removal of anticipatory bail provisions is not absolute.

³¹ National Crime Records Bureau, "Report on Crimes in India 2016" (Ministry of Home Affairs, 2017).

³² (2018) 9 SCC 472.

³³ *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569; *Hema Mishra v. State of Uttar Pradesh* (2014) 4 SCC 453; *Dr. Subhash Kashinath Mahajan v. State of Maharashtra* (2018) 6 SCC 454.

Consequently, it can cause an influx of cases in the Constitutional Courts for interim bails, thus increasing the burden of cases at hand.

Furthermore, Section 439(4) CrPC has also been amended. It is now mandatory for the Court to give a fifteen-day notice to the Public Prosecutor before granting bail to the person accused of raping a woman or gang-raping a woman below the age of sixteen years. Thus, the Public Prosecutor will have the right of representation before such bail is granted. This amendment is a welcome step as it furthers the principles of natural justice.

In a criminal trial, the amendments requiring faster time bound investigation seem to create an ideal situation. However, when these amendments continue to be a few words printed in statutory books its purpose is completely defeated. Unless a system that ensures its proper implementation is devised keeping in mind the number of investigating officers and the quantum of new and pending cases, the amendment will continue to be a work of fiction.

V. POCSO: CONFLICTING LAWS

The POCSO Act deals with sexual offences against persons below eighteen years of age. This comprehensive law has been designed to provide safeguards for children from offences such as sexual assault, sexual harassment, and pornography. It includes provisions related to the protection of the child at every stage in the trial procedure. It incorporates child-friendly mechanisms for reporting the case, recording of the evidence, investigations as well as a speedy trial of offences by appointing Special Public Prosecutors and Special Courts. The Act provides for stringent punishments which have been graded as per the gravity of the offence.

The modifications in CLAA focus on bringing congruency between the post amendment IPC and POCSO in terms of the differing sentences laid down for the same offence in both the Acts. However, the lawmakers have once again ignored the fact that POCSO is a gender-neutral act, while IPC is currently not.

Gender Neutrality

Section 42 of the POCSO i.e., the Alternative Punishment provision, was amended to comply with the amendments made in the IPC. These amendments extended the enhanced punishments in IPC to the cases falling under POCSO. Newly created offences (Sections 376AB, 376B, 376DA, 376DB) were substituted.

Section 42 says that if an accused has committed an offence under any section of the POCSO and the IPC, then the punishment which is greater in degree shall be applicable. For instance, in case of penetrative sexual assault, the minimum punishment prescribed under

POCSO is seven years' imprisonment, whereas the parallel under IPC prescribes a punishment of ten years, or twenty years if the woman is under the age of sixteen years. Here, the offender will be sentenced under the provisions of IPC.

However, the CLAA has not taken into account the fact that POCSO is a gender-neutral law, and on the other hand, rape laws in IPC are gender-specific. POCSO addresses the victim and the perpetrator as 'person'; contrary to, Sections 375, 376 and other provisions, where the words 'woman' and 'man' are used in this reference.

The rape convict of a girl below twelve years would be awarded minimum life imprisonment or capital punishment, by virtue of Section 376AB of the IPC read with Section 42, POCSO. However, in case, the same offence is committed on a boy, the punishment will be ten years or life imprisonment because of the lack of a parallel provision regarding this in the IPC. Same inconsistency will follow in the situation of gang rape against a boy and a girl.

Hence, CLAA discriminates between sexes in matters of punishment and is not able to satisfy the equal protection clause. Thus, CLAA is clearly in violation of Article 14 of the Constitution of India, 1950.

VI. CRIMINAL LAW (AMENDMENT) BILL 2019

The Criminal Law (Amendment) Bill 2019 has been introduced as a remedy to the problem of gender-specific laws of sexual offences in the IPC. It was brought in as a Private Members' Bill by K.T.S. Tulsi and its central theme revolves around making laws related to sexual offences, gender neutral. The law that currently exists only recognises women as a victim of rape. This is because the Supreme Court had refused to make rape a gender-neutral offence, thus shifting the responsibility to do so on the Indian Legislature.

The first amendment it proposes is an addition to Section 8 of the IPC, to include the word 'Transgender' in the definition of 'he' in the Act. Similarly, Section 10 IPC will be substituted to include the gender 'Others' along with man and woman. Thus, it aligns with the landmark Supreme Court judgement of *National Legal Services Authority*,³⁴ which gave transgender people the right to decide their gender identity and be treated as a 'third gender', apart from binary genders. Therefore, it is a big step for this community to be recognised by the identity they associate with, under Indian laws.

In *Navtej Singh Johar's* case,³⁵ the Apex Court decriminalised Section 377 of the IPC to the

³⁴ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

³⁵ *Navtej Singh Johar v. Union of India, Ministry of Law and Justice*, (2018) 1 SCC 791.

extent of making homosexuality (consensual sexual intercourse between the same sex) legal. As the State now allows consensual intercourse between the same-sex, intercourse of this nature without consent will amount to rape. In furtherance of this logic, the Bill has proposed to criminalise such non-consensual intercourse amongst individuals belonging to the same sex. A new provision, Section 8A has been proposed to be introduced in the IPC, to define 'modesty' as an attribute attached to the personality of any man, woman or transgender.³⁶ Currently, modesty has only been attributed to women under Section 354 IPC that criminalises outraging the modesty of a woman. The Hon'ble Supreme Court held that the essence of a woman's modesty is her sex and anyone who has committed an act against a woman which is suggestive of sex, then such acts shall be punished under Section 354, IPC.³⁷ Consequently, Section 354 is also edited to not only be limited to a woman but also aiming to criminalise outraging the modesty of men and transgender persons as well.

An extension of the aforementioned provision, Section 354B IPC, which renders penal offences of disrobing of women, has been proposed to be applied as a safeguard for men and transgender persons as well. The offence of stalking under Section 354D, IPC has also been extended to include 'any persons'.

Under the amendments directed at making sexual offences gender-neutral, the biggest advancement under the bill is to make the offence of 'rape' gender-neutral under Section 375 IPC. 'Any Person' and 'other persons' in the new Section for rape includes not just men, but also Transgender persons. Even though this is a landmark amendment that the Bill proposes, there will exist a conflict as the newly notified Transgender Persons (Protection of Rights) Act, 2019 punishes sexual offences against a transgender person with imprisonment which may extend up to two years and a fine.³⁸ The punishment for rape under Section 376 IPC, is in the form of rigorous imprisonment, which shall not be less than ten years. Thus, an amendment under the Transgender Persons (Protection of Rights) Act, 2019 will also be necessary if the Bill is accepted as an Act.

This bill solves the long-standing and ignored problem of sexual offences committed by the police officials faced by the transgender community³⁹ and men in custody⁴⁰ by substituting Section 376 IPC with a gender-neutral one.

³⁶ Criminal Law (Amendment) Bill, 2019, s. 2.

³⁷ *State of Punjab v. Major Singh*, AIR 1967 SC 63.

³⁸ Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s. 18.

³⁹ *Supra* note 32.

⁴⁰ *Supra* note 33.

VII. CONCLUSION

Dr Amartya Sen, a Nobel Prize winner in Economic Sciences for his vast contribution in the field of welfare economics and social choice theory has critiqued John Rawls theory of justice in his book titled, 'The Idea of Justice'. While Rawls promoted complete ignorance of the consequences of laws made behind the veil of ignorance, Sen, a stark opponent of transcendental institutionalism based his concept of justice on the principle of transforming *Niti*, i.e. policies into *Nyaya*, i.e. their social realisation. He emphasised that *Niti* will lose all meaning if the same is not implemented to achieve the end goal, which is *Nyaya* (justice).

India's Criminal Justice system has both flaws as well as strengths. However, a trend can be noticed that the lawmakers wake up only when India shocks them out of their wits. As a consequence of media pressure and public outcry, hasty amendments are enacted. For example, soon after the *Nirbhaya case*, the amendment in Criminal Law, 2013 was enacted. Similar is the case with the current one. As a result of hastiness, the amendments enacted to make the system more robust end up weakening it even more.

Blurring the distinction between rape *simpliciter* and the aggravated forms without proper reasoning and excluding the application of the judicial mind for sentencing an accused (for raping a girl below the age of sixteen years), show that the amendments to the IPC are a façade to fool citizens into trusting the *bona fides* of the lawmakers again. The lawmakers have ignored the ramifications of those accused in cases of statutory rape of a girl below the age of sixteen years, where consensual intercourse constitutes rape. Neglecting the importance of the application of the judicial mind may result in gross injustice in many cases. The layman may view these changes as ones that will change India's fate forever. Increased and mandatory punishments sound fascinating to the millions who are oblivious to cases where the accused is completely innocent. The term 'justice' must not only be attached to the one who brings the case and claims to have been wronged, but also the one against whom the fingers are raised.

While the amendments in the IPC are based on flawed reasoning and irrationality, the modifications introduced to the CrPC are impossible to implement in the current Indian scenario. As already mentioned, with the limited number of investigating officials available and keeping in mind the pending investigations that pile up every year, speeding up the trial process in cases of rape is a far cry. In addition to this, the provisions of barring anticipatory bail for the accused in cases where the prosecutrix is a minor, will clog the High Courts who have the power of granting the same.

An analysis of the CLAA 2018 reveals that lawmakers have followed John Rawls' theory of

justice, where the veil of ignorance has forced them into an oblivion of the consequences of this law. India needs a law, which will be more than just a piece of paper and can be optimally implemented to transform into Justice. As Sen said, “the theory of justice must be more concerned with the elimination of removable injustices rather than defining a perfectly just society”. This façade that has been legislated is more towards creating an ideal society that facilitates injustices.

In addition to this, the rape laws in India are incomplete in many aspects that need to be revamped. One such aspect is gender-neutrality of all laws related to sexual offences, which the Criminal Law (Amendment) Bill 2019 seeks to solve. Another aspect is the second exception to Section 375, IPC that licenses husbands to rape their wives. Though many say India may not be ready for the aforementioned changes, the concept of ‘justice’ must not be alien to a human only because he is a man, a transgender, a wife or an accused.

While a shameful number of rape cases happen each year in India, most escape the public eye and get lost in the columns of various newspapers. Only some cases like *Nirbhaya*, *Kathua* and *Unnao* see public outcry and media support that leads to fast track trials, convictions and sentencing. Unfortunately, many victims of this heinous crime also become victims of unending investigations, long trials, and justice seems to get lost on the way. Similarly, on the other side, many are wrongfully accused of such a crime, and provisions that deny the application of judicial minds lead to false convictions. Therefore, there is a dire need for a balanced law that not only acts as a deterrent in society but is also conducive enough to ensure no man suffers for a crime he did not commit. The line between such conduciveness to safeguard the innocent and a loophole that would aid criminals to go scot-free is extremely thin. But until the same is not done, the legislatures will continue to fail in transforming *Niti* into *Nyaya*
