

Making Women Alternatively Empowered Beyond Measure. (With Reference To The Criminal Amendment Act, 1983)

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ABSTRACT: Rapes and dowry deaths still remain the grotesque of the crimes for the society. The wanton needs of awakening not only by spiritual means but also in the matter of governance and the applicability of the procedural laws presents as the need of the hour. This paper argues about the procedural application of section laid out in the amendment act in question. It further goes on articulating whether the sections laid out by the way of amendment are actually providing a taskforce to counter the crimes or are menacing in character to the already existing situation. Therefore, a close look to the bearings of the amendment act is called for. The authors supplements the same with the most recent case authorities mentioning about the meandering provisions that could land a woman who is seeking redressal to her grievance, in a rut and simply could present authorities with a fabulous gift of extorting money. Since, in every state and system the urgency is required for the remedification of such sections, the authors coherently expresses their views in context of the state – Rajasthan. The inherently crept in damages present in the department, their mechanisms and functioning are needed to be addressed keeping in view the misuse rather abuse of the amendment act. However, if properly interpreted these provisions could act as barrier for crime mongers. Hence, by the same token authors in the present research paper put forward their views as to how the interpretation by the authorities should be done and what system of redressal is most viable looking at the present needs and aspirations of the societal mind frame.

KEY WORDS: Abuse, Rape, Dowry, Crime, Woman, Amendment, Act.

I. INTRODUCTION

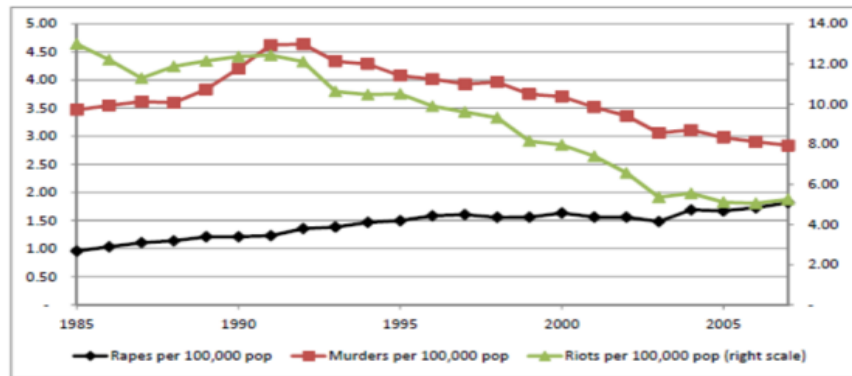
The criminal law amendment act, 1983 came after the Criminal law amendment act, 1961. The question that arises here as to why and what was the need of another criminal act when India was opening itself in terms of global economic opportunities. The era of 1960s in India witnessed two wars one after another at the frontiers of North West from Pakistan and at the North East from China. Thus there arose an inherent and immediate need to define the frontiers and simultaneously make it intact and devoid of intrusion by way of acts. And thus came up the 1961 criminal law amendment act. Though this Criminal Law Amendment Act had other features which included precluding state agents or private ones from forfeiting of currency. Thus the conclusion that can very well be drawn by even a naive is that the amendment acts come in operation only when there is a need to put a rider on the negative advances done in society. Keeping this notion in mind, if we go underneath searching for the basic reason for the upcoming of the 1983 criminal law amendment act, then it could be drawn that the prevalence of morbid crimes such as rape and sodomy must have made legislators doubt the already existing provisions of being not worthy enough to fulfil the comeuppance of these crimes. What also can be interpreted and inferred that the increasing number of dowry deaths, custodial rapes and intercourse between a husband and wife even after judicial separation decree has been obtained is the prime reason for the implementation of such act. The Criminal Law Amendment Act, 1983 has brought in operation the heading “of rape” in section 375, followed by the institution of section 376 A- E (rape and allied offences). This act constitutes the most important part of whole Indian Penal Code because it substituted the section 498-A which has the power to run counter against dowry death that were prevalent in the country.

II. RAPE AND ALLIED OFFENCES: SECTION 376- A TO SECTION 376- D

The table below shows the data of 1980s which have compelled legislators to draft the amendment act in question.

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Figure I
Nationwide Trends in Selected Crime Categories



Section 376 A; Intercourse by a man with his wife during separation²—

Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent, shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine. The section clearly lays down that after obtaining the decree of judicial separation from the court of law a husband and wife cannot cohabit. The reason for the induction of such a section is very straight and clear. Since, after marriage the wife and husband have the right to cohabit and are bound by all the marriage obligations and duties³. So husband comes in a superior position to dominate his wife's mind after the long sustaining marriage even if they are judicially separated but not divorced. Court thus keeping in view their right of marital cohabitation cannot outrightly reject the intercourse calling it as rape; but since circumstance are made well versed with judge before the question comes the common predisposition has been the superiority of male counterpart in matters of dominance and ruling over female in a compulsive way to have intercourse with him. Therefore, the category of rape and allied offences has been very well made out. Though this comes as a boon for women those who have been made subject to several of the atrocities like dowry, sex discrimination etc. And were anyhow able to escape from such circumstances where the husband's dominance still forced them against their consent. Since, to every existing entity has a both good and evil consequence same goes with the implementation of such a section. Where in one of the particular circumstance wife and husband were residing together for 2 days and no judicial separation decree was obtained by them. Court in this light of facts held that the prerequisite for the attraction of section 376 –A is that a decree should have been obtained beforehand and thereafter cohabitation must have been done.⁴

This section basically governs the situation wherein the husband has been in a position to dominate his wife's will. English law, which is an evolutionary law and considered one of the oldest governing set of laws, lays down husband and wife as one entity. It further considers that a woman cannot make her husband liable for the advances that she has herself consented to. "The husband cannot be guilty of a rape committed by himself upon his lawful wife, or by their matrimonial consent and contract the wife hath given herself up in this kind unto her husband whom she cannot retract"⁵. These lines were quoted by sir Mathew hale in 1736.in R v. Clarence⁶ the defendant was suffering from a venereal disease namely gonorrhoea, even after knowing this he had intercourse with his wife. Consequently, wife became infected with the same disease and husband's conviction was done under Section 47 and Section 20 of the Offences against the person Act, 1861. In the appeal, conviction was quashed; reason being that wife herself had consented to the act of intercourse and therefore no assault or battery was said to be committed up on her. It was therefore held immaterial that wife was infected with same disease even if she had known this earlier; her consent was already given thus not amounting to assault or battery committed on her. Therefore, it can be said that this section is not attracted and no crime is committed unless wife's consent was absolutely unavailable. The defendant's wife moved out in 1952 while filling a petition for divorce. Before the hearing could take place, the defendant one fine day comes and has sexual intercourse with his wife against her will.

² Indian Penal Code, 1860 (Substituted by Act 43 of Criminal Law Amendment Act, 1983)

³ Criminal law: cases and materials, 6th edition, 2012

⁴ Sreekumar and anr v. Pearly Karun , 1999(2)ALT(Cri)77

⁵ History of the pleas of crown: 1 Hale P C (1736) 629

⁶ (1889) 22 QB 23

Reference may be made to a decision of the House of Lords in *R v. R*⁷. In that case, in October, 1989, the wife had already left matrimonial home. Divorce proceedings were, however, not initiated. In November, 1989, the husband went to the house of wife's parents and attempted to have sexual intercourse with her against her will. He also assaulted her. He was charged on two counts, the first being rape and the second being assault causing bodily harm to wife. He was convicted on both the counts. Confirming the conviction, and commenting upon Hale's proposition, Lord Keith stated: "The position is that part of Hale's proposition which asserts that a wife cannot retract the consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principles there is no good reason why the whole proposition should not be held inapplicable in modern times." The act further has described these sections and defined them.

S.376B. Intercourse with public servant with woman in his custody⁸

Whoever, being a public servant, takes advantage of his official position and induces or seduces any woman, who is in his custody as such public servant or in the custody of public servant subordinate to him, to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

III. CUSTODIAL RAPES⁹

This section creates a whole new category of offences which do not amount to rape since there is consent though obtained in compelling circumstances. The person so administering rape is under a supervisory role or position so as to bring the consent of women at his own peril. This law till date exist as absolutely an inadequate one as the loopholes and vagueness still persist in relation to the shift of burden of proof.

S. 376C. Intercourse by superintendent of jail, remand home etc¹⁰.

Whoever, being the superintendent or manager of the jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and induces or seduces any female inmate of such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to 5 years and shall also be liable to fine.

S.376D. Intercourse by any member of the management or staff of a hospital with any woman in that hospital¹¹

Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his position and has sexual intercourse with any woman in that hospital, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

All the offences mentioned above does not amount to rape since the consent is obtained in the circumstances. The question remains that obtainment of consent by somebody who is in a superior position and able to influence a female for the same will not be regarded as a rapist—is it the most righteous way for the implementation of the sections in question?

IV. COUNTER TO DOWRY PREVALENCE : SECTION- 498 A OF INDIAN PENAL CODE, 1860

Section 498A was introduced in the year 1983 to protect married women from being subjected to cruelty by the husband or his relatives. A punishment extending to 3 years and fine has been prescribed. The expression 'cruelty' has been defined in wide terms so as to include infliction of physical or mental harm to the body or on the health of the woman and indulging in acts of harassment with a view to coerce her or her relatives in order get demand of valuable security and material possessions fulfilled. Even creating situations where a compulsion arises for a woman to commit suicide is also an outcome of 'cruelty'. The offence under s.498A is cognizable, non-compoundable and non-bailable.

The section is as follows:-

Section 498A.

⁷ (1991) 4 ALL ER 481

⁸ Indian Penal Code, 1860 (Substituted by Act 43 of Criminal Law Amendment Act, 1983)

⁹ Gaur, K.D. (2009), Textbook on The Indian Penal Code, New Delhi, Universal Law Publishing Co.

¹⁰ Indian Penal Code, 1860 (substituted by Act 43 of 1983)

¹¹ Indian Penal Code, 1860 (Substituted by Act 43 of Criminal Law Amendment Act, 1983)

Husband or relative of husband of a woman subjecting her to cruelty-Whoever, being the husband or the relative of the husband of woman, subjects such woman to cruelty shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.-For the purpose of this section, "cruelty" means-

- (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of woman; or*
- (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet an unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."*

V. EXPLANATION-

1. The petitioner who was having illicit relations with the husband of the deceased was let off by holding that no charge could be framed against her under Section 498 - A as she was not the 'relative' of the husband in the case of Rajasthan High Court, *Suraj Sharma versus State*¹² and also in The Hon'ble Supreme Court in *State of Punjab v. Gurmit Singh*¹³ -held that A relative who was not related to husband either by blood or marriage or adoption could not be prosecuted under the provisions of the section. Hence 498-A was only applicable against relatives.

2. The provisions of this section provide its applicability to the women who are subjected to cruelty. Cruelty has been explained in the explanation to Section 498 – A. It has to be established that that the wife has been meted out to cruelty or harassment which has subsequently resulted in she being inflicted with grave bodily injury or making such circumstances so as to make her urge to commit suicide while asking her to fulfil illicit demands of dowry. Thus it is clear that not every type of harassment or cruelty would attract the provisions of Section 498 – A. To illustrate this the Bombay High Court in the case of *Sunil Kashinath Raimale vs State*¹⁴ held that sporadic incidents of woman being ill-treated by husband do not attract Section 498 – A as the same were aimed at pressurising the wife for divorce and not aimed at pressurising her to satisfy any demand of dowry.

3. Several enactments and provisions have been brought in force to address the concerns of liberty, dignity and equal respect for women whose guiding force is the perception that women is that section of society which suffers more from violence and are deprived of their constitutional rights owing to several social and cultural factors. The insertion of Section 498A IPC is one such move towards curbing this menace as it rightly penalizes offensive conduct of the husband and his relatives towards the lady so subjected. Though there exist widespread complaints there is no reliable and empirical data based on extent of the misuse even when judiciary itself has taken the cognizance of the matter several times.

VI. THE INGREDIENTS OF THE SECTION:-

CRUELTY

It was held in 'Kaliyaperumal vs. State of Tamil Nadu', that cruelty is a common essential in offences under both the sections 304B and 498A of IPC. The two sections are not mutually inclusive but both are distinct offences and persons acquitted under section 304B for the offence of dowry death can be convicted for an offence under sec.498A of IPC. The meaning of cruelty is given in explanation to section 498A. Section 304B does not contain its meaning but the meaning of cruelty or harassment as given in section 498-A applies in section 304-B as well¹⁵. Under section 498-A of IPC cruelty by itself amounts to an offence whereas under section 304-B the offence is of dowry death and the death must have occurred within the course of seven years of marriage. But no such period is mentioned in section 498-A.

In the case of '*Inder Raj Malik vs. Sunita Malik*^[6]', it was held that the word 'cruelty' is defined in the explanation which inter alia says that harassment of a woman with a view to coerce her or any related person to make them meet with unlawful demand of property or any valuable security amounts to cruelty.

COMPOUNDABILITY OF OFFENCE

There is number of opinion in favour of making the offence under S,498-A compoundable with the permission of the court. Even those (individuals, officials and organizations) who say that it should remain a

¹² 2013 (4) WLC 14

¹³ 2014(8) JT 195 : 2014(3) RLW 2131

¹⁴ 2006 Cri LJ 589

¹⁵ Richa Mishra,2009, Section 498-A IPC- Whether shield or weapon, <http://www.legalserviceindia.com/article/I336-Section-498-IPC.html>,

non-bailable offence, have suggested that the offence should be made compoundable, subject to the permission of court. Some States, for e.g., Andhra Pradesh have already made it compoundable. The Supreme Court, in the case of *Ramgopal v. State of M. P*¹⁶ observed that the offence under S, 498-A should be made compoundable. *Justice Malimath Committee on Criminal Justice Reform* also recommended that it should be made compoundable as well as bailable. "The Committee notes that the offence under Section 498A IPC is essentially fallout of strained matrimonial relationship for which there might be various considerations. Since there can be various causes leading to an offence under Section 498A, IPC and parties to the marriage could be responsible for the same in varying degrees, it would be appropriate if the remedy of compromise is kept open to settle a matrimonial dispute. In this context, the Committee feels that in case of any marital discord which has reached the stage of a complaint under Section 498A, IPC, it would be better if the parties have the option of a compromise thereafter they can settle down in their lives appropriately for a better future rather than diverting their energies negatively by pursuing litigation. The Committee recommends to the Government to consider whether the offence under Section 498A, IPC can be made compoundable."

However, there is sharp divergence of views on the point whether it should be made a bailable offence. It is pleaded by some that the offence should be made bailable at least with regard to husband's relations in relation to the case which fall within the ambit of explanation to clause (b) of section- 498- A

VII. THE ALLEGATIONS OF MISUSE

In the last 20 years of criminal law reform a common argument made against laws relating to violence against women in India has been that women misuse these laws. The police, civil society, politicians and even judges of the High Courts and Supreme Court have offered these arguments of the "misuse" of laws. The allegation of misuse is made particularly against Sec 498A of the IPC and against the offence of dowry death in Sec 304B. One such view was expressed by former Justice K T Thomas in his article titled 'Women and the Law', which appeared in *The Hindu*. The 2003 Malimath Committee report on reforms in the criminal justice system also notes, significantly, that there is a "general complaint" that Sec 498A of the IPC is subjected to gross misuse; it uses this as justification to suggest an amendment to the provision, but provides no data to indicate how frequently the section is being misused.

(A.) FAVOURABILITIES OF THE SECTION

This law instead of helping the genuine victimized women has become a source of blackmail and harassment for males. Once a complaint (FIR) is lodged with the Police under s.498A/406 IPC, it becomes an easy tool in the hands of the Police to arrest or threaten the husband and other relatives named in the FIR without even considering the intrinsic worth of the allegations and making a preliminary investigation. When the members of a family are arrested and sent to jail, with no immediate prospect of bail, the chances of amicable re-conciliation or restoring of marriage will be lost once and for all. The long and protracted criminal trials lead to acrimony and bitterness in the relationship among the kith and kin of the family. Pragmatic realities have to be taken into consideration while dealing with matrimonial matters with due regard to the fact that it is a sensitive family problem which shall not be allowed to be aggravated by over-zealous/callous actions on the part of the Police by taking advantage of the harsh provisions of s.498A of IPC together with its related provisions in Cr.P.C. It is pointed out that the sting is not in s.498A as such, but in the provisions of Cr.P.C making the offence non-compoundable and non-bailable. The abuse of this section is rapidly increasing and the women often well-educated know that this section is both cognizable and non-bailable. Like in the case of *Savitri Devi v Ramesh Chand & Ors*¹⁷ the court held clearly that there was misuse and exploitation of the provisions to such an extent that it was hitting at the foundation of marriage itself and proved to be 'not so good' for health of society at large. The court believed that authorities and lawmakers had to review the situation and legal provisions to prevent such from taking place. This section was made keeping in mind protection of the married woman from unscrupulous husbands but is clearly misused by few women and again this is strictly condemned in *Saritha v R. Ramachandran*¹⁸ where the court did notice that the reverse trend was becoming prevalent and asked the law Commission and Parliament to make the offence a non-cognizable and bailable one. It has been the duty of the court to condemn wrongdoings and protect the victim but what happens when the victim herself turns into the abuser? Which remedy lies then with the male counterpart?

On this ground, the woman gets to divorce her husband and re-marry or even gain money in the form of compensation. Many women rights' groups go against the idea of making the offence a non-cognizable and bailable one; thinking that this gives the accused a chance to escape conviction. When females accuse their husband under S.498A by making the offence non-bailable and cognizable, and just in case the husband is

¹⁶ SLP (Crl.) No. 6494 of 2010 (Order dt. July 30, 2010),

¹⁷ 2003 CriLJ 2759

¹⁸ 1 (2003) DMC 37 (DB)

innocent, he does not get a chance quickly to get justice and hence proving the phrase --'justice delayed is justice denied'. Therefore, the law makers must suggest some way of making this section non- biased to any individual such that the guilty is punished and the person who has fallen prey to the circumstances can be rightly rescued back.

The position of the women in India is still bad. They still need rights to alleviate themselves in society but many a times fail to notice others 'rights as long as their rights are ensured. The educated woman of today must agree with the mantra of equality and demand the same but the trend is slowly getting reversed. Women are taking due advantage of the fact they are referred to as the 'weaker sex' and on the foundation of rights ensured to them are violating others rights

(B.) USE OR MISUSE

9 out of 10 of the cases are always related to dowry, wherein the woman is continuously threatened for want of more money and property which if remains unfulfilled, the married woman is tortured, threatened, abused- both physically and verbally and harassed. Likewise in the case of *Ram Kishan Jain&Ors v State of Madhya Pradesh*¹⁹ due to insufficiency of dowry demands the woman was administered calmpose tablets and thereafter she even cut the arteries of both her hands. Sometimes, dowry may not be the cause but the woman for several reasons like her complexion or family status is tortured to death. In the case of *Surajmal Banthia & Anr. v. State of West Bengal*²⁰ the deceased was ill-treated and tortured for several days and even not given food several times. Her father- in-law also misbehaved with her quite often. This is the treatment that several young brides face when they move out of their parents' home and into the house of her in-laws'. It is the duty of the court to prevent any of these abusers from escaping. The increasing rate of bride burning for want of more dowry and brutal torture of young wives, together with a clear escape of the abuser is a clear indication that the court has not taken any strong measures for the implementation of S. 498A IPC properly. Also S.498A IPC does not only deal with dowry deaths but also any wilful conduct on part of the husband which causes harm to the wife's ' life, limb or health (whether mental or physical).'To prove that cruelty was caused under Explanation a) of S.498A IPC it is not important to show or put forth that the woman was beaten up- abusing her verbally, denying her conjugal rights or even not speaking to her properly would fall into the ambit of cruelty. Hence This Section provides for the remedy to woman and these days it is being used as a 'brahamastra' by the woman.

VIII. CONCLUSION

The criminal law amendment act, 1983 was brought into enactment after the government observed the rising trends in the crimes inflicted upon women. Therefore, went on to lay down certain circumstances wherein the superior authority while taking undue advantage of its position manipulates woman into having sexual intercourse with them. Further, the menace of dowry that had crept in the roots of our society was sought to be removed by legislators by way of induction of section 498- A. Sometimes, the victim itself starts abusing the law when he understands that the ball is in his court which often leads to others suffering for no reason and unjustifiably. Therefore, what needs to keep in mind is that though women have been empowered by way of the inclusion o these sections but these sections should never be imposed at the behest of other people's happiness.

¹⁹ II (2000) DMC 628

²⁰ 2003 C.Cr.LR (Cal) 530