

VOLUME VIII

ISSUE-IV (Oct - Dec 2022)



# QUEST

A Quarterly Journal of the Students published  
by the Indian Institute of Legal Studies

## INDIAN INSTITUTE OF LEGAL STUDIES

UG & Post Graduate Advanced Research Studies in Law  
Approved under Section 2(f) & 12B of the UGC Act, 1956  
Accredited by NAAC

Affiliated to the University of North Bengal

Recognized by the Bar Council of India, New Delhi

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## MESSAGE

### FROM PRINCIPAL'S DESK



Big thanks to the Quest Editorial Board and its contributors for giving their valuable time. I believe this edition will enrich the reader's knowledge. I would also like to thank the students who, through various mediums, have presented their ideas, views, emotions and expressions. I believe they are going to be the flag bearers of the legal fraternity in India. I would also like to thank and congratulate to all the editors and the contributors of this edition. I am sure, that the readers will be enhancing their knowledge base with this edition of Quest.

Thank You

**Prof. (Dr.) Ganesh Ji Tiwari**

Handwritten signature of Prof. (Dr.) Ganesh Ji Tiwari.

Principal,  
Indian Institute of Legal Studies

## MESSAGE

### FROM REGISTRAR'S DESK



“No thief, however skillful, can rob one of knowledge, and that is why knowledge is the best and safest treasure to acquire.”

**L. Frank Baum**

I am grateful to the Quest Editorial Board and its contributors for encouraging us to complete the journal which will help the readers in many ways. Every edition brings new challenges as well as new opportunities for the contributors.

I believe this journey of Quest has been a cause of reflection, full of unlearning old habits and adopting new ones. The journey was challenging but it was worth it. I hope this opportunity not only helped the students to sharpen their minds but also to represent the principles of Indian Institute of Legal Studies.

I would also like to thank and congratulate the entire Board who helped

in putting together this journal.

This journal will positively help us to rekindle the inner student in us.

We assure to give our best efforts in making this journal a grand success.

Thank You

A handwritten signature in black ink, appearing to be 'SJB', with a horizontal line underneath it.

**Shri Sanjay Bhattacharjee**  
Registrar,  
Indian Institute of Legal Studies

## **EDITORIAL MESSAGE**

### **FROM EDITOR-IN-CHIEF**

Dear readers,

We hope you are doing well!

Albert Szent-Gyorgyi rightly said *“Research is seeing what everybody else has seen and thinking what nobody else has thought”*.

It gives us immense joy and satisfaction to introduce our very own student journal ‘QUEST’.

The objective of this journal is to promote, develop and enhance the research skills of creative minds. We are proud of our contributors who present you with write-ups dealing with various legal issues, and engage other disciplines with law. Further, this journal gives a platform to showcase talent, and also it stokes curiosity and improves the way one expresses.

A lot of effort has gone into the making of this issue. Amidst the hectic schedule of semesters, examinations, assignments, and internships, we tend to lose track of all the simple things we are capable of. Often, we tend to procrastinate and lose grip over things that could make a proud moment for us and give a sense of satisfaction.

We hope you enjoy reading this issue as much as we have enjoyed making it!



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# LONG ARTICLE



# CRITICAL ANALYSIS OF MARITAL RAPE: AN EXCEPTION TO THE INDIAN RAPE LAWS

-Rinti Paul<sup>1</sup>

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## ABSTRACT

*“Rape” has now become one of the most common crimes committed against woman and unfortunately, India regularly shows up in the top-ranked countries with the most rape cases. Although India is trying to eradicate this social plague as much as possible by amending and introducing improved provisions in its rape laws, still it is bearing no fruit. On top of it, there is Exception 2 of Section 375 of the Indian Penal Code, 1860 which exempts marital rape from the category of rape. It states “sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape”. If it is not rape then is it “sexual assault”? “Rape” and “sexual assault” are two sides of the same coin then why forced sexual intercourse in marriages should be “sexual assault” and not “rape”? This proviso is unintentionally providing a man with a right to do anything with his own wife not considering her consent or will to engage in that particular act. Indian rape laws are flawed in many aspects. First, it is not gender-*

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<sup>1</sup>Student of B. Com LL. B (H), Semester III, Indian Institute of Legal Studies, Siliguri, paulrinti2@gmail.com.

*neutral. Secondly, it is still based on colonial archaic thoughts. It is said that after independence, India is decolonizing but these provisions state otherwise.*

*This research paper will put light on the topics such as marital rape, the reasons for which India still treats it as an exception, the history of Marital rape exception and the arguments in support of and against Marital rape exception.*

**KEYWORDS:** *Marriage, Rape, Violence, Marital Rape, Consent, Married Woman.*

# 1. INTRODUCTION

“Marital rape” is still a taboo in the Indian society. Although the matter is not under the blanket anymore, citizens of India are very well aware of it and as a result of it numerous petitions to criminalize marital rape were filed before the Hon’ble High Court of Delhi in the year 2015. The reports of marital rape started to increase after this issue came into limelight. According to data, Karnataka has the highest report of marital rape (10.3), followed by West Bengal (9), Bihar (8.1), and Ladakh (7.7) and this is just the tip of the iceberg.<sup>2</sup>

The Indian legislation points out that rape can only occur between strangers and not between a married couple. Is it justifiable? Rape is forcing or manipulating another person into engaging in sexual intercourse without their consent so why is it that forced sex between spouses cannot be referred to as rape. In India, it is assumed that there is implied consent in a marital relationship for every other sexual and non-sexual activity between the spouses; so, by saying yes to marriage, women have to give away their lifetime’s liberty to say ‘NO’. This belief is recognized under the Indian legislative system in the name of “Exception of Section 375 of the Indian Penal Code, 1860.”<sup>3</sup> According to this, a wife’s consent or will should not come between a husband’s desire and she must adhere to his

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<sup>2</sup>THE HINDU BUSINESS LINE, <https://www.thehindubusinessline.com/data-stories/data-focus/marital-rape-most-married-women-are-sexually-abused-by-their-husbands-says-nfhs-data/article65409875.ece> (last visited Dec. 3, 2022).

<sup>3</sup>The Indian Penal Code, 1860, §. 375, No. 45, Acts of Parliament, 1860 (India).



command even if it is happening without her approval. This archaic concept is not acceptable in today's time.

‘Marital rape exception’ is wrong in many ways. First, it is not gender-neutral. Secondly, it creates a distinction between the rapist and the rape victims. For instance, forcing your wife into sexual intercourse without her consent is not rape but forcing another’s wife without her consent is rape. Thirdly, it encourages husbands to rape their own wives without any future consequences. Although some people disregard such allegations saying that this exception is for the greater good of society because proving rape in a marriage is not easy. They argue that this exception is added to bring equality in the rape laws as it is generally more biased towards women.

Rape is a heinous crime that has multiple consequences including mental trauma and severe adverse medical effects. The impact of rape on a married woman is no less than on an unmarried woman. In the case of a married woman, it is more traumatic because she has to face this from her own husband and it is not a one-time thing. According to the National Family Health Survey (2019-2021) “of all women in India who have ever experienced any type of physical or sexual violence, only 14 percent have sought help for the violence, and 77 percent have never sought for any help nor told anyone about the violence they experienced.”<sup>4</sup> Therefore, in most cases wives tend to endure the same throughout their lives thereby leading

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<sup>4</sup>THE HINDU BUSINESS LINE, <https://www.thehindubusinessline.com/data-stories/data-focus/marital-rape-most-married-women-are-sexually-abused-by-their-husbands-says-nfhs-data/article65409875.ece> (last visited Dec. 3, 2022).

to multiple rapes.

The criminalization of marital rape is not only the need of oppressed married women but also for the law itself. In a recent judgment by the Supreme Court on the matter of the Medical Termination of Pregnancy Act, 1971 the Apex Court stated that the meaning of the offence of rape must include ‘marital rape’ or the purpose of the Medical Termination of Pregnancy Act, 1971.<sup>5</sup> It is not the first time that marital rape issue has been raised. Prior to this, in the case of decriminalization of adultery, our current Chief Justice D.Y. Chandrachud stated that “the right to say ‘No’ (to sex) should be there after marriage also.”<sup>6</sup> This remark has challenged the validity of Exception 2 of Section 375.<sup>7</sup>

## **2. HISTORY OF MARITAL RAPE EXCEPTION**

The exception to marital rape is another colonial legacy followed by Indian legislation till now. We all know that the Indian judicial system is a contribution of the Britishers and many laws in India are similar to the laws of England including Indian rape laws. In the 19<sup>th</sup> century, when rape laws were introduced to the citizens of India, rape was considered to be a violation of woman’s chastity which is not possible in the context of marriage.<sup>8</sup> Therefore, the exception of marital rape was incorporated in the

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<sup>5</sup>Sudha Sandeep Devgirkr v. Union of India, (2018) 13 SCC 427.

<sup>6</sup>Joseph Shine v. Union of India, AIR 2018 SC 4898.

<sup>7</sup>The Indian Penal Code, 1860, §. 375, No. 45, Acts of Parliament, 1860 (India).

<sup>8</sup>THE HINDU, <https://www.thehindu.com/news/national/explained-marital-rape-in-india-the-history-of-the-legal-exception/article65404106.ece> (last visited Dec. 1, 2022).

rape laws. The exception is also justified by Lord Macaulay as he said in his original draft of the criminal law in 1839 that an exception is necessary to protect the “conjugal right” of a husband.<sup>9</sup>

The concept of “rape is not possible in a marital relationship” was derived from the doctrine expounded by the British jurist Sir Matthew Hale.<sup>10</sup> In his book “The History of the Pleas of the crown” (published 1736) boldly stated, “The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.” This indicates the autocratic belief of the educated people back in the day. Later on, many people agreed with Lord Hales’s words, and therefore, it was added as an exception to the rape laws.<sup>11</sup>

In addition to the marital rape exception, there was one more statement from a case in 1707 that says “in return for support and protection, the wife owed her husband a ‘consortium’ of legal obligations, which included sexual intercourse.”<sup>12</sup> This clearly indicated that back in the days in Britain, marriage was considered to be a contract where there was a give

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<sup>9</sup>Vakasha Sachdev, *Explained: Why Marital Rape is Not a Crime in India (Yet)*, THE QUINT (May 11, 2022, 11:42 AM), <https://www.thequint.com/amp/story/news/law/marital-rape-not-recognised-as-crime-in-india-explainer>.

<sup>10</sup>Umang Poddar, *Explainer: Why is Marital Rape Not a Crime in India – and Can the Courts Make it One*, SCROLL. IN (Jan. 21, 2022, 06:30 AM), <https://amp.scroll.in/article/1015495/explainer-why-is-marital-rape-not-a-crime-in-india-and-can-the-courts-make-it-one>.

<sup>11</sup>*Id.*

<sup>12</sup>THE HINDU, <https://www.thehindu.com/news/national/key-judgments-puncture-governments-defense-on-marital-rape/article38267927.ece> (last visited Dec. 1, 2022).

and take from both parties.<sup>13</sup> Therefore, we can say that the Marital Rape Exception is based on the concept of contractual marriage. If that is the case then how can a country like India follow such a rule where marriages are considered to be a sacrament and not a contract.

Britain was a patriarchal country that treated women as nothing but objects and property. According to them, before marriage a woman is the property of her father and after marriage, her rights get transferred to the husband which is also famous in the name of “Doctrine of Coverture”.<sup>14</sup> When someone damages his own property, it is not a crime but damaging others' property is a crime. In the same sense, when a husband performs sexual intercourse with his own wife without her consent, it is not rape but performing non-consensual sexual intercourse with another's wife or an unmarried woman will amount to rape. India claims to disregard the concept of the “Doctrine of Coverture” but at the same time allows a provision such as the Marital rape exception which is so highly influenced by it.<sup>15</sup>

### **3. THE REASONS WHY MARITAL RAPE IS AN EXCEPTION**

“Marriage” in India is considered to be a sacred institution wherein both

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<sup>13</sup>LEGAL SERVICE INDIA, <http://www.legalservicesindia.com/article/2500/Does-Section-375-of-IPC-Include-Marital-Rape.html> (last visited Dec. 4, 2022).

<sup>14</sup>Joshika Saraf, *Explainer: A Colonial Vestige, Why Marital Rape Exception Has Become Untenable*, BEHANBOX (Feb. 1, 2022, 08:30 AM), <https://behanbox.com/2022/02/01/a-colonial-vestige-why-marital-rape-exception-has-become-untenable/>.

<sup>15</sup>SCROLL. IN, *supra* note 10.

the husband and wife have their own rights and duties. One of which is “conjugal right” (the rights created by marriage, i.e., the right of the husband or the wife to the society of the other spouse including sexual activities). It is said that after marriage conjugal rights must be performed by the spouses as the main purpose of marriage is procreation. So, the assumption is that “expecting sex in a marriage” is the right of both spouses. Adding 'marital rape' as an offence would destroy the basis of ‘conjugal right’. Thus, it is one of the reasons why marital rape is still not criminalized under the Indian Penal Code, 1860.

Non-consensual sexual intercourse is exempted from the scope of rape because a husband cannot be treated the same as a stranger. In India, a spousal relationship is not only between two people, it includes two families and the progeny hence, it is believed that if marital rape comes into force, then it will not only affect one individual but a family at large. Indian legislature fears that marital rape might destroy the “institution of marriage” which includes conjugal expectations, financial obligation, and finally duty towards progeny.

Another reason being that Section 498 of the Indian Penal Code, 1860 and the Domestic Violence Act, 2005 comprises provisions regarding “sexual violence committed by husband”.<sup>16</sup> It is said that the legislature cannot criminalize the same thing which is already criminalized. Moreover, the Indian Penal Code, 1860 does not include any male protective rape laws

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<sup>16</sup>The Indian Penal Code, 1860, §. 498, No. 45, Acts of Parliament, 1860 (India).



and treats men only as an offender and not a victim. So, some Indian citizens, in support of the Marital rape exception argue that marital rape is excluded only to provide equality in the legal system.

A legal definition of rape is widely based on an individual's voluntary, genuine, and willing consent to participate in that particular act and the absence of consent must be satisfied in order to prove the offence of rape. A husband and wife's relationship is said to be very intimate and private, therefore, proving the lack of consent is next to impossible. Some assume that marital rape is exempted as a solution to this.

#### **4. ARGUMENTS IN FAVOUR OF AND AGAINST THE MARITAL RAPE EXCEPTION**

“Marital rape” has become the talk of the town since Delhi High Court's 1:1 split verdict. The two-Judge Bench had totally opposite views on this case. Justice Rajiv Shakti, who headed the two-Judge Bench said in his verdict that the Marital rape exception is unconstitutional and needs to get struck down but the other Justice C. Hari Shankar rejected the plea of marital rape stating that any change in the law has to be carried out by the legislature since the issue requires consideration of various aspects, including social, cultural and legal. Here, both of the Judges represent two sections of the society, one who supports #criminalizemaritalrape and other who trends #marriagestrike on Twitter. But one thing that was

common in both sections was that both demanded gender-neutral rape laws.<sup>17</sup>

#### **4.1. Arguments in Support of the Marital Rape Exception**

The supporters of Marital rape exception pointed out that it does not in any manner require a wife to submit to forced non-consensual sexual intercourse by the husband and does not encourage a husband to impose himself on the wife. There are remedies available to address non-consensual sex between spouses under Section 376B<sup>18</sup> and Section 498A<sup>19</sup> of the Indian Penal Code, 1860 and the provisions of the Protection of Women from Domestic Violence Act, 2005. These are the provisions used to criminally prosecute a husband who refuses to respect consent and violates a woman's right to say 'NO'. Actually, the legislature has indirectly criminalized non-consensual sex between spouses by creating a separate legal ecosystem for dealing with spousal sexual violence without terming it as "rape". This distinction has been made by the legislature not because of patriarchy rather knowing the complexity involved while dealing with the institution of marriage.

The Indian Penal Code, 1860 is filled with provisions where acts committed by different persons take a different shape or result in a different outcome. For example, the same offence committed by an

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<sup>17</sup>RIT Foundation v. Union of India & Others, W.P. (C) 284/2015. & CM Nos. 54525 – 26/2018.

<sup>18</sup>The Indian Penal Code, 1860, §. 376B, No. 45, Acts of Parliament, 1860 (India).

<sup>19</sup>The Indian Penal Code, 1860, §. 498A, No. 45, Acts of Parliament, 1860 (India).

adult instead of a juvenile result in different outcomes. The provisions of the Prevention of Children from Sexual Offences (POCSO) Act, 2012 are a live example of the fact that the Indian Penal Code, 1860 is not blind to context, relationships, age, or other valid aspects.

Further, the arguments were if international norms and standards are to be applied. The main aim is to enact gender-neutral laws in the realm of sexual violence as Indian rape laws only prioritize women and think that men cannot be prey to sexual violence or they cannot get raped. The misuse of the provisions of Section 498A<sup>20</sup> of the Indian Penal Code, 1860 is a clear example that there is a need to introduce gender neutrality in the sphere of sexual violence. Even the Domestic Violence Act, 2005 is for women only and is seen as a biased provision towards one gender.

Therefore, if marital rape gets criminalized then it would only add to the existing inequities and injustice. The striking down of marital rape exception would result in enlarging the scope of rape laws and end up in recognizing the sexual act committed in the context of marriage as an offence. The matter concerning marital rape or spousal sexual violence is not only a legal issue, it includes a social and cultural aspect also.

The provision of the Indian Penal Code, 1860 if read along with

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<sup>20</sup>LEGAL SERVICE INDIA, <http://www.legalservicesindia.com/article/2500/Does-Section-375-of-IPC-Include-Marital-Rape.html> (last visited Dec. 4, 2022).

Section 114A<sup>21</sup> of the Indian Evidence Act, 1872, would have grave consequences if extended to husbands. Section 114A<sup>22</sup> of the Evidence Act, 1872 states that in a prosecution of rape the main question that arises is as to whether or not it had the consent of the woman and if the woman states that she did not accord consent, the Court shall presume that no consent was given by the woman. If the procedure is same for marital rape also, then it will be hard for the husbands to prove their innocence as it happens in the confines of a household.

Also, given the age of sexual liberation that we live in, it is not possible to conclude whether the wife was exposed to sexual cruelty or non-consensual sex. In other words, even the presence of bruises or injury cannot automatically lead to a conclusion as they could be merely a manifestation of passion between the spouses when they indulge in sexual acts. Therefore, the intervention of the State is required to balance individual dignity and prevent the possibility of abuse of legal remedies which may end up harming an individual's dignity or reputation.

In a marital relationship, the conjugal expectation is a two-way street. The partners may choose to perform sexual acts for a variety of reasons and not all of them would necessarily amount to cruelty. In those situations, consent is given as a part of spousal intimacy although the will to engage might be missing. If all of those circumstances are

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<sup>21</sup>The Indian Evidence Act, 1872, §. 114A, No. 1, Acts of Parliament, 1872 (India).

<sup>22</sup>*Id.*

treated in a precise manner in the case of marital rape, then the only way for partners to survive in a marriage would be by drawing up a detailed written agreement. The steps for courtship or mating will be done by creating a detailed evidentiary record of every act of intimacy and/or by inviting a third party to act as a witness, none of which is healthy for the survival of the institution of marriage.

## **4.2. Arguments Against the Marital Rape Exception**

It is arbitrary to decriminalize marital rape on the ground that by entering into matrimony a woman consents to a continued sexual relationship from which she cannot retract. Also, if western countries can criminalize such provisions, then why is marital rape is still unrecognized in India?

The assumption that in marriage there is an “expectation of sex” is flawed. Marriage merely gives social sanction to sex between adults resulting in procreation that also receives acceptability from society. Therefore, a husband may “expect sex” but cannot “demand sex” in the name of satisfying carnal desire and procreation. It is a moral right of an unmarried and married woman to refuse unwanted or forcible sexual intercourse. The right of a wife to say “yes” to sexual intercourse includes the corollary right to say “no”.

Marital rape exception is archaic and is based on an outdated notion of marital relationships that has no place in a just constitutional order. As we all know that the Indian Penal Code, 1860 is a pre-constitutional law and at that time the objective of Marital rape exception was to



protect the conjugal rights of husbands. After the enactment of the Indian Constitution in 1950, the objective has also undergone a change. The object of post-constitutional rape laws is to protect women from violence and to secure their sexual autonomy and right to bodily integrity. Here, there is no distinction between married and unmarried women.

Marital rape exception is flawed for the following reasons:

- It nullifies the objective of the main provisions of rape laws. The objective of the main provision is to criminalize rape but it is decriminalizing a form of rape.
- It places the privacy of marriage as an object above the privacy of the individual in the marriage.
- The protection of conjugal rights by not penalizing forced sex within marriage is not a legitimate objective post-adoption of the Constitution. It does not align with the understanding of conjugal rights as it is understood in today's time. Conjugal right ends where bodily integrity begins while enforcing restitution of conjugal rights between a married couple. The Court can direct the husband or wife to cohabit but it cannot force them to have sexual intercourse. Thus, refusal of conjugal rights can only result in attachment of property or imprisonment in civil prison. Therefore, by denying a spouse sex, a person's property and freedom may be at risk but not his/her bodily integrity.

The Marital rape exception act as a loophole for those husbands who are continuously committing this offence. For instance, if a victim is subjected to gang rape and one of the rapists is the husband the consequences for the husband and the others will not be the same. While all others who were part of the act would be liable for prosecution under Section 376<sup>23</sup> of the Indian Penal Code, 1860 the husband would be protected under it. Also, sometimes in small areas when cases of non-consensual sexual violence come into the purview of the Court. Therefore, the husbands get the immunity to save themselves from the charges of rape.

The attempt to seek conviction for rape in the disguise of grievous hurt or cruelty is like attempting to fit a square pig in a round hole. The ingredients of offences such as grievous hurt, outraging the modesty of a woman, and cruelty are substantially different from that of rape. Furthermore, criminal laws such as the Indian Penal Code, 1860 penalizes wrongful acts and punishes the wrongdoer, if found guilty wherein Marital rape exception allows the wrongdoer or the husband to escape the consequences of marital rape.

The accusation that if marital rape exception is struck down then it will be misused by women is completely false. In fact, the most recent data (2015-2016) of the National Family Health Survey (NFHS) reveals that 83% of married women falling between the age bracket 15-49

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<sup>23</sup>The Indian Penal Code, 1860, §. 376, No. 45, Acts of Parliament, 1860 (India).

years were victims of sexual violence committed by their “current husbands”, while 9% were subjected to violence by their “former husbands”. Furthermore, the analysis of NFHS data reveals that nearly 99.1% of sexual violence cases are not reported and most such instances, the perpetrator is the husband of the victim. This data reveals that a woman is 17 times more likely to face sexual violence from her husband than from others. Besides this, even after cases involving marital rape and an assault are excluded, the data reveals that only 15% of sexual offences committed by persons other than the current husband of the victim are reported to the police.<sup>24</sup> It is important to note that there are enough safeguards available in the Code to protect those who bear the brunt of a false criminal complaint. Sections 182, 191 and 211 of the Indian Penal Code, 1860<sup>25</sup> are some of those provisions.

Although there are several provisions in the Code that deal with offences committed against married women by their husbands, they do not address the crime concerning non-consensual sex between a husband and a married woman. On this behalf, we should give attention to Sections 498A, 304B, 306 and 377 of the Indian Penal Code, 1860;<sup>26</sup> the presumptions created in law under Section 113A and

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<sup>24</sup>BEHANBOX, *supra* note 14.

<sup>25</sup>The Indian Penal Code, 1860, §. 182, 191 & 211, No. 45, Acts of Parliament, 1860 (India).

<sup>26</sup>The Indian Penal Code, 1860, §. 498A, 304B, 306 & 377, No. 45, Acts of Parliament, 1860 (India).

113B of the Evidence Act;<sup>27</sup> Section 3 of the Dowry Prohibition Act, 1961;<sup>28</sup> Section 3 of the Domestic Violence Act, 2005<sup>29</sup> and lastly Section 24 of the Pre-conception and Pre-natal Diagnostic Technique (Prohibition of Sex Selection) Act, 1994.<sup>30</sup> The aforementioned provisions criminalize and punish a variety of crimes committed by a husband against his wife. It includes criminal acts in the nature of physical violence, mental cruelty or violence, and dowry demand. Besides, these provisions were established for the event of the unnatural death of a married woman or in a case involving the unlawful determination of the sex of a fetus. None of these comes under forced sexual acts committed by the husband on his wife. Likewise, it is said that Section 498<sup>31</sup> covers marital rape which is untrue. This Section was incorporated in the Indian Penal Code, 1860 with a motive to deal with the specific evil of dowry deaths and marital cruelty inflicted by the husband or the in-laws on a married woman for dowry. The definition of “cruelty” in Section 498A<sup>32</sup> does not bring non-consensual acts committed in marriage within its ambit. In criminal law, the offences are separately and distinctly defined. There is no

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<sup>27</sup>The Indian Evidence Act, 1872, §. 113A & 113B, No. 1, Acts of Parliament, 1872 (India).

<sup>28</sup>The Dowry Prohibition Act, 1961, §. 3, No. 28, Acts of Parliament, 1961 (India).

<sup>29</sup>The Domestic Violence Act, 2005, §. 3, No. 43, Acts of Parliament, 2005 (India).

<sup>30</sup>The Pre-conception and Pre-natal Diagnostic Technique (Prohibition of Sex Selection) Act, 1994, §. 24, No. 57, Acts of Parliament, 1994 (India).

<sup>31</sup>SCROLL. IN, *supra* note 10.

<sup>32</sup>LEGAL SERVICE INDIA, <http://www.legalservicesindia.com/article/2500/Does-Section-375-of-IPC-Include-Marital-Rape.html> (last visited Dec. 4, 2022).

overlap between provisions created to address crimes against women and the offence of non-consensual sexual intercourse in a marriage. Each of the aforementioned special provisions or statutes, framed for the protection of a married woman, deal with specific crimes. The crime of rape is outside the purview of the aforementioned provisions or statutes.

The classification of rape victims based on marital status gives married women lesser protection against non-consensual sexual intercourse by their husbands than against strangers. It also results in lesser protection than that which is available to a woman who is subjected to a non-consensual sexual act by a cohabitee or a live-in partner. This is particularly misleading when the Indian Penal Code, 1860 in the same breath recognizes that an act perpetrated by a person who is in a position of trust i.e., in a fiduciary capacity is more egregious than one done by a stranger. [Section 376(2)(f) of the IPC.]<sup>33</sup>

## **5. CONCLUSION**

Non-consensual sexual violence in a marriage poses an obstacle to a women's mental peace and bodily rights. The criminalization of marital rape is a challenge to a woman's constitutional rights and a threat to her life and liberty as enshrined under Article 21<sup>34</sup> of the Constitution.

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<sup>33</sup>The Indian Penal Code, 1860, §. 376(2), cl. f, No. 45, Acts of Parliament, 1860 (India).

<sup>34</sup>INDIA CONST. art. 21.

Although it is hard to prove the absence of consent in a marriage-like arrangement, it is not impossible. Laws should be made for all individuals and there should be no discrimination of age, caste, and gender. The criminalization of marital rape should also happen with the same in mind. The legal system is developing with time and people's needs, one of its biggest examples is the decriminalization of Section 377<sup>35</sup> of the Indian Penal Code, 1860. This was another law based on the archaic concept and people sought to change it as they are doing in the case of marital rape. If a country like the United Kingdom (the country to first recognize marital rape exception and to bring it into the Indian legislation) can criminalize marital rape then why can't India do it too?

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<sup>35</sup>The Indian Penal Code, 1860, §. 377, No. 45, Acts of Parliament, 1860 (India).



# **SHORT ARTICLE**



# THE PREDATORY PRACTICE OF CYBERSQUATTING AND ITS REMEDIES IN THE INDIAN LEGAL FRAMEWORK

-Sneha Das<sup>1</sup>

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## ABSTRACT

*In this era of the internet, e-commerce has become a part of our day-to-day lives, with companies like Amazon, Facebook, and Flipkart becoming household names. All of these businesses have one thing in common: a sturdy online presence and the first step towards establishing such a presence is acquiring a domain name for their e-commerce website. In practice, businesses and organizations often register such websites by using the organization's name as the domain name for the website, and in this pursuit, they are often faced with the problem of cybersquatting. Cybersquatting refers to a situation wherein an Internet domain name that is likely to be wanted by another person, business, or organization is registered by a third party in the hopes of selling it to them for a profit. These days, every business, whether big or small, prefers to have an online presence because it helps them secure an even wider market for their products and services. Therefore, it becomes pertinent to understand the impact of cybersquatting and*

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*the remedies available against such practices.*

*In this article, an attempt has been made to discuss the adverse effects of cybersquatting in India and to gauge the efficacy of existing laws with the help of case studies.*

**KEYWORDS:** *Domain name, Cybersquatting, Trademark, Bad faith, WIPO.*

# 1. INTRODUCTION

When the COVID-19 pandemic took over the world, a greater number of people were spending more and more time online, businesses shifted their marketing and selling to the internet platforms, this created a target-rich environment for cyber squatters and as a result, the instances of cybersquatting increased rapidly. As per the reports of WIPO's Arbitration and Mediation Center from January through October 2020, the World Intellectual Property Organization (WIPO) center handled 3405 cases, a whopping 11% increase over the same period during 2019.<sup>2</sup>

Cybersquatting refers to the unauthorized registration and use of Internet domain names that are identical or similar to trademarks, service marks, company names, or personal names with the intention of making an unlawful profit by selling these domain names back to registered businesses. Since domain names are an important aspect of how we use the Internet. Cybersquatting is a menace against the rights of Domain Name Holders.’’

## 2. DECODING DOMAIN NAMES

Domain name is a one-of-a-kind moniker that is used to distinguish one website from another. Without a domain name, a computer would have no way of knowing where to seek a web page, and e-mail routers would be unable to transmit emails but to understand it we must first learn about IP

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<sup>2</sup>WIPO, [https://www.wipo.int/pressroom/en/articles/2020/article\\_0026.html](https://www.wipo.int/pressroom/en/articles/2020/article_0026.html) (last visited Dec. 3, 2022).

addresses. An IP (Internet Protocol) address is a series of numbers that identifies the physical location of a particular device on the Internet network.<sup>3</sup>

And domain name is a unique and easy-to-remember name that's associated with a physical IP address on the Internet,<sup>4</sup> it appears after the *www.* in web addresses and helps give access to the websites to which they are associated when typed into web browsers such as Chrome, Opera, Mozilla Fire Fox, etc. domain names can be bought for a price.

The Hon'ble High Court of Bombay, in the recent case of *Hindustan Unilever Limited v Endurance Domains Technology LLP & Ors.*<sup>5</sup>observed that.

“A domain name is simply an easy-to-remember or mnemonic for an internet protocol address. The IP address is a string of numbers in four sets separated by a period.”<sup>6</sup>

Every web server requires a Domain Name Server (DNS) system to translate the domain name into IP address. The DNS first come first serve policy is a breeding ground for opportunists who have neither trademark registration, nor any inherent rights to “pirate” or “squat” over domain names.<sup>7</sup>

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<sup>3</sup>GOOGLE HELP, <https://support.google.com/a/answer/2573637?hl=en> (last visited Dec. 3, 2022).

<sup>4</sup>*Id.*

<sup>5</sup>*Hindustan Unilever Limited v. Endurance Domains Technology LLP & Ors.*, (2020) SCC Online Bom 809.

<sup>6</sup>*Id.*

<sup>7</sup>THE NEW INDIAN EXPRESS,

## 2.1. Kinds of Domain Names

Domain names are of various kinds, for instance, we have the domain name: [www.anytrademarkname.com.in](http://www.anytrademarkname.com.in)

In the above example, ‘www’ means that the site is linked to the World Wide Web, this is a type of third-level domain; “anytrademarkname” represents the name that we choose for the site, these are names which are often readily identifiable with our organization and are also known as second level domains. Lastly, ‘.com’ indicates the kind of activity that our organization is engaged, i.e., commercial activity as is the case in the above example and ‘.in’ means the organization is registered in India. This last part of every domain name is called a top-level domain (TLD).<sup>8</sup>

Broadly top-level domain names are of two types-

### 2.1.1. Country Code Top-Level Domains (ccTLDs):

ccTLDs are two characters long and each ccTLD is reserved for a particular country example, ‘.au’ is used for Australia, ‘.fr’ for France, ‘.in’ for India. They follow the norms of ISO 3166-1 standard for country codes (ISO, 2018).<sup>9</sup>

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<https://www.newindianexpress.com/states/karnataka/2022/feb/11/blamed-for-mishandling-hijab-row-udupi-college-principal-says-he-tried-to-resolve-issue-2418005.html> (last visited May 16, 2022).

<sup>8</sup>Harman Preet Singh, *Cyber Squatting and the Role of Indian Courts: A Review*, 2 AJCS 18, 19 (2018), <https://www.amity.edu/ajcs/current-issue.aspx>.

<sup>9</sup>*Id.*

## 2.1.2 Generic Top-Level Domains (Gtlds):

A gTLD is another top-level domain. It is deployed by a specific class of organization. Each gTLD is three or more characters long. It is named according to the type of organization represented (for example, .com for commercial businesses, .edu for educational institutions).<sup>10</sup>

However, some of the gTLDs have become unrestricted i.e., they no longer symbolize any specific type of organization. Any person can obtain a domain name under unrestricted gTLDs. As an example, .com has become unrestricted. It can be registered and used by any entity even if it is not conducting commercial activity. gTLDs are managed and governed by ICANN terms and conditions in cooperation with the gTLD registries.<sup>11</sup>

## 3. CYBERSQUATTING: CONCEPT AND TYPES

Cyber Squatting is the registering, trafficking in, or using of a domain name with the mala fide intention of profiting from the goodwill of a trademark belonging to someone else.<sup>12</sup> Cyber squatters usually buy domain names with the name of already existing companies and sell these names back to those companies at a far greater price than that at which

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<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>NOLO, <https://www.nolo.com/legal-encyclopedia/cybersquatting-what-what-can-be-29778.html#:~:text=Cybersquatting%20is%20registering%2C%20selling%20or,a%20profit%20to%20those%20businesses>(last visited Dec. 3rd, 2022).

they bought it, in order to attain a profit.

The Delhi High Court in the case of *Manish Vij vs Indra Chug*<sup>13</sup> has defined cybersquatting as “an act of obtaining fraudulent registration with an intent to sell the domain name to the lawful owner of the name at a premium”. Some of the first victims of Cybersquatting were Multinational Companies such as Tata and McDonald’s.

### **3.1 Types**

#### **I. Typo Squatting**

It is one of the most common forms of cybersquatting wherein the cyber squatters purposely purchase domain names that are misspelled versions of popular brands, hoping to lure internet users into the false website by preying on the typographical errors made by them while typing the web address in the browser.<sup>14</sup> This form of cybersquatting is also known as URL hijacking.

#### **II. Identity Theft**

Domain name registrations on the internet are for a set period of time. If the owner of a domain name does not renew the domain name with the Domain Name Registrar prior to its date of expiration then it leaves the domain capable of being purchased by anybody from any corner of the world after the registration has

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<sup>13</sup>Manish Vij v. Indra Chug, AIR 2002 Del 243.

<sup>14</sup>Shaunak Deshpande, Cyber Squatting: -A study of Legal framework in India, 3 IJLMH 1825, 1827-1828 (2020), <https://www.ijlmh.com/cyber-squatting-a-study-of-legal-framework-in-india/>.

lapsed.<sup>15</sup> Cyber Squatters prey on this loophole and with the help of automated software tools register such domain names, the minute they expire.

### **III. Name Jacking**

In this form of cybersquatting an individual's name is purchased as a top-level domain name. E.g., if a person name-jack's "Manish Mehra" he would purchase a domain name such as manishmehra.com. Setting up such a website would allow said person to capitalise on any searches done for that particular name on search engines like Google, Microsoft Edge, etc.

These types of "name jacked" websites are typically set up by people in order to sell high profit and low investment items such as e-books and various other business opportunities, on top of it since they are set up using non-trademarked names and have the objective that is different from simply selling the domain name back to an individual, they are able to evade most laws around the globe.

## **4. INDIAN LEGAL FRAMEWORK VIS-A-VIS CYBERSQUATTING**

India does not specifically have any law to protect individuals and organizations from cybersquatting, this makes domain name protection a

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<sup>15</sup>NOLO, *supra* note 12.

cumbersome task, what is even more unfortunate is that the only cyber legislation in the country, i.e., Information Technology Act, 2000 does not even address the issue of cybersquatting, therefore, most cases relating to cybersquatting are either dealt with the help of cease-and-desist letters, international bodies or national bodies in the following ways:

## **I. By Sending Cease and Desist Letters to the Cyber-Squatters:**

These are letters from (or on behalf of) a trademark owner requesting that the recipient cease and desist from using an infringing domain name and demanding the domain name's cancellation or transfer and other remedies and assurances from the alleged infringer. It includes language anticipating legal action if the cyber-squatter does not respond to the request, such letters are usually tailored to suit the facts and circumstances of the particular matter.<sup>16</sup>

### **A. INTERNATIONAL BODIES**

## **II. By Initiation of Arbitration Proceedings Under ICANN's Dispute Resolution Policy:**

A domain name is exclusive around the globe but, there have been instances where the national laws haven't been as efficient in protecting the domain names on a global level, therefore, international regulatory

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<sup>16</sup>THOMSON REUTERS PRACTICAL LAW, [https://uk.practicallaw.thomsonreuters.com/w-006-7301?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-006-7301?transitionType=Default&contextData=(sc.Default)&firstPage=true) (last visited Dec. 3, 2022).



bodies such as ICANN were created. It is considered the world's internet administration cell. It was introduced to solve global domain name disputes in an efficient and money-saving manner.<sup>17</sup> ICANN implemented the Uniform Domain Name Dispute Resolution Policy (UDRP) in 1999, which has been used to resolve more than 20,000 disputes over the rights to domain names.<sup>18</sup> Currently, there are 6 ICANN approved UDRP Service Providers<sup>19</sup>:

- a. Asian Domain Name Dispute Resolution Centre (ADNDRC)
- b. Canadian International Internet Dispute Resolution Centre (CIIDRC)
- c. The Czech Arbitration Court Arbitration Centre for Internet Disputes
- d. National Arbitration Forum
- e. World Intellectual Property Organization (WIPO)

## **B. NATIONAL BODIES**

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<sup>17</sup>Meera Patel, *Use of Arbitration to Resolve Domain Name Disputes*, IPLEADERS (Dec. 4, 2022, 2:15 PM), [https://blog-ipleaders-in.cdn.ampproject.org/v/s/blog.ipleaders.in/use-of-arbitration-to-resolve-domain-name-disputes/?amp=1&amp\\_gsa=1&amp\\_js\\_v=a9&usqp=mq331AQKKAFQArABIIACAw%3D%3D#ICANN\\_dispute\\_resolution\\_policy=&ampshare=https%3A%2F%2Fblog.ipleaders.in%2Fuse-of-arbitration-to-resolve-domain-name-disputes%2F](https://blog-ipleaders-in.cdn.ampproject.org/v/s/blog.ipleaders.in/use-of-arbitration-to-resolve-domain-name-disputes/?amp=1&amp_gsa=1&amp_js_v=a9&usqp=mq331AQKKAFQArABIIACAw%3D%3D#ICANN_dispute_resolution_policy=&ampshare=https%3A%2F%2Fblog.ipleaders.in%2Fuse-of-arbitration-to-resolve-domain-name-disputes%2F).

<sup>18</sup>Piyush Charan, *A Survey of the Prominent Effects of Cybersquatting in India*, 4 IJISC 47, 50 (2015),

[https://www.researchgate.net/publication/281630211\\_A\\_Survey\\_of\\_the\\_Prominent\\_Effects\\_of\\_Cybersquatting\\_in\\_India#:~:text=In%20India%2C%20there%20is%20no,adequate%20protection%20of%20domain%20name.](https://www.researchgate.net/publication/281630211_A_Survey_of_the_Prominent_Effects_of_Cybersquatting_in_India#:~:text=In%20India%2C%20there%20is%20no,adequate%20protection%20of%20domain%20name.)

<sup>19</sup>ICANN, <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en> (last visited Dec. 3, 2022).

### **III. By Registration of Complaint With the .in Dispute Resolution Body:**

In response to the domain name disputes and cybersquatting in India, the national arbitration body, .IN registry developed the .IN Dispute Resolution Policy (. INDRP) As per the procedural rules of .IN, any person who has acquired a domain name by legally registering the name can initiate a complaint by providing legitimate grounds and reasons.<sup>20</sup>

### **IV. BY INITIATION OF PROCEEDINGS UNDER THE TRADE MARK ACT, 1999 OF INDIA:**

Under the Trademark Act of 1999, domain name infringement can be tackled in two ways:

If a trademark is registered, action can be taken on the grounds that trademark and intellectual property has been violated.

Action can be on the grounds of passing off, wherein the aggrieved party has to prove that the squatter is passing off his goods or services as theirs. In these cases, the court applies the “likelihood of confusion” test.<sup>21</sup> As per this test, if it can be established that a domain name used by a person is likely to cause confusion in the mind of the common public or the end users that the domain or the products and services projected on their website belong to another person, the courts would evict the cyber squatter

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<sup>20</sup>THOMSON REUTERS PRACTICAL LAW, *supra* note 16.

<sup>21</sup>Harman Preet Singh, *Cyber Squatting and the Role of Indian Courts: A Review*, 2 AJCS 18, 20 (2018), <https://www.amity.edu/ajcs/current-issue.aspx>.

and grant an injunction against the use of the domain name for such purposes.

## **4.1. Indian Judiciary on Cybersquatting**

The Indian Judiciary has made remarkable contributions in the field of Cybersquatting with its progressive judgments, let us understand with the help of some landmark Judgement how the position of cybersquatting and cybersquatters have evolved in India over the years.

### **4.1.1. Yahoo!, Inc. v. Akash Arora & Anr.<sup>22</sup>**

This is the first Indian case with regard to cybersquatting. In this case, the defendant had launched a website called yahooindia.com which was nearly identical to the plaintiff's renowned U.S.-based website Yahoo and also provided services similar to it. The Court here observed that the act of the defendant was clearly an effort to ride on the coattails of yahoo's trademark's fame.

Ruling in favor of the Plaintiff the court further added that a domain name registrant does not obtain any legal right to use that particular domain name simply because he has registered the domain name, he could still be liable for trademark infringement.

### **4.1.2. Rediff Communication v. Cyber booth and Another.<sup>23</sup>**

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<sup>22</sup>Yahoo!, Inc. v. Akash Arora & Anr., 1999 IAD Delhi 229.

<sup>23</sup>Rediff Communication v. Cyber booth and Another, AIR 2000 Bombay 27.

This case is a classic example of Typo squatting, wherein the defendant had registered a domain by the name of radiff.com which was similar to the plaintiff's renowned, rediff.com. When the matter went to court, the Hon'ble Bombay High Court held that a domain name is like a corporate asset of a company and decided in favor of the plaintiff.

#### **4.1.3. Tata Sons Ltd. v. Manu Kishori & Others.<sup>24</sup>**

In this case, the defendant had registered a number of domain names bearing the name Tata. It was held by the court that domain names are not only addresses but trademarks of companies and that they are equally important.

#### **4.1.4. Aqua Minerals Ltd. v. Pramod Borse & Anr.<sup>25</sup>**

In this case, a trademark "Bisleri" had been registered in India by the plaintiff which made him the registered owner of the brand but the defendant Mr. Pramod Borse & Anr registered the domain name www.bisleri.com. The Hon'ble Delhi High Court ruled that the defendant had committed trademark infringement and granted the plaintiff permission to seek the transfer of the website that was registered in its name.

#### **4.1.5. Satyam Infoway Ltd. v. Siffynet Solutions Pvt.Ltd.<sup>26</sup>**

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<sup>24</sup>Tata Sons Ltd. v. Manu Kishori & Others, 2001 IIIAD Delhi 545.

<sup>25</sup>Aqua Minerals Ltd. v. Pramod Borse & Anr., AIR 2001 Delhi 463.

<sup>26</sup>Satyam Infoway Ltd. v. Siffynet Solutions Pvt.Ltd., AIR 2004 SC 3540.

In this case, the word Sify was first coined by the plaintiff using elements from its corporate name Satyam Infoway and it had a very wide reputation and goodwill in the market. The Respondent had registered domain names “www.siffynet.com” and “www.siffynet.net” which were similar to the Plaintiff’s domain name “www.sifynet.com.” The Hon’ble Supreme Court deciding in favor of the plaintiff held that “domain names are business identifiers, serving to identify and distinguish the business itself or its goods and services and to specify its corresponding online location.

## **4.2. WIPO on Cybersquatting**

### **4.2.1. SBI card and Payment Services Private Limited v. Domain Active Property Ltd.<sup>27</sup>**

In this case, the domain name Sbicards.com was stolen by an Australian organization with the intention of subsequently selling it at a profit to a subsidiary of the State Bank of India. The WIPO board agreed with the argument made by SBI Card lawyers that “the Australian company was in the business of acquiring and selling domain names via its site,” and ruled that Sbicards.com be transferred back to the Indian company.

### **4.2.2. Indian Oil Corporation Limited v. Nitin Jindal.<sup>28</sup>**

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<sup>27</sup>SBI card and Payment Services Private Limited v. Domain Active Property Ltd., Case No. D2005-0271 (WIPO AMC).

<sup>28</sup>Indian Oil Corporation Limited v. Nitin Jindal, Case No. D2010-2003 (WIPO AMC).

In this case, the disputed domain name indianoil.org was similar to the complainant's well-known and reputed registered trademark “INDIAN OIL” except for the addition of .org designation. An ex-parte order was passed by WIPO administrative panel wherein it was held that Indian Oil Corp has the exclusive right to use the domain name as it is a well-known company and accordingly, Nitin Jindal was directed to transfer ownership of the website.

#### **4.2.3. Bennett Coleman & Co. Ltd. v. Steven S Lalwani and Bennett Coleman & Co Ltd. v. Long Distance Telephone Company.<sup>29</sup>**

In these cases, the respondents had registered domain names in www.theeconomictimes.com and the www.timesofindia.com with network solutions of the United States, using which users would be redirected to a different website www.indiaheadlines.com which provided India-related news.

## **5. SUGGESTIONS**

In conclusion, Cybersquatting is an infernal nuisance that stems from the unfair advantage granted by the lacunas of the country’s legal system and though our courts have thus far, awarded exemplary judgments in this relation, it is high time that some concrete changes are brought about

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<sup>29</sup>Bennett Coleman & Co. Ltd. v. Steven S Lalwani and Bennett Coleman & Co Ltd. v. Long Distance Telephone Company, Cases No. D2000-0014 and 2000-0015 (WIPO AMC).

exclusively for this area, just as countries like the United States have done with progressive legislations like the Anti-Cybersquatting Consumer Protection Act, 1999.

Proposed below are four solutions to deal with cybersquatting:<sup>30</sup>

**I. Need for a new legislation-** In the present day with rapidly increasing cases, it is high time that India drafts new legislation expressly dealing with domain names as there isn't adequate protection provided against cyber squatters by the existing laws. The lack of direct laws enables miscreants to exploit the loopholes and exonerates them from the trial. What is even more saddening is that the Information Technology Act which regulates mostly cybercrimes is completely silent about cybersquatting. Most Indian Courts in such matters either refer to foreign judgments in order to tackle these cases along with giving a wide interpretation to the provisions under the Trademark law.

**II. Independent Adjudicatory Body-** Taking the example of the US national arbitration forum and the Czech arbitration court India too, should set up a body that shall only decide cases relating to domain name disputes and especially cybersquatting within the domains of India. Such institutions could prove less time-consuming but at the same time more effective as the parties will not have to wait to get onto a docket, and then

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<sup>30</sup>Piyush Charan, *A Survey of the Prominent Effects of Cybersquatting in India*, 4 IJISC 47, 56-57 (2015),

[https://www.researchgate.net/publication/281630211\\_A\\_Survey\\_of\\_the\\_Prominent\\_Effects\\_of\\_Cybersquatting\\_in\\_India#:~:text=In%20India%2C%20there%20is%20no,adequate%20protection%20of%20domain%20names.](https://www.researchgate.net/publication/281630211_A_Survey_of_the_Prominent_Effects_of_Cybersquatting_in_India#:~:text=In%20India%2C%20there%20is%20no,adequate%20protection%20of%20domain%20names.)

keep on waiting for the final decree and other paraphernalia associated with due process of law to take place.

**III. Revamping INDRP-** The INDRP needs to be made more uniform and consistency of the UDRP on the lines of which it is drafted and needs to be elevated to the status of law, from a mere policy because in its current form it is not mandatory to follow, thereby making the regime is ineffective.

**IV. Arbitration-** Last but not least, arbitration decisions of the WIPO Arbitration and Mediation Centre should be made binding in India under the Arbitration and Conciliation Act 1996. Just as other arbitration decisions are considered to be decrees under the Arbitration Act the Information Technology Act 2000 should be amended to include an appeal provision for WIPO decisions before the High Court and execution petitions can be filed to enforce them accordingly. This way ICAAN and WIPO decisions will ease the overburdened Indian court system.



# MONUMENTS AND THEIR PROTECTION: AN OVERVIEW OF ARTICLE 49 OF THE INDIAN CONSTITUTION

-Shruti Garg<sup>1</sup>

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## ABSTRACT

*Monuments provide a very constructive principle in restructuring history and ancient India. Old buildings are representative of the different changes that the cities have faced over time. So, it becomes a prime responsibility of the state to look after the historical sites. Article 49 of the Constitution of India lays emphasis on the protection of monuments, places, and objects of national importance. This article explains that it shall be the obligation of the state to protect every monument or place or object or artistic or historic interest declared by the or under the laws made by the Parliament to be of national importance, from spoliation, disfigurement, destruction, removal or disposal or export as the case may be. Article 49 is the directive to the state to implement laws for the protection of monuments from any encroachment. It is well known for a fact that the Directive*

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*Principles are not enforceable but they hold equal importance in the eyes of law. The basic aim of this article is to enlighten the readers about the current scenario and to bring to light the responsibilities of the state towards safeguarding the authenticity of our history from being crippled.*

**KEYWORDS:** *Monuments, Heritage, Restoration, National Interest, Conservation.*

# 1. INTRODUCTION

India is a country with diverse cultures, languages, religions, and traditions. Monuments symbolize that Indian culture is the most ancient culture present in the world. Monuments, artifacts, and heritage sites form an integral part of our culture as it contributes to historic significance and integrity. Besides their historical value, they are a major point of attraction for tourists, domestic as well as international,<sup>2</sup> so it becomes the prime responsibility of the government to take measures in order to protect these monuments. Though it is the primary duty of the Centre to conserve the monuments and heritage sites the Constitution entrusts this duty upon the states as well, to take measures to restore our culture. Article 49 of Part IV of the Constitution of India imposes an obligation on the states to protect every monument or place or object or historical interest which is of national interest from any national importance.<sup>3</sup> Under the Constitution, both the Centre and the States are responsible for carrying out their duties by protecting the monuments and taking necessary measures for their preservation, restoration, preservation, and conservation.

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<sup>2</sup>PARLIAMENT OF INDIA,  
[https://rajyasabha.nic.in/rsnew/Committee\\_site/Committee\\_File/ReportFile/20/166/324\\_2022\\_6\\_14.pdf](https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/20/166/324_2022_6_14.pdf) (last visited Dec. 2, 2022).

<sup>3</sup>INDIA CONST. art 49.

## **2. LEGISLATIONS WITH RESPECT TO THE PROTECTION OF MONUMENTS**

### **2.1. The Ancient Monuments and Archaeological Sites and Remains Act, 1958**

The Ancient Monument and Archaeological Sites and Remains (Amendment & Validation) Act, 2010 was enacted with the sole objective of preserving the ancient and historical monuments, archaeological sites and remains for the regulation of archaeological excavations, protection of sculptures and other similar objects.<sup>4</sup> With the enactment of this legislation, different states were empowered to form laws for their state for the protection of those monuments that were not owned by the Central Government. For e.g., the Assam Ancient Monuments and Archaeological Sites and Remains Act, 1959, Punjab Ancient & Historical Monuments and Arch Sites & Remains Act 1964, The Mysore Ancient and Historical Monuments and Archaeological Sites Rules 1965, Bihar Ancient Monuments and Archaeological Sites Remains and Art Treasures Act, 1976, etc.

Section 20A of this Act restricted the enjoyment of property rights within the protected area i.e., a hundred meters.<sup>5</sup> This provision

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<sup>4</sup>The Ancient Monuments and Archaeological Sites and Remains Act, 1958, No. 24, Acts of Parliament, 1958 (India).

<sup>5</sup>*Id.*

bars a person from constructing or reconstructing a structure within the limits of the prohibited area. Even though it defined the limits, according to the Ministry, the area prescribed was not reasonable on the grounds that it depended from place to place. This argument was substantiated by giving an example of the Begumpur Mosque in Delhi which forms a part of the Begumpur village.<sup>6</sup> Prior to the Act, this mosque was used as part of their daily life by the villagers for carrying out their daily chores, but with the prohibition of construction within the prohibited area of hundred meters, the mosque is regarded as nothing but a source of trouble.<sup>7</sup> The Ancient Monuments and Archaeological Sites (Amendment and Validation) Act, 2010 states that a structure can be constructed within an area of 100- 300 meters with the permission of the Archaeological Survey of India.<sup>8</sup>

This Act imposes heavy penalties on those who fail to abide by the provisions. Section 16 imposes a penalty that may extend to imprisonment of two years and a fine that may extend to two lakh rupees or both.<sup>9</sup> This is a mandatory provision as it creates a sense of responsibility and a liability for the wrongdoer. However, it is

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<sup>6</sup>INDIAN EXPRESS, <https://indianexpress.com/article/cities/delhi/delhi-in-disrepair-begumpur-mosque-awaits-some-help-7509347/> (last visited Dec. 2, 2022).

<sup>7</sup>PARLIAMENT OF INDIA, *supra* note 2.

<sup>8</sup>The Ancient Monuments and Archaeological Sites and Remains Act, 1958, No. 24, Acts of Parliament, 1958 (India).

<sup>9</sup>*Id.*

seen that penalties are not imposed as prescribed. In 2014, housing-related construction activity had taken place within the 100- 300 meters of protected monuments, the responsible persons were found guilty but ASI chose to settle the case.<sup>10</sup> This reflects the irresponsible behavior on the part of the custodian whose aim is to protect the heritage by punishing the offender.

### **3. STATUTORY BODIES FOR THE PRESERVATION OF MONUMENTS**

This Act includes two major statutory bodies which have been setup under the Ancient Monument and Archaeological Sites and Remains (Amendment & Validation) Act, 2010 i.e., the National Monuments Authority (NMA) and the Archaeological Survey of India (ASI).<sup>11</sup>

#### **3.1. The National Monuments Authority (NMA)**

The National Monuments Authority (NMA) came into existence in 2011 as a statutory body constituted under the provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 2010.<sup>12</sup> The basic objective for setting up of NMA is the implementation of the statutory provisions of prohibited and

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<sup>10</sup>TIMES OF INDIA, <https://timesofindia.indiatimes.com/city/ahmedabad/asi-lets-3-get-away-with-damaging-heritage-site-on-paying-meagre-fines/articleshow/70565896.cms> (last visited Dec. 5, 2022).

<sup>11</sup>The Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act, 1958, S. 20 F No. 24, Acts of Parliament, 1958 (India).

<sup>12</sup>*Id.*

regulated areas of centrally protected monuments for the purpose of construction, repair/renovation of buildings, and public projects.<sup>13</sup> The time taken for disposal of applications was reduced from more than 3 months to an average of 30 days after the complete application of receipt online with the help of the National Monuments Authority in order to fasten the process.<sup>14</sup>

National Monuments Authority has made a record number of 101 Heritage by Laws during the pandemic, covering a total of 126 centrally protected monuments.<sup>15</sup>

### **3.2. The Archaeological Survey of India (ASI)**

The Archaeological Survey of India under the Ministry of Culture is an organization for the Archaeological research and protection of cultural heritage. The prime concern of ASI is the maintenance of ancient monuments, archaeological sites, and remains of national importance. At present 3,691 monuments nationwide are protected by the Archaeological Survey of India.<sup>16</sup>

This organization has a workforce that includes trained archaeologists, conservators, epigraphists, architects, and

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<sup>13</sup>*Id.*

<sup>14</sup>NATIONAL MONUMENT AUTHORITY, <https://www.nma.gov.in/> (last visited Dec. 3, 2022).

<sup>15</sup>PRESS INFORMATION BUREAU, <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1827998> (last visited Dec. 4, 2022).

<sup>16</sup>THE HINDU, <https://www.thehindu.com/news/national/list-of-monuments-under-asi-likely-to-be-reviewed/article30957860.ece> (last visited Dec. 4, 2022).

scientists for conducting various projects.<sup>17</sup> In spite of having such a large workforce there are some inadequacies in its functioning. It was observed that the World Heritage Sites did not receive proper care and protection.<sup>18</sup> There were numerous cases of encroachment and unauthorized construction in and around such sites. As the primary activity carried out by the ASI is excavation and exploration of remains, however, it was seen that less than 1% of its total expenditure was spent on these activities.<sup>19</sup>

Recently, a report was prepared by the Comptroller and Auditor General of India on the preservation and conservation of antiquities and monuments which brought to light the malfunctioning of ASI.<sup>20</sup> Audit reports revealed that there were encroachments in around 546 monuments as against 249 as mentioned by ASI HQ.<sup>21</sup> There was encroachment in Sisupalgarh Fort, Bhubaneswar where the state government had converted the agricultural land into residential and allowed the construction of several buildings. Also, in Golconda Fort, Hyderabad the state government had allowed the

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<sup>17</sup>CAG GOVERNMENT, [https://cag.gov.in/uploads/download\\_audit\\_report/2013/Union\\_Performance\\_Ministry\\_Cultures\\_Monuments\\_Antiquities\\_18\\_2013.pdf](https://cag.gov.in/uploads/download_audit_report/2013/Union_Performance_Ministry_Cultures_Monuments_Antiquities_18_2013.pdf) (last visited Dec. 4, 2022).

<sup>18</sup>UNESCO WORLD HERITAGE SITE, <https://whc.unesco.org/en/158/> (last visited Dec. 4, 2022).

<sup>19</sup>ECONOMIC TIMES, <https://economictimes.indiatimes.com/news/india/cag-pulls-up-asi-for-low-expenditure-on-excavation-vacancies/articleshow/93438718.cms?from=mdr> (last visited Dec. 5, 2022).

<sup>20</sup>CAG GOVERNMENT, *supra* note 17.

<sup>21</sup>*Id.*



land within the monument to be used as a dumping yard.<sup>22</sup> A similar destruction took place in various other monuments like Moti Jheel masjid in Kolkata, Chittorgarh Fort, Raipur etc.<sup>23</sup> In order to prevent such rampant encroachment and construction around the monuments and other sites the Ancient Monument and Archaeological Sites and Remains (Amendment & Validation) Act, 2010 was enacted.

In Madhya Pradesh, unauthorized constructions started coming up near ASI sites at Khajuraho, Gwalior. The ASI imposed a blanket ban on all constructions within 100 meters (prohibited zone) of any monument protected by the ASI and allowed limited construction in the next 200 meters (regulated zone).<sup>24</sup> Constructions were allowed near the Amleshwer or Mamleshwar group of temples after imposing fines varying from Rs.10,000 to Rs 50,000.<sup>25</sup>

#### **4. SHADOW ON ARTICLE 49**

The Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act, 2010 acts as a shadow on Article 49 of the Constitution. It empowers the Central Government to take measures for the conservation of monuments and places of national interest. With

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<sup>22</sup>THE HINDU, *supra* note 16.

<sup>23</sup>*Id.* 9.

<sup>24</sup>CAG GOVERNMENT, *supra* note 17.

<sup>25</sup>TIMES OF INDIA, <https://timesofindia.indiatimes.com/city/bhopal/national-monument-authority-cant-allow-construction-asi/articleshow/50157690.cms> (last visited Dec. 6, 2022).

the formation of two statutory bodies which have failed to deliver their promise by exercising their powers with due diligence, the center must delegate its responsibility to the respective states. The provisions of the Act cast a doubt on the autonomy of the National Monument Authority and Archaeological Survey of India. In 2017, the Union Minister raised concerns regarding the construction in prohibited areas and also, raised a concern regarding the destruction of structures due to construction activities and the impact that the amendment will have on the “poorly resourced” ASI and NMA.<sup>26</sup>

## **5. PRESERVATION OF HERITAGE AS A DUTY UPON THE CITIZENS**

Places of national interest belongs to the Central Government and the States, for this purpose, it is the obligation of the government to work for the sustenance of these historic interests. On the one hand, the Constitution declares it as the fundamental principle of governance on part of the States and on the other hand, it makes it a fundamental duty of the citizens as well to value and protect these structures. Article 51-A (f) states that it is the duty of the citizens to value and preserve the rich heritage of our composite culture.<sup>27</sup> Many locals and tourists encroach upon the walls of

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<sup>26</sup>FIRST POST, <https://www.firstpost.com/india/bill-allowing-construction-near-heritage-monuments-impinges-autonomy-of-asi-nma-centre-must-take-public-into-confidence-4285691.html> (last visited Dec. 6, 2022).

<sup>27</sup>INDIA CONST., art 51-A, cl. (f).

the monuments by writing their names or by making ugly graffiti, this not only shows their lack of sense of nationality but also, their lack of respect towards the architecture and no sense of respect for their culture. In order to prevent these notorious activities, the government has made provisions for penalties that must be imposed for violating their fundamental duty as a citizen.

## **6. CONCLUSION**

Indian culture is the oldest and includes a diverse community. Once it is destroyed nothing can be done to restore it. That's why it is the responsibility of the states as well as the citizens to protect and preserve monuments and heritage sites. The laws made to safeguard monuments have been amended according to the needs. But the main problem lies in the way these laws are implemented by the respective states. The states must be given autonomy to have a larger workforce and a team to oversee their activities so that there is a decentralization of power and all the monuments can be looked after. If the contribution made is put to judicious use, it will not only help conserve our culture but also contribute to the overall development of the economy of our country. The government must ensure that there is no overlapping role of the Archaeological Survey of India (ASI) and the National Monument Authority (NMA). The functions performed by both authorities must be differentiated for the proper implementation of the legislation. It must be made sure that there is a strict implementation of the penal provisions which is possible only if there is a

delegation of duties between the authorities. The competent authorities should hold quarterly meetings and make a report in order to check the progress of the work undertaken.

# EFFICACY OF DEATH PENALTY AS A FORM OF PUNISHMENT IN INDIA

-Devansh Agarwal<sup>1</sup>

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## ABSTRACT

*The validity of the death penalty has been in question for quite some time. The death penalty, also known as capital punishment, is a highly controversial. Some people believe that it is a necessary punishment for certain crimes, while others argue that it is inherently wrong and should be abolished. There are strong arguments on both sides of the debate. On the one hand, supporters of the death penalty argue that it serves as a deterrent to crime, as it sends a strong message that certain actions will not be tolerated. They also argue that it provides justice for victims and their families, who may feel the offender does not deserve to live after committing a heinous crime. On the other hand, opponents of the death penalty argue that it is wrong to take the life of another human being, no matter the circumstances. They also point out that there is a risk of executing innocent people, as the justice system is imperfect. Additionally, they argue that the death penalty is not an effective deterrent to crime, as there is no evidence to suggest that it reduces the incidence of violent crime. The author aims to address the*

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*complex and multifaceted issue of the death penalty and help his readers decide where they stand on the issue.*

**KEYWORDS:** *Death Penalty, India, Constitutionality, Violent Crime, Right to Life.*

# 1. INTRODUCTION

Executing people as retribution for specific offenses is known as the death sentence. It has a long past that goes back to early civilizations. The death penalty was once applied to various crimes, including treason, theft, and even minor acts like vandalism. The first known use of the death penalty was in the Code of Hammurabi, a set of laws that governed the ancient Babylonian empire. The code, which was inscribed on a large stone tablet, prescribed the death penalty for a variety of crimes, including murder, theft, and rebellion.<sup>2</sup>

Over time, different societies and civilizations have used various methods of the death penalty, including crucifixion, drowning, and burning at the stake. In the Middle Ages, execution by hanging became Europe's most common method of carrying out the death penalty.<sup>3</sup>

In the United States, the use of the death penalty has been a controversial issue since the country's founding. The first recorded execution in the U.S. was of Captain George Kendall in the Jamestown colony of Virginia in 1608.<sup>4</sup> Since then, the death penalty has been used in various forms in

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<sup>2</sup>*History of Death Penalty Laws*, FIND LAW, <https://www.findlaw.com/criminal/criminal-procedure/history-of-death-penalty-laws.html>, (last visited Dec. 16, 2022, 6:30 PM).

<sup>3</sup>*Hanging*, BRITANNICA, <https://www.britannica.com/topic/hanging>, (last visited Dec 16, 2022, 7:00 PM).

<sup>4</sup>*Early History of The Death Penalty*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty> (last visited Dec. 16, 2022, 7:10 PM).

different states, including electrocution, gas chamber, and lethal injection.<sup>5</sup> In recent years, there has been a significant decline in the use of the death penalty in the U.S. and other countries.<sup>6</sup> Many states have abolished the practice altogether, and it is now only used in a handful of jurisdictions.<sup>7</sup> The reasons for this decline include concerns about the fairness and effectiveness of the death penalty, as well as the high cost of carrying out executions.<sup>8</sup>

## **2. EFFICACY OF DEATH PENALTY AS A FORM OF PUNISHMENT**

The fairness of the death penalty is a matter of ongoing debate and discussion. Some people believe that the death penalty is fair because it provides justice for victims and their families, and it also serves as a deterrent to crime. Others argue that the death penalty is unfair because it is disproportionately applied to certain groups of people, such as people of color and those with low income. Additionally, there is concern that the

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<sup>5</sup>*Methods of Execution*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/executions/methods-of-execution> (last visited Dec. 16, 2022, 7:10 PM).

<sup>6</sup>*History of Death Penalty*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty> (last visited Dec. 16, 2022, 7:10 PM).

<sup>7</sup>Somya Deshwal, *Death Penalty: Contemporary Issues*, INDIAN NATIONAL BAR ASSOCIATION, <https://www.indianbarassociation.org/death-penalty-contemporary-issues/>(last visited Dec. 16, 2022, 8:00 PM).

<sup>8</sup>*The Death Penalty*, ACLU, <https://www.aclu.org/other/death-penalty-questions-and-answers>(last visited Dec. 16, 2022, 8:15 PM).



death penalty can be applied incorrectly, leading to the punishment of innocent people. Ultimately, whether or not the death penalty is considered fair is a subjective determination that varies from person to person.

The effectiveness of the death penalty as a deterrent to crime is a matter of ongoing debate and disagreement. Some studies have suggested that the death penalty can be a deterrent to crime, while others have found no evidence to support this claim. Additionally, the relationship between the death penalty and crime rates is complex and can be influenced by a variety of factors, such as the overall level of crime in a given area, the presence of other deterrents to crime, and the specific circumstances of individual cases.<sup>9</sup> As a result, it is difficult to definitively say whether the death penalty is an effective deterrent to crime.

One argument in favor of the death penalty as a deterrent is that the fear of being sentenced to death can prevent individuals from committing crimes.<sup>10</sup> Proponents of this view argue that the certainty and finality of the death penalty can be a stronger deterrent than the possibility of being sentenced to life in prison.<sup>11</sup>

However, other studies have found that the death penalty is not an effective deterrent to crime.<sup>12</sup> These studies point to the fact that crime rates in states with the death penalty are not consistently lower than in states without the

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<sup>9</sup>ACLU, *supra* note 8.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

death penalty.<sup>13</sup> Additionally, countries that have abolished the death penalty, such as Canada and many European countries, have not seen an increase in crime rates.<sup>14</sup>

Overall, the effectiveness of the death penalty as a deterrent to crime remains a highly debated and controversial issue, with strong arguments on both sides.

### **3. DISCOURSE ON DEATH PENALTY AS A FORM OF PUNISHMENT**

#### **3.1. Moral Arguments**

The use of the death penalty is supported by a variety of moral justifications. Some people think that the death sentence is appropriate because it brings justice to the victims and their families, deters crime, and rids society of dangerous criminals.<sup>15</sup> Others, however, contend that the death penalty is intrinsically evil since it violates the right to life, is frequently imposed arbitrarily, and doesn't always serve as a more effective deterrence to crime than alternative types of punishment.<sup>16</sup> Concerns exist around the

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<sup>13</sup>*Id.*

<sup>14</sup>*Countries That Have Abolished the Death Penalty Since 1976*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976> (last visited Dec. 17, 2022, 7:10 PM).

<sup>15</sup>*The Death Penalty*, ACLU,

<https://www.aclu.org/other/death-penalty-questions-and-answers> (last visited Dec. 16, 2022, 8:15 PM).

<sup>16</sup>*Id.*

possibility of erroneous convictions as well as the use of the death penalty as a form of oppression. The moral reasons for and against using the death penalty are frequently at the center of the discussion.

### **3.2. Utilitarian Arguments**

Utilitarian arguments for the death penalty often focus on the idea that the punishment serves the greater good by providing justice for victims and their families, deterring crime, and protecting society from dangerous criminals.<sup>17</sup> Proponents of this view argue that the death penalty is necessary in order to achieve these goals and that the benefits of the punishment outweigh the costs.<sup>18</sup> For example, they may argue that the punishment deters potential criminals by making them fear the consequences of their actions and that it provides a sense of closure and justice for the victims and their loved ones. However, critics of this view argue that the death penalty is not an effective deterrent to crime and that it can result in the wrongful execution of innocent people.<sup>19</sup> They also argue that there are other, more humane ways to achieve the goals

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<sup>17</sup>*Capital Punishment*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <https://iep.utm.edu/death-penalty-capital-punishment/> (last visited Dec 16, 2022, 8:39 PM).

<sup>18</sup>*The Death Penalty*, ACLU,

<https://www.aclu.org/other/death-penalty-questions-and-answers> (last visited Dec 16, 2022, 8:15 PM).

<sup>19</sup>*Id.*

of punishment, such as life imprisonment.<sup>20</sup>

## 4. DEATH PENALTY IN INDIA

In India, the death penalty is legal and can be imposed for certain crimes such as murder, terrorism, and treason. However, it is rarely used and is reserved for the "rarest of rare" cases. In recent years, there has been a growing debate in India about the use of the death penalty. Some argue that it is a necessary tool to combat crime and provide justice for victims and their families, while others argue that it is a cruel and inhumane punishment that does not deter crime.

In 2019, the Supreme Court of India issued new guidelines for the imposition of the death penalty, stating that it should only be used in the "rarest of rare" cases where the crime is "the most heinous and uncommon" and there are no other punishment options.<sup>21</sup>

Overall, the use of the death penalty in India remains a highly controversial and debated issue. It plays an important role from getting a poor slum dweller his ration card through RTI to unearthing massive scams like 2G Spectrum, Adarsh Society Scam, Commonwealth Games Scam, Indian Red Cross Society Scam, etc.<sup>22</sup>

India objected to a UN resolution that called for a moratorium on the death sentence because it violates both Indian law and the sovereign right of

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<sup>20</sup>*Id.*

<sup>21</sup>Bachan Singh vs. State of Punjab, AIR 1980 SC 898.

<sup>22</sup>LEGIT QUEST, <https://www.legitquest.com/legal-guide/right-to-information-act> (last visited Apr. 13, 2022).

every nation to develop its own legal system.<sup>23</sup> It is given for the most severe offenses in India. No person shall be denied the “right to life” that is guaranteed to each and every citizen of India, according to Article 21.<sup>24</sup> Additionally, everyone is afforded equality before the law and equal protection under the law under Article 14 of the Constitution.<sup>25</sup> The constitutionality of the death penalty was contested on the grounds that it violated Articles 19 and 21, but because it lacked a mechanism, different judges have affirmed its constitutionality.<sup>26</sup> The judges are granted sufficient authority to impose the death penalty since it is a fair, rational, and legal method of taking life.<sup>27</sup> In India, many actions such as criminal conspiracy, murder, the war against the government, abetment of mutiny, dacoity with murder, and anti-terrorism are punishable with death penalties under the Indian Penal Code (IPC).<sup>28</sup>

In situations when death sentences are involved, only the president has the authority to grant compassion.<sup>29</sup> The President of India has the authority to pardon, reprieve, respite, or remit punishment, as well as to suspend, remit, or lessen the sentence of any individual who has been found guilty

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<sup>23</sup>*India Opposes Un Resolution On Moratorium On Death Penalty*, LIVE MINT (Dec 17, 2022, 5:00 PM), <https://www.livemint.com/Politics/7kiNlu4HWkU1O0ugxnDjxK/India-opposes-UN-resolution-on-moratorium-on-death-penalty.html>.

<sup>24</sup>INDIA CONST. art 20.

<sup>25</sup>INDIA CONST. art 14.

<sup>26</sup>*Shatrughan Chauhan & Anr vs Union Of India & Ors*, W.P. (CRIMINAL) NO. 55 OF 2013.

<sup>27</sup>*Bachan Singh vs. State of Punjab*, AIR 1980 SC 898.

<sup>28</sup>Indian Penal Code, 1860, Sec 120 B, Acts of Parliament, 1860 (India).

<sup>29</sup>INDIA CONST. art 72.

of an offense, according to Article 72 of the Indian Constitution.<sup>30</sup>

#### **4.1. Indian Judiciary and Death Penalty**

In *Jagmohan v. State of U.P.*,<sup>31</sup> The Supreme Court stated, Articles 14, 19, and 21 do not contravene the death penalty. According to reports, the judge decided between the death penalty and life in prison based on the circumstances, the evidence, and the type of crime that was presented throughout the trial. Therefore, as required by Article 21, the decision to impose the death penalty was made in line with the legal process.

But, in *Rajendra Prasad v. State of U.P.*,<sup>32</sup> the right to life that individuals are guaranteed by the Indian Constitution is directly impacted by the death sentence, according to Krishna Iyer J. However, the law imposes the death penalty, and this Article contains no reference to the rule of law. As a result, it is true.

Further, two things are required to impose the death penalty in a case:

1. That the 'special reason' has to be recorded for imposing the death penalty, and

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<sup>30</sup>Bachan Singh vs. State of Punjab, AIR 1980 SC 898.

<sup>31</sup>Jagmohan v. State of U.P., 1973 AIR 947.

<sup>32</sup>Rajendra Prasad v. State of U.P., 1979 SCC (3) 646.

2. That there must be extraordinary circumstances in order to impose the death penalty.<sup>33</sup>

In *Bachan Singh vs. State of Punjab*,<sup>34</sup> The Supreme Court reversed its earlier ruling in the Rajendra Prasad case by a margin of 4 to 1. It was decided that using the death sentence as an alternative to other forms of punishment for murder did not contravene Articles 14, 19, or 21 of the Constitution. This is due to the fact that "public order," as defined in clauses (2) and (4), differs from "law and order" and reiterates the notion that the death sentence should only be applied in exceptional circumstances.

Further, in *Machhi Singh vs. State of Punjab*,<sup>35</sup> The Supreme Court laid down outlines where death sentences should be awarded. Justice Thakkar, speaking for the Court held five categories of cases that may be regarded as rarest of rare cases which shall deserve the death penalty:

- A. Manner of commission of murder: When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

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<sup>33</sup>Tejsi, *Constitutional Validity of Capital Punishment*, LEGAL SERVICE INDIA, (Dec. 12, 2022, 07:40 PM), <https://www.legalserviceindia.com/legal/article-8861-constitutional-validity-of-capital-punishment.html>.

<sup>34</sup>*Bachan Singh vs. State of Punjab*, AIR 1980 SC 898.

<sup>35</sup>*Machhi Singh vs. State of Punjab*, 1983 AIR 957.

- B.** Motive for Commission of murder: When the murder is committed for a motive that evinces total depravity and meanness.
- C.** Socially abhorrent nature of the crime: When a murder of a Scheduled Caste or minority community, etc., is committed not for personal reasons but in circumstances that arouse social wrath.
- D.** Magnitude of Crime: When the crime is enormous in proportion.
- E.** Personality of the victim of murder: When the victim of murder is:
  - a.** An innocent child who could not have or has not provided even an excuse, much less a provocation, for murder,
  - b.** A helpless woman or a person rendered helpless by old age or infirmity,
  - c.** When the victim is a person vis a vis whom the murderer is in a position of domination or trust, or

When the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.<sup>36</sup>

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<sup>36</sup>Tejsi, *Constitutional Validity of Capital Punishment*, LEGAL SERVICE INDIA, (Dec. 12, 2022, 07:40 PM), <https://www.legalserviceindia.com/legal/article-8861-constitutional-validity-of-capital-punishment.html>.



## **4.2. Cost-effectivity of Death Penalty as a form of Punishment in India**

It is difficult to say whether the death penalty is cost-effective in India, as the cost of implementing the death penalty can vary depending on a number of factors. These factors can include the length and complexity of the legal process, the cost of carrying out the execution, and the cost of maintaining prisoners on death row. Additionally, the cost-effectiveness of the death penalty is highly dependent on an individual's perspective and priorities. Some people may consider the death penalty to be cost-effective if it is seen as providing justice for victims and their families. In contrast, others may consider it to be a waste of resources that could be better spent on other forms of crime prevention or punishment.

## **5. CONCLUSION**

The abolition movement against the death penalty is a global movement that seeks to end the use of the death penalty. This movement comprises individuals and organizations that believe the death penalty is inhumane, costly, and often applied unfairly. They argue that the death penalty violates the right to life and is not an effective deterrent to crime. The abolition movement uses a variety of strategies to achieve its goals, including public education and awareness campaigns, lobbying of

government officials, and legal challenges to death penalty laws.<sup>37</sup> Over the years, the abolition movement has had significant success in many countries, with more and more jurisdictions around the world either abolishing the death penalty outright or imposing moratoriums on its use.<sup>38</sup> It has been contended all throughout the world that the death sentence is cruel and brutal in nature and violates a person's right to life. India has maintained and steadfastly supported the death penalty. However, the courts have made it very plain in a number of rulings that the death penalty can only be imposed in extremely rare or exceptional circumstances. Article 21 of the Indian Constitution guarantees the right to life and personal liberty to all citizens. This right is considered to be a fundamental right and is protected by the Constitution. Some people argue that the death penalty is a violation of the right to life and personal liberty and is therefore not in accordance with Article 21 of the Indian Constitution.<sup>39</sup> Based on the evidence, we may conclude that only a very small number of severe crimes result in the death penalty being imposed. The death penalty has frequently been substituted for life in prison as a result of numerous arguments and other considerations. The death sentence serves as a deterrent to deter heinous and cruel crimes.

There are many different perspectives on the use of the death penalty. Some people believe that it is a necessary tool for maintaining law

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<sup>37</sup>*Death Penalty*, AMNESTY INTERNATIONAL, (Dec. 17, 2022, 7:00 PM) <https://www.amnesty.org/en/what-we-do/death-penalty/>.

<sup>38</sup>*Id.*

<sup>39</sup>INDIA CONST. art 21.

and order and deterring violent crime, while others argue that it is an ineffective and immoral practice that violates the right to life. Ultimately, the decision about whether to use the death penalty is a complex and deeply personal one that varies depending on an individual's values, beliefs, and experiences.

# DOMESTIC VIOLENCE: A PLAGUE IN THE INDIAN SOCIETY

-Archana Rampuria<sup>1</sup>

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## ABSTRACT

*Frequently domestic violence is misunderstood to be mere physical torture; however, this is not the case, regardless of whether physical, emotional, financial, or psychological, actions, or the threat of actions that influence another person, all fall under domestic violence which affects one's overall health and well-being. Domestic violence can be defined as a forceful or torturous control of one person over another that results in harm of various kinds such as mental, physical, sexual, etc. It affects more than just the spouses themselves; it also affects children, widows, mothers, and sisters. The aim of this article is to analyze the efficacy of the Domestic Violence Act, 2005 in prohibiting domestic violence so far, to determine whether women are aware of their rights under the act, and to examine the relevance of the act in protecting men against domestic violence. Even today, after 75 years of independence, women cannot sustain themselves as they have low power or self-esteem, and, in some cases, even men. This ultimately leads them to stay in abusive relationships and hence, they become the victims of*

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*domestic violence. This article focuses primarily on the causes of an increase in domestic violence, as well as, the various types of violence and ways to reduce them.*

**KEYWORDS:** *Marital Rape, India, Domestic Violence, Women, Abuse.*

# 1. INTRODUCTION

Domestic violence is a ginormous problem because it is either hidden by the perpetrator or the victim. It isn't very obvious and it is hard to understand whether someone is a victim of domestic violence. It basically includes control of one individual over another. As already mentioned, domestic violence does not only include physical torture but also verbal, emotional or mental, economic, physical, or sexual.<sup>2</sup>

## 1.1. Verbal Abuse

Verbal domestic violence which is also known as verbal abuse - is like controlling the mind of another person or manipulating someone in such a sense which might harm them mentally or make them have self-doubt. Very often it is seen that the person who is under the control of someone or is being manipulated cannot admit the fact. Verbal abuse can be either threatening to hurt or hurt, threatening to share personal information, or tracking or monitoring to frighten someone. It is a form of mental abuse which is designed to undermine a person by constantly humiliating, using foul language to hurt people, speaking aggressively or violently, and verbally discounting a person's feelings or thoughts. Verbal abuse in a relationship may be in the form of gaining control over

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<sup>2</sup>Swati Shalini, *What is Domestic Violence? What are its types, causes, and effects?* MYADVO, (Nov. 25, 2022, 03:45 PM), <https://www.myadvo.in/blog/domestic-violence-against-women>.

another spouse or constant humiliation, leading to chronic stress, anxiety, isolation, etc. It is very hard to identify verbal abuse as every individual's tolerance level is different which might make them think they are not a victim.

## **1.2. Emotional Abuse**

Emotional abuse can strip away any individual's self-esteem and make them doubt their own perspectives or ability. When a person is emotionally abused it might lead to them being silently treated, criticized, or opposed.

## **1.3. Economic Abuse**

Economic abuse is a type of domestic violence where one spouse has control over the other spouse's money or finances and is also known as financial abuse. It involves such tactics or behavior that are intended to dominate a person by having access to and using their economic resources.<sup>3</sup>

## **1.4. Physical Abuse**

Physical abuse is physical harm or intentional harm or injury caused to one spouse by the other in the form of slapping, kicking, punching, suffocating, hitting, biting, scratching, etc. Physical abuse need not be direct physical contact but can involve indirect contact such as hurting a person by throwing an object at them.

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<sup>3</sup>NATIONAL DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/>, (last visited Nov. 27).

## 2. INDIAN ETHOS AND DOMESTIC VIOLENCE

“Men physically assaulted a woman while drunk”, “Husband tortured his wife”, “The in-laws made derogatory remarks to the newlywed bride”, “The husband and his family killed a woman for a dowry”, and so on, these are the headlines we read and see daily; this is a harsh reality of our patriarchal society. In our nation, domestic violence affects nearly one in three women.<sup>4</sup> There are a lot of cases that are not reported because of family pressure or out of respect for the family in society. Marital rape which is also a part of domestic violence remains ignored in our nation and cases are also not registered because some people accept it as a part and parcel of marriage or culture. Considering the Supreme Court's concern that the right to live in dignity is a part of Art. 21 of the constitution, a global culture that denies women equal rights and legitimizes violence against women feeds into torture.<sup>5</sup>

It should be noted that while legislations exist to protect women from domestic violence, our society continues to turn a blind eye to the plight of married men who endure domestic violence and are oblivious to the urgent need to legislate provisions for their protection.

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<sup>4</sup>*Study on the Impact Of Covid-19 On Gender Equality With A Focus On Intersectionality And Economic Empowerment*, GIZ REPORT, (Nov. 25, 2022, 04:00 PM), [https://gender-and-development.de/fileadmin/user\\_upload/Syspons\\_Report\\_Covid\\_Intersectionality\\_final.pdf](https://gender-and-development.de/fileadmin/user_upload/Syspons_Report_Covid_Intersectionality_final.pdf).

<sup>5</sup>Francis Caroline Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608: AIR 1981 SC 746.



## **2.1. Causes of Domestic Violence**

Domestic violence can happen for many different reasons. Domestic violence against women is caused by a combination of sociological/behavioral, historical, religious, and cultural factors.<sup>6</sup>

### **2.1.1. Behavioral and sociological factors**

Anger issues/aggressive attitudes, poverty/economic hardship, the difference in status, controlling/dominant nature, drug addiction, upbringing, and psychological instability (depression, stress, etc.) are examples of the sociological, behavioral, and cultural factors including others that influence domestic violence. Domestic violence is also exacerbated by a lack of trust or neglect of conjugal responsibilities.

### **2.1.2. Factors from the past**

The inherent evil of patriarchy and the superiority complex that has ruled society for centuries can be traced back to historical factors that can be attributed to the continuance of domestic violence. The history of patriarchy in our Indian society has normalized domestic violence in certain strata of society and even the newer generations make scanty efforts to stop it. Women have been taught to bow to men and be submissive. Women often do not question their sense of inferiority because it is so deeply ingrained in them. In a similar vein, men have been socialized to believe that they are superior to

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<sup>6</sup>MYADVO, *supra* note 2.

women and that they have the right to even dictate how women act.

### **2.1.3. Factors of Religion**

The religious sanctifications reflect a subtle, if not outright, dominance over women. Domestic violence against women is also encouraged by this subconsciously because it perpetuates the practice of treating women as “second-class citizens”.

### **2.1.4. Social Variables**

The desire for a male child is one of the cultural factors that contribute to domestic violence. Domestic violence against women is the result of this obsession caused by a lack of awareness and the inherent superiority of men. The causes or motivations behind domestic violence may vary, and this is not an exhaustive list of the factors.

### **2.1.5. Dowry**

Dowry is a type of cultural and social factor. However, due to the prevalence of cases of domestic violence brought on by the illegal demand for dowry, it becomes essential to mention it separately. This was also realized by Parliament because the Domestic Violence Act,<sup>7</sup> added dowry-related domestic violence as a separate category to the list of abuses that can lead to domestic violence.

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<sup>7</sup>NATIONAL PORTAL OF INDIA, <https://www.india.gov.in/protection-women-domestic-violence-act-2005-1>, (last visited Nov. 25, 2022).

## 2.2. Repercussions of Domestic Violence

Domestic violence divides families and has enormous social, individual, and financial impacts. The devastating impact on an individual's physical, mental, and emotional health, including depression, shame, anger, and suicide.<sup>8</sup>

Violence and the threat of violence at home create fear and can destroy family environments and lead to the break-up of families.<sup>9</sup> Children and young people can be affected by violence without seeing it. Children and adolescents living with domestic violence can suffer from physical and emotional harm, ongoing anxiety and depression, emotional distress, and physical symptoms like stomach aches and headaches.<sup>10</sup>

While women aren't the only victims of such abuses, they are significantly more likely than men to be victimized by current or former intimate partners—women account for 85 percent of spouse abuse victims and 86 percent of victims of abuse by a boyfriend or girlfriend, according to data compiled by Futures Without Violence.<sup>11</sup> The CDC report estimated that each year,

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<sup>8</sup>Martin R. Huecker; Kevin C. King; Gary A. Jordan; William Smock, *Domestic Violence*, NATIONAL LIBRARY OF MEDICINE, (Nov. 25, 2022, 04:32 PM), <https://www.ncbi.nlm.nih.gov/books/NBK499891/>.

<sup>9</sup>Sarwaswa Shrivastava, *Causes and Effects of Domestic Violence*, (Nov. 25, 2022, 04:45 PM), <https://eduindex.org/2021/07/21/cause-and-effects-of-domestic-violence/>.

<sup>10</sup>R.A.F.T.W.P, *Consequences of domestic violence can last a lifetime*, CAPE COD TIMES, (Nov. 25, 2022, 04:48 PM), <https://www.capecodtimes.com/story/lifestyle/health-fitness/2014/09/11/consequences-domestic-violence-can-last/36026584007/>.

<sup>11</sup>*Id. at 9.*

domestic violence results in 1,200 deaths and 2 million injuries among women and nearly 600,000 among men.<sup>12</sup>

A recent study has concluded that violence against women is the fastest-growing crime in India. According to the latest report prepared by India's National Crime Records Bureau (NCRB), a crime is recorded against women every three minutes in India.<sup>13</sup> Every 60 minutes, two women are raped in this country.<sup>14</sup> Every six hours, a young married woman is found beaten, burnt, or driven to suicide.<sup>15</sup>

### 3. VIOLENCE AGAINST WOMEN

The women's movement, which has dealt with the issue of domestic violence for many decades, is marked by the passage of the Protection of Women from Domestic Violence Act, 2005. This law lifts the movement from its long-standing position of attributing “dowry” to all forms of domestic violence against women and broadening the definition of

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<sup>12</sup>Roberto A. Ferdman, *For Women, The Consequences of Domestic Violence Can Last a Lifetime*, THE WASHINGTON POST (Nov. 26, 2022, 4:50 PM), <https://www.washingtonpost.com/news/wonk/wp/2014/09/10/for-women-the-consequences-of-domestic-violence-can-last-a-lifetime/>.

<sup>13</sup>Ankur Kumar, *Domestic Violence in India: Causes, Consequences and Remedies*, YOUTH KI AWAAZ, (Nov. 26, 2022, 5:00 PM), <http://www.youthkiawaaz.com/2010/02domestic-violence-in-india-causes-consequences-and-remedies-2/>.

<sup>14</sup>THE TIMES OF INDIA, <https://m.timesofindia.com/india/two-women-raped-in-india-every-hour/articleshow/3778956.cms> (last visited on Nov. 26, 2022).

<sup>15</sup>Ankur Kumar, *Domestic Violence in India: Causes, Consequences and Remedies*, YOUTH KI AWAAZ, (Nov. 26, 2022, 5:00 PM), <http://www.youthkiawaaz.com/2010/02domestic-violence-in-india-causes-consequences-and-remedies-2/>.

“domestic violence.”

The oppression, borne by Indian women, was intolerable until the 19th century.<sup>16</sup> During this time, the British and the great Indian social reformers set the stage for vast improvements in every aspect of the lives of these oppressed women.<sup>17</sup> Some of the customs and practices, which were banned, are the practice of Sati, female infanticide, child marriage, and the prohibition on widows remarrying.<sup>18</sup> After the adoption of the Constitution in 1950, the Government of India enacted many laws to safeguard the interest of women.<sup>19</sup> But, ironically, her status in the matrimonial home deteriorated as there has been no just and effective legal remedy to guarantee her physical safety, mental stability, her financial and economic welfare, and custody of children.<sup>20</sup>

The criminalization of domestic violence in India was brought only in the early 1980s after a consistent campaign by feminist groups and women

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<sup>16</sup>Sweta Patil, *How Were Women Oppressed During the Ancient and Medieval India - Analysis of Legislative Framework and Customary Practices*, IPLEADERS, (Nov. 26, 2022, 06:32 PM), <https://blog.ipleaders.in/journey-of-indian-women-oppression-since-ancient-days-till-the-present-day/>.

<sup>17</sup>Abhishek Singh, *Social Reformers of India and their contributions*, INDIA CELEBRATING, (Nov. 26, 2022, 06:48 PM), <https://www.indiacelebrating.com/general-awareness/social-reformers-of-india/>.

<sup>18</sup>Hindu Widows' Remarriage Act, 1856, BARE ACTS LIVE, (Nov. 26, 2022, 06:58 PM), <http://www.bareactslive.com/ACA/ACT040.HTM>.

<sup>19</sup>MINISTRY OF WOMEN & CHILD DEVELOPMENT (1970), <https://wcd.nic.in/womendevlopment/national-policy-women-empowerment>, (last visited Nov. 26, 2022).

<sup>20</sup>M.J.Janarthanan v. K.A.Nagaayasamy, O.P.No.743 of 2000.

organizations across the country.<sup>21</sup> The fierce demand for the criminalization of dowry death and domestic violence resulted in the enactment of Section 498-A in the Penal Code (IPC) in 1983, Section 304-B in 1986, and corresponding provisions (S. 113-B) in the India Evidence Act, 1872. Section 498-A of Indian Penal Code deals with the offense of cruelty while Section 304-B deals with the dowry death.<sup>22</sup>

### **3.1. The Protection of Women under the Domestic Violence Act, 2005**

This law was enacted with the intention of protecting women from being the victims of domestic violence and preventing the occurrence of domestic violence in society. It was enacted keeping in mind the rights guaranteed under Articles 14, 15, and 21 of the Constitution in mind.<sup>23</sup>

Victims of domestic violence, a protection officer, or anyone acting on the victim's behalf, can take resort to certain orders under the Act such as protection order, residence order, monetary relief order, and temporary custody order.<sup>24</sup>

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<sup>21</sup>Fran S. Danis, *The Criminalization of Domestic Violence: What Social Workers Need to Know*, NATIONAL LIBRARY OF MEDICINE, (Nov. 26, 2022, 7:22 PM), <https://pubmed.ncbi.nlm.nih.gov/12718419/>.

<sup>22</sup>Indian Penal Code, 1860, § 498 A, 304 B, No. 45, Acts of Parliament, 1860 (India).

<sup>23</sup>Harini Sudersan & Nirupama Ramakrishnan, *The Domestic Violence Act: Constitutional Perspectives*, LEGAL SERVICE INDIA, (Nov. 26, 2022, 07:45 PM), <https://www.legalserviceindia.com/articles/dmt.htm>.

<sup>24</sup>NATIONAL DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/>, (last visited Nov. 27).

### **3.2. Penal Provisions**

When the case of Domestic Violence is reported for the first time, there is no penal provision against the offender/abuser, yet there lies civil remedy in the form of protection or relief order passed by the court;<sup>25</sup>

If there is a violation or breach of protection order of the court by the respondent, then it is a cognizable and non-bailable offense for which imprisonment up to one year or fine up to Rs 20,000 or both can be imposed.<sup>26</sup>

### **3.3. Statistical Report**

A growing body of research studies confirms the prevalence of physical violence in all parts of the globe, including the estimates of 20 to 50 percent of women from country to country have experienced domestic violence.<sup>27</sup>

The crime rate under crimes against women was reported as 53.9 in 2015. Delhi UT has reported the highest crime rate (184.3) compared to 56.3 at all India levels during the year 2015, followed

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<sup>25</sup>Harini Sudersan & Nirupama Ramakrishnan, *The Domestic Violence Act: Constitutional Perspectives*, LEGAL SERVICE INDIA, (Nov. 26, 2022, 07:45 PM), <https://www.legalserviceindia.com/articles/dmt.htm>.

<sup>26</sup>*Id.*

<sup>27</sup>United Nation Declaration on The Elimination of Violence Against Women, UN, <https://www.unicef-irc.org/publications/pdf/digest6e.pdf>, (last visited Nov. 27).

by Assam (148.2), Telangana (83.1), Odisha (81.9), Rajasthan (81.5), Haryana (75.7) and West Bengal (73.4).<sup>28</sup>

## 4. VIOLENCE AGAINST MEN

Any spouse, whether wife or husband, can experience IPV, also known as Intimate Partner Violence.<sup>29</sup> Absence of instruction, working-class values, one individual procuring a higher pay, and so forth, are among the main factors that lead to IPV.

In India, gender-based violence affects men as well as women, because most women are victims of violence, there is a common misconception that domestic violence is gender-specific, which is not true. As India is a patriarchal or male-dominated society, it is frequently difficult to accept the possibility that even men can be victims of domestic violence.

Gender is a social construct that is frequently influenced by race, caste, country, class, culture, sexual preference, ability, and rituals, among other factors. Men who are victims of domestic violence at the hands of their wives or intimate partners, typically women, are exempted from the provisions of the Indian Penal Code that deal with gender violence. Only a man can be held liable for cruelty toward his wife under Section 498A

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<sup>28</sup>Deepti Purohit, *Best women safety apps in India for Android and IOS*, TechRadar. TECHRADAR, (Nov. 27, 2022, 11:30 AM) <https://www.techradar.com/news/best-women-safety-apps-in-india-for-android-and-ios>.

<sup>29</sup>Intimate Partner Violence, US DEPARTMENT OF VETERANS AFFAIRS, <https://www.womenshealth.va.gov/WOMENSHEALTH/topics/intimate-partner-violence.asp>, (last visited Nov. 27, 2022).



of the Indian Penal Code of 1860.<sup>30</sup> There isn't any subsection or any arrangements given in the resolution that will make a lady responsible for abusive behavior at home. No one, not even the police, listens to men who try to talk about the torture and physical violence they are subjected to. In Indian society, a man may be viewed as “effeminate” or “feeble” if he complains about domestic violence.

Because many men believe that things will get better soon, they also do not tell anyone about the domestic violence they experience. The sad thing is that these biased laws automatically assume that a man can never be the victim. Women are not required to provide any kind of proof to support their authenticity. The biased laws assume that they are real culprits.

As per a recently published report in the Indian Journal of Community Medicine, 2012-13, in District Rohtak, Haryana, it was found that 52.4% of men experienced gender-based violence.<sup>31</sup> Out of 1000, males 51.5% experienced violence at the hands of their wives/intimate partner at least once in their lifetime, and 10.5% in the last 12 months.<sup>32</sup> The most common spousal violence was emotional (51.6%) followed by physical violence (6%).<sup>33</sup>

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<sup>30</sup>Indian Penal Code, 1860, § 498 A, No. 45, Acts of Parliament, 1860 (India).

<sup>31</sup>Jagbir Singh Malik and Anuradha Nadda, *A Cross-Sectional Study of Gender-Based Violence Against Men in The Rural Area of Haryana, India*, NATIONAL LIBRARY OF MEDICINE, (Nov. 27, 2022, 09:32 PM), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6437789/>.

<sup>32</sup>*Id.* at 31.

<sup>33</sup>*Id.*

In *Arneshkumar v. State of Bihar*,<sup>34</sup> the Hon'ble Supreme Court observed that “Section 498-A of the IPC was introduced with avowed object to combat the menace of harassment to a woman at the hands of her husband and his relatives.<sup>35</sup> The fact that Section 498-A is a cognizable and non-bailable offense has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shields by disgruntled wives.<sup>36</sup> The simplest way to harass is to get the husband and his relatives arrested under this provision.<sup>37</sup> In quite a number of cases, the bed-ridden grandfathers and grandmothers of the husbands, and their sisters living abroad for decades are arrested.<sup>38</sup> The Hon'ble Supreme Court took cognizance of the alarming number of matrimonial disputes in recent years and directed all the State Governments to instruct their police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down under Section 41, of the Code of Criminal Procedure.<sup>39</sup>

## 5. CONCLUSION AND SUGGESTIONS

Analyzing the situation in detail it can be concluded that the state of women in Indian society has not yet improved in spite of imposing various

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<sup>34</sup>*Arneshkumar v. State of Bihar*, (2014) 8 SCC 273.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

legal protections, in fact in our country not only women are victimized, but also men.

The study concludes that men are also victims of violence at different social levels. This can be attributed to the fact that women in our society have an edge over men as they are mostly viewed as innocent and dignified. But many a time, they exploit this edge to their advantage and commit various horrendous acts of violence against men which are not limited to physical acts alone but also include sexual, psychological, and emotional abuse. It is therefore suggested that violence should be treated as a gender-neutral problem, rather than a female or male problem.<sup>40</sup>

There are some suggestions that might help in reducing domestic violence that plagues India-

**I. Creation of family counseling centers-** There must be a creation of Family counseling centers where social workers, counselors, psychiatrists, lawyers, etc. are employed and authorized to take appropriate actions on behalf of the battered spouse and to provide legal services in cases of domestic violence.<sup>41</sup>

**II. Getting the community educated and organized-** This can be an excellent measure to eradicate violence as educating people will help them

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<sup>40</sup>Harini Sudersan & Nirupama Ramakrishnan, *The Domestic Violence Act: Constitutional Perspectives*, LEGAL SERVICE INDIA, (Nov. 26, 2022, 07:45 PM), <https://www.legalserviceindia.com/articles/dmt.htm>.

<sup>41</sup>Mohd. Ashraf, *Domestic Violence and The Law: A Social and Legal Approach*, 18 ALI (2007-08) 97.

know their rights and how they can use them to gain justice, and it will create a sense of awareness among them.

**III. Creating legal and social awareness-** Lack of education, awareness, poverty, traditional oppression, and customs place Indian women at the receiving end. Hence creating legal and social awareness amongst women is the need of the hour. The Government and NGOs play a very effective role in this direction.<sup>42</sup>

Thus, in conclusion, the plague of domestic violence will not be eliminated solely by the creation of laws but requires proactive and constant efforts on the part of the government, various help groups, NGOs, and law enforcement agencies to not only uphold the laws but also, ensure that justice is made accessible to the voiceless victims.

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