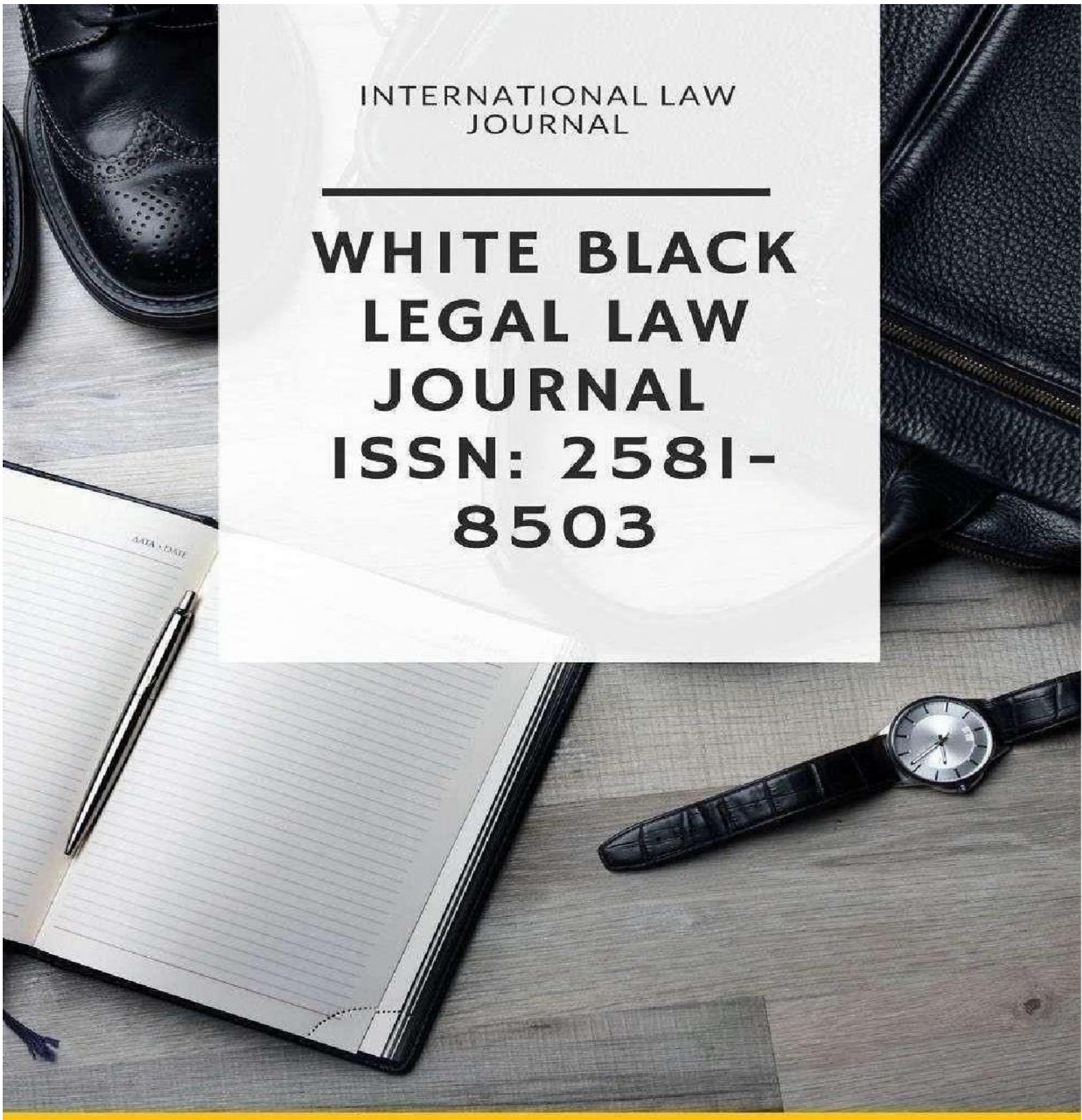

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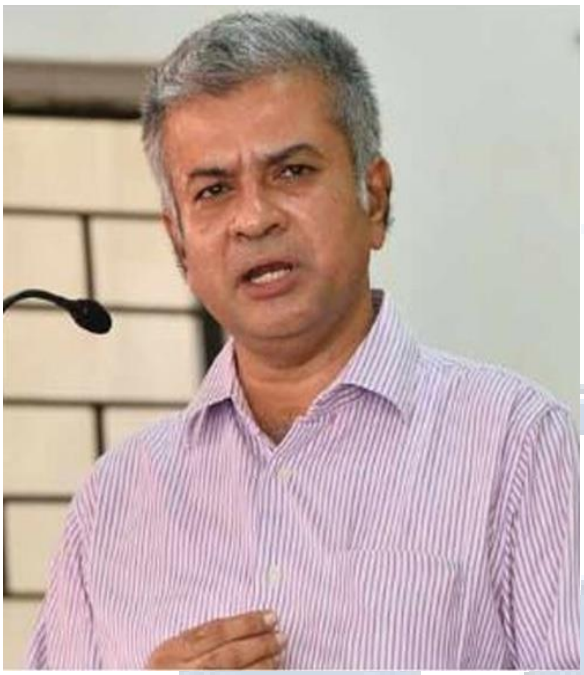

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

PRE-EMPTIVE OFFENCES: THE BEYOND MISCHIEF RATIONALE

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Abstract: *Crime, in order to be understood as one, has to have all its essential elements like mens rea, actus reus, concurrence, and causation within it. But there exist certain acts of individuals that are incomplete in nature, yet they have the potential to aid some crime to come into fruition. They are covered under the principle of pre-emptive criminalization. It is especially helpful for dealing with grave offences that pose a threat public order. It may consecutively be used to criminalize certain acts based on pure conjecture and apprehension. For example: Vagrancy. Here, the history of pre-emptive offences, the legal principles behind it, and the various criticisms that pre-emptive criminalization draw will be discussed. Thereafter, the goal would be to address the misuse and find a solution for enhancing the efficacy of such criminalization.*

Keywords: *Pre-emptive offences, criminalization, inchoate crimes.*

INTRODUCTION

The general order of criminal law jurisprudence is such that it rests on the principle of legality. That is to say that it rests upon principles like *nullum crimen sine lege*, which means that there is no crime without a prior law. But can there be crime without an actual crime? By virtue of a general rationale, an individual should not be held liable without a commission of an offence. But 'Pre-emptive offences' are a grey area of criminalization that works on the common idiom of 'prevention is better than cure'. It criminalizes act that does not fulfil the ultimate definition of crime, but rather acts that are preparing or increasing the risk of the crime. In a way, it comes after thinking to commit a crime and before the commission of the actual crime. The crimes in this grey area can include acts which are not manifestly criminal, much less criminal in itself. It can also be a part of a series of acts required to commit a crime. It is a stage before inchoate offences take shape. Inchoate or incomplete offences like abetment, conspiracy and attempt are offences prior to the actual substantive offence. Pre-emptive offences can include a wide variety of offences like assistance, encouragement, and also acts which are preparatory in nature, before there is an 'attempt' signifying

inchoateness. Throughout history in India as well as abroad, the Habitual Offenders Act, Vagrancy Act (UK), erstwhile Criminal Tribes Act (India) and preventive detention laws have had varied elements of criminalization of 'pre-emptiveness'. I will be assessing the various facets of pre-emptive offences and how it is expanding criminal law, for better or worse. Offences that criminalize the incitement of violence, particularly towards a particular race, religion, ethnicity, and other such identifying factors can also fall under the definition of pre-emptive offences. The Indian Penal Code, for example, in Section 153A prohibits the promotion of enmity between different groups on grounds of religion, race, place of birth, residence, language, etc. Anyone trying to create disharmony among different groups will be penalized. Here, it is immaterial whether disharmony has been actually created or not. The only aspect that matters is the possibility of such harm due to particular act of such nature.

EVOLUTION OF PRE-EMPTIVE OFFENCES

Pre-emptive offences have evolved from the concept of 'pre-crime'. According to Lucia Zedner[1], this term evolved through science fiction writings of Phillip K. Dick and was made popular by Steven Spielberg's film called Minority Report. Pre-crime existed as an idea that certain acts can be prevented so as to protect the society from future harm. It drew some inspiration from evolutionary criminology, especially the positivist school. This school of thought propounds that that there exist criminals from birth that can be determined through their evolutionary (mostly, physical) characteristics. As the concept evolved, we see that it was largely used by the police to arrest people based on suspicion. This suspicion again arose as a result of class divide, whereby mostly vagrants were targeted.[2] The principle of double jeopardy prevents one from being punished for the same crime twice. But the jurisprudence of pre-emptive offences runs a bit parallel to this widely accepted notion. Pre-emptive offences which are back by pre-crime jurisprudence evolved with the ideas of othering, surveillance, societal norms, reactionary and foreseeable notions of harms. The origins of pre-emptive criminalization in the United Kingdom starts with the Vagrancy Act of 1824. Pre-emptive offences gave power to the police to detain people simply on the basis of suspicion. Hence, it was widely supported and used by the police.[3] On the rationale behind having preparatory type of offences, Stark and Bock says that the goal of criminalizing preparatory markers of acts is to prevent future harm. The level of harm it intends to curb is however not mentioned. There are difficulties of

[1] Lucia Zedner, Pre-crime and pre-punishment: a health warning, Centre for Crime and Justice Studies, CJM 102, Available at: <https://www.crimeandjustice.org.uk/publications/cjm/article/pre-crime-and-pre-punishment-health-warning>

[2] Paul Lawrence, The Vagrancy Act (1824) and the Persistence of Pre-emptive Policing in England since 1750, 57(3) *The British Journal of Criminology* 513-531 (2017). Available at: <https://doi.org/10.1093/bjc/azw008>

[3] Ibid.

such kind of criminalization.[4] Criminalization is intricately linked to social perception and cultural sensibilities.[5] Taking the example of risk analysis among races and person of variable mental capacities suggest that the institutional framework of policing is such that it reinforces stereotypical notions of the 'other kind'. This can be was used to understand pre-emptive offences and the underlying reasons of criminalization without crime.

A certain level of importance is given to the predictability of offences or harms that are yet to be carried out. The 'othering' aspect of pre-emptive offences came from perceived social (especially, class) differences as is apparent from the Vagrancy Act of nineteenth century England. Mostly, the concerns for security were given as an overarching justification for pre-emptive offences. Security of the society at large from unscrupulous and mischievous elements. Such a rationale manifested in both individual offences and group offences. While the former is in operation in varied shades, the latter still (and rightfully) receives a lot of criticism for its problematic parameters that goes against the well-established principles of equality and dignity. Terrorism is one such area where the importance of pre-emptive offences has been time and again felt. The counter-terrorism framework requires that the criminal law be expanded to accommodate acts beyond the substantive criminal law so that the procedure for identification, conviction as well as prosecution is apt and hassle-free.[6] The rationale behind expansion is to mitigate the greater risk from a utilitarian standpoint. Utilitarianism believes in the maximum good of maximum people – which is a simpler way to describe the purpose of the Bentham's *felicific calculus.*[7]

PRE-EMPTIVE OFFENCES – LEGAL PRINCIPLES

As has been discussed, pre-emptive offences are different from regular offences, or for that matter, even inchoate offences or incomplete offences like abetment, conspiracy or attempt. While the *mens rea* element is present in such crimes, the actus reus part is assumed in a standalone matter, and not as a culminating element. Criminal conspiracy, for example, is an example of such crimes. However, some scholars say that criminal conspiracy in itself is a whole crime where both *mens rea* and *actus*

[4] Stark, Findlay and Bock, Stefanie, Preparatory Offences, University of Cambridge Faculty of Law Research Paper No. 64/2018 (2018). Available at SSRN: <https://ssrn.com/abstract=3276568> or <http://dx.doi.org/10.2139/ssrn.3276568>

[5] Diana Wendy Fitzgibbon, Pre-emptive Criminalisation: Risk Control and Alternative Futures, Issues in Community and Criminal Justice Monograph 4 (2004)

[6] Jude McCulloch and Sharon Pickering, "PRE-CRIME AND COUNTER-TERRORISM: Imagining Future Crime in the 'War on Terror.'" 49(5) *The British Journal of Criminology* 628-45 (2009) *JSTOR*, Available at: <http://www.jstor.org/stable/23639183.>

[7] *Felicific calculus* is pleasure measurement concept introduced the Jeremy Bentham. Bentham was a proponent of Utilitarianism which supports acts that cause maximum happiness to maximum number of people, and avoid harm. In *felific calculus*, seven things are taken into consideration – intensity, duration, certainty, propinquity or remoteness, fecundity, purity, and extent.

reus are present. Pre-emptive offences can include a wide variety of offences like assistance, encouragement, and also acts which are preparatory in nature, before there is an 'attempt' that comes under inchoate or incomplete offences.

Like all offences, pre-emptive offence also tries to avoid a 'mischief'. According to the mischief rule of statutory interpretation, a good way to interpreting the law would be to understand the 'mischief' it tries to prevent. It advises caution from going or looking beyond the mischief while assessing guilt of an offence. Pre-emptive offences tend to go beyond the mischief (the main harm) and criminalizes acts that can aid in the culmination of the actual mischievous act. Pre-emptive offences fall under the category of offences that is prior to the actual offence. As such, the nature of these offences is determined always in relation to the ultimate offence. Pre-emptive offences therefore are not standalone offences. RA Duff in his work Criminal Law, Civil Order and Public Wrongs[8] is of the opinion that criminalization should be the last resort to deter unpleasant acts. That is to say, if at all other options are there to deter harmful acts, those should be considered first. Since pre-emptive acts are itself quite ambiguous as compared to full-fledged crimes, they can be considered for other type of deterrence methods. However, one cannot also undermine the importance of pre-emptive offences in grave crimes like terrorism. This can be rationalized by assuming that the risks that terrorism poses to a population is far greater than the perpetrator-centric principle of 'criminalization as a last resort'. Expanding the scope of criminalization for such offences are very well justified.

The Harm Principle of J.S Mill which suggests that harm to others is the only ground for criminalization. It has a narrow scope in the sense that it does not suggest criminalization if there are no grounds of harm. However, this definition is silent on future harm. One way to look at the idea of future harm is to distinguish it from regular foreseeable harms. But another way to look at it will be to look at all harms as future harms, regardless of the reasonable nexus and foreseeability. If we take the later view, pre-emptive offences can be justified. Andrew Von Hirsch[9] while cautioning about criminalization said that the 'self-limiting' feature of the Harm Principle can be obliterated when harm is perceived through the lens of offence, especially offence to the society. He suggests that reasonable grounds have to be given to show that why a particular type of conduct can potentially "treat others badly". This ground applies to determining pre-emptiveness too since the very idea of that type of criminalization is to prevent potential harm.

[8] R.A. Duff et. al, Public Wrongs, and Civil Order, 13(1) Criminal Law and Philosophy 27-48 (Springer, 2019) <https://doi.org/10.1007/s11572-018-9457-x>

[9] Andrew von Hirsch, The Offence Principle in Criminal Law: Affront to Sensibility or Wrongdoing, 11 K.C.L.J. 78 (2000).

Another important legal principle in the determination of pre-emptive offences is the proximity rule. The proximity rule, as is apparent from the name, is a test which determines how close an act of an individual is towards the commission of an offence. An accused person's liability and culpability is determined through this rule. The more the distance between the act and the supposed crime, the less likely is the person to be held liable for it. Similarly, the lesser the distance between the act and the actual offence, likelier is he to be held liable for a preparatory act. Preparatory acts are those acts that somehow eventually contributes towards the commission of a crime. For example: A person buys pesticide from somewhere with an intention to kill someone. But he did not lace the victim's food with the poison. It could be because of lack of opportunity as well. This act of simply buying will not be considered as pre-emptive offence. Rather, if along with buying the poison, the perpetrator had 1) laced the food with the said poison, and 2) placed the poison laced food in front of the victim, it would then complete the requirement of the offence. It is not necessary that all kinds of preparatory acts will be considered for criminalization. It depends on various aspects like the nature of the ultimate offence as well as the nature of preparatory act that has been carried out, along with ofcourse the degree the proximity. All these aspects have to be considered while understanding pre-emptive offences.

The Indian Penal Code, 1860 has listed certain offences which can be considered to be in the nature of pre-emptive offences. These are also interchangeably called as inchoate offences, which means offences which are incomplete. Albeit they are incomplete, they have to directly or indirectly contribute to an offence. Offences related to abetment, incitement, conspiracy, illegal omission, abetment through assistance, and attempt are some of the examples. If, for example, murder under S. 302 is the targeted crime, any attempt to murder under S. 307 of the Indian Penal Code will be considered as a different offense in itself, albeit it never came to fruition. The same act will be a murder, and not an attempt to murder, if the individual was actually successful in committing it. Again, a certain inchoate offence would in itself consist of different ways in which the said offence comes to fruition. Abetment, for example, would consist of instigation, conspiracy, intentional aiding. It requires for any of these ways to be fulfilled in order to qualify for the offence of abetment.

PRE-EMPTIVE OFFENCES AND ITS CRITICISMS

D.W Fitzgibbon in her work suggested that there is a link among the three processes of pre-emptive criminalization, institutional racism and risk analysis.[10] She explains that policing can be understood in terms of existing prejudices and cultural attitudes. She adds that risk analysis is also with respect

[10] Diana Wendy Fitzgibbon, Institutional Racism, Pre-Emptive Criminalisation and Risk Analysis, 46(2) The Howard Journal 128-144 (2007)

to group affiliations instead of individual history, and in this matrix, the issue of mental health is not given adequate importance. Perhaps, individuals who simply need mental health assistance are seen as potential criminals. This view, if at all it exists, indicates a lack of empathy and sensitivity towards others. The society at large is not only turning a blind eye towards their needs but also criminalizing their debilitating condition. Additionally, pre-emptive crimes being precautionary in their approach do not have a fixed time for detention or imprisonment unlike normal crimes which have stipulated time period.[11] This makes the lives of the concerned individuals quite uncertain.

Another oft-criticized aspect of pre-emptive offences is the growing trend of surveillance by the states.[12] Although it does not directly fit into the criminalization discourse of pre-emptive offences, we cannot overlook how surveillance has played a role in such offences. For example: The erstwhile Criminal Tribes Act required individuals to report on a regular basis to the police station. The motive was to keep an eye on such people. The modern and rather fancier notions of privacy had absolutely no value or respect from the colonial state's point of view, just like the people it seemed to target.

CONCLUSION

Pre-emptive offences being offences without the active elements of *actus reus* have the possibility of wrongful criminalization. Therefore, lawmakers have to be extra cautious while formulating or dealing with such offences as its components are not objectively clear. However, another way of looking at pre-emptive offence would be that it is a whole offence in itself having its own elements of *mens rea* and *actus reus*. For example: Buying equipment for burglary. Whereas burglary is an end goal, buying equipment will be a standalone crime with 'thinking to buy for burglary' is the mental element and actually buying is the real act. It is immaterial whether the end goal was successful or not. As we saw, the evolution of pre-emptive offences has been smeared with a disproportionate power dynamic. People belonging to impoverished backgrounds were usually the target of such criminalization, often in the absence of actual displays of anti-social or criminal behaviour.[13] Such criminalization has also been manifestly racist and ableist in various countries. In India, for example, the erstwhile Criminal Tribes Act had once recognized entire tribes as 'criminals' on a ground of potential harm. The British lawmakers at that time believed that these Indian nomadic and semi-nomadic tribes were habitual committers of petty crimes because of which they required all time surveillance to prevent the potential harm of a petty offence being carried

[11] Patrick Keyzer et. al, Pre-emptive Imprisonment for Dangerousness in Queensland under the Dangerous Prisoners (Sexual Offenders) Act 2003: The Constitutional Issues, 11 Psychiatry, Psychol. & L. 244 (2004).
[12] Valsamis Mitsilegas, The Transformation of Privacy in an Era of Pre-Emptive Surveillance, 20 TILBURG L. REV. 35 (2015).
[13] Diana Wendy Fitzgibbon, Pre-emptive Criminalisation: Risk Control and Alternative Futures, Issues in Community and Criminal Justice Monograph 4, NAPO ISBN 0-901617-19-9 (2004)

out.[14] If potential harm was really the case, they would have committed more crimes once they were de-notified. There are no statistics which point towards them being 'inherently' criminal. There is a growing need to address these issues and make pre-emptive criminalization realize its unadulterated goal. On the other hand, inchoate crimes like abetment, incitement, conspiracy, etc. that pertains to larger acts of terrorism and disruption of public order can be understood in a different light than the ones mentioned above which are based on pure conjecture. Acts of terrorism requires the level of scrutiny that pre-emptive criminalization provides because of its sheer damaging nature. There cannot be any harm in using the rationale of pre-emptive criminalization for such acts of grave nature. That is why perhaps, it will be more effective if its scope of pre-emptive criminalization is chiselled to fit grave crimes like terrorism, and not to target any individual who do not conform to typical standards of being. To do the latter would be a great dishonour to the pre-crime jurisprudence and its legitimate motive to protect the society from harm. In that too, the proportionality of the foreseeable harm has to be estimated.

It is true, therefore, that criminal law is indeed expanding because of pre-emptive offences. But lawmakers have to be cautious while dealing with such a type of criminalization as the risk of wrongful conviction can be high in the absence of a tangible crime. As William Blackstone said, it is better that ten guilty persons escape than that one innocent suffers.

[14] Srujana Bej, et. al, Construction(s) of Female Criminality: Gender, Caste and State Violence, EPW Engage. Available at: <https://www.epw.in/engage/article/constructions-female-criminality-gender-caste-and>