ALEXIS FOUNDATION

PART 02

ALEXIS REVIEW

VOLUME 1

ALEXIS REVIEW

VOLUME 1, PART 2

PUBLISHED BY

ALEXIS FOUNDATION

Published by: Alexis Foundation

Registered Office: 108, Eldeco Towne, IIM Road, Lucknow – 226013.

Website: www.alexis.org.in

Email: info@alexis.org.in

ISBN: 978-81-931647-9-2

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PREFACE

This book is a compilation of the selected research papers received due to Call for Papers by the Alexis Foundation in July 2016.

We are extremely fortunate to work with kind and helpful people who support us, appreciate our efforts and give us guidance. We would like to thank all those who have made this book possible and acknowledge the support and encouragement extended to us by the Model Governance Foundation, INY Foundation, GNLU Centre for Law and Society, Adhrit Foundation, Agrasar Foundation, Alexis Society, Advitya Ventures, Bharat Sansthan, and India Leadership Institute.

Lastly, we would like to invite comments, suggestions and guidance from various experts and readers about this book for improvements in future. The comments/suggestions can be mailed to us at info@alexis.org.in.

- **Editor(s)**

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1. A COMPARATIVE INSIGHT AND CRITICAL ANALYSIS ON THE PRINCIPLE OF NET NEUTRALITY IN INDIA

Author(s): Anshritha Rai[1]

ABSTRACT

Net neutrality, simply put, refers to an internet network that permits everyone to communicate without barriers and restrictions. It champions free and open communication on a level-playing field and has helped shape the internet. It implies that there should neither be fast nor need slow lanes for the internet and that users not pay differently for using certain websites. In the absence of net neutrality, the internet as we know it cannot exist. A pressing issue, it was the flavor of the season over the past two years and was extensively deliberated upon. It benefitted entrepreneurs, small businesses, innovators and the concept of free and fair competition. In India, censorship of the internet has drastically increased, with the TRAI or Telecom Regulatory Authority of India regulating all telecom sectors within the confines of the country. There exists no bill or law to regulate net neutrality in India, and while it suffers from the want of a legislation and judicial backing, instances of flouting net neutrality is common. Net neutrality garnered considerable attention in 2014 when Airtel disclosed its proposition of additional costs for making certain calls. Subsequently, Facebook came up with the idea of Free Basics which permitted consumers to use some apps free of cost. In response, the Telecom Regulatory Authority of India published a consultation paper titled 'Regulatory Framework for Over-the-top (OTT)', and inviting public opinion on the same. In early 2015, TRAI made a landmark decision favoring net neutrality. This in turn prevented Airtel's Zero Platform and Facebook's Free Basics. This article concentrates on the advent of the net neutrality principle, arguments advanced in favor as well as against, the situation across various countries, the legal provisions for net neutrality and the development of the concept over the years. It delves into the history of the concept, evaluates India's stance on the matter and concludes with suggestions on the matter.

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I. INTRODUCTION

The concept of net neutrality was introduced by Tim Wu, special advisor at the office of the New York State Attorney General.[2] There exists no pervasive definition of the term, but in essence, net neutrality is a web design pattern that espouses broadband network suppliers to be absolutely disconnected from the data disseminated over their networks. It advocates that not a single piece of information must be championed over the other.[3] In turn, this prescribes the following:

1) All websites are to be handled alike by Telecom Service Providers (TSP's),
2) Access to applications must be facilitated at an identical pace, and
3) The usage of all applications must be provided at an identical rate.

The advent of the neutrality principle however isn't restricted to the internet. Multitudinous networks utilized in daily life also rely on this concept. The neutrality theory has been in existence since the 1800s, from the age of the telegram.[4]

The entry of private services in the market necessitated the inception of independent governance. Hence, the Telecom Regulatory Authority of India *(TRAI)* was established with immediate effect in 1997 by an Act of Parliament, namely, the Telecom Regulatory Authority of India Act, 1997. TRAI seeks to manage all telecom services, including in its ambit the setting and review of tariffs for telecom services which was previously vested with the Central Government. Its objective is to mould and stimulate conditions for the advancement of telecommunications in the country at a rate which will equip India to assume a leading role in a developing global information society. TRAI strives to

[2] Hassan Habibi Gharakheiliy, Arun Vishwanath, Vijay Sivaramany, 'Perspectives on Net Neutrality and Internet Fast-Lanes' (2016)
[3] Ray Lin, 'Definition of Net Neutrality' https://www.ocf.berkeley.edu/~raylin/whatisnetneutrality.htm, accessed 8 September 2016
[4] Alexis C Madrigal and Adrienne Lafrance, 'Net Neutrality: A guide to (And a History of) a contested idea (25 April 2014) http://www.theatlantic.com/technology/archive/2014/04/the-best-writing-on-net-neutrality/361237/

promote a policy atmosphere which fosters a level playing ground and aids fair competition[5].The Telecom Regulatory Authority of India (TRAI) is an independent regulating and governing body in the telecom sector.

TRAI solicited views from several telecom bodies and interested parties concerning the regulation of net neutrality in 2006 and released a consultation paper in the same year forecasting that although the Internet had been neutral since 1998 where private ISPs were entitled to commence operations, the environment may be altered entirely in the future.[6] Airtel reshaped its service conditions in December 2014 for 2G and 3G data packs such that VoIP data was factored out from the predetermined level of free data. Further, the Chairman of TRAI declared that Airtel's attempts violated net neutrality.[7]

It is pertinent to take into account the stakeholders in the cyber space who are impacted by the matter. The four interested players are the consumers, the Telecom Service Providers (TSPs) or Internet Service Providers (ISPs), the over-the-top (OTT) service providers who provide services like websites and applications, and the government who regulates and determines the nexus between the aforementioned parties. .[8]

Telephone and cable corporations can sculpt the Internet into speedy and slow tracks in the absence of the principle of Net Neutrality. ISPs would then be empowered to limit access to their competitors' matter or stringently oppose political views it personally opposed. ISPs could charge surplus rates to some business companies that could afford to cough up money for prioritized and biased treatment, in turn demoting others to a slower tier of service.

[5] History of TRAI http://www.trai.gov.in/Content/History.aspx accessed 7 September, 2016

[6] Telecom Regulatory Authority of India, Consultation paper On Improvement in the Effectiveness of National Internet Exchange of India (NIXI) (2006)

[7] Chandresh Dedhia, 'Net Neutrality in India: Pay Rs250 per month to access Whatsapp or Facebook' (DQ India Online, 8 April 2015) <http://www.dqindia.com/net-neutrality-in-india-pay-rs-250-per-month-to-access-whatsapp-or-facebook/>

[8] Apoorva Shankar , 'The net neutrality debate in India' (9 February 2016) < http://www.legallyindia.com/blogs/the-net-neutrality-debate-in-india>

The scheme advanced, acts as a retaliatory measure to the Internet.org platform that it bore a similarity with. Internet.org was publicly disclosed by the Facebook-Reliance partnership, both of who drew sharp criticism for being deemed to violate net neutrality.[9]

Net Neutrality is indispensable for nurturing petty and small business owners, start-ups and entrepreneurs, who can easily activate their businesses by launching it online. This platform has motivated entrepreneurs to take the initiative of introducing innovative business models using technology as the crux. Moreover, effective and fair competition may also face the brunt in case Internet Neutrality[10] is violated. It is also critically imperative for innovation and generating employment opportunities. Google, Twitter and several other giant commercial establishments are examples of companies that sprung from net neutrality. Thereby, in case it disappears, high speed net will be available only to the rich section of society for it would then be beyond the means of the others.[11] Further, it is also vital for the freedom of speech and permitting netizens to voice their views without any angst of being blocked or barred.[12]

The compelling counter to the Net Neutrality debate asserts that in a nation like India, a large section of the population lacks access to data or mobile Internet because it is highly priced. Thus, zero-ratings act as a plausible remedy. Zero ratings ensure that a TSP or ISP could announce that a particular service or app is free of charge, and generically, these are facilities that the corporation has tied-up

[9] Naina Khadekar, 'What is net neutrality and why is it important in India' (13 April 2015) http://tech.firstpost.com/news-analysis/what-is-net-neutrality-and-why-it-is-important-in-india-262120.html

[10] 'Net neutrality debate in India' <http://indianexpress.com/article/technology/social/net-neutrality-in-india-licensing-to-zero-ratings-its-a-complicated-debate/#sthash.7l8Qz6k9.dpuf> accessed 14 February, 2016

[11] M Jagadesh Kumar, 'The Pay or Perish Game: Why we should stand up against 'active discrimination' for the survival of net neutrality', IETE Technical Review, 32:3, 161-163,DOI:10.1080/02564602.2015.1042709 < http://dx.doi.org/10.1080/02564602.2015.1042709>

[12] Naina Khadekar, 'What is net neutrality and why is it important in India' (13 April 2015) http://tech.firstpost.com/news-analysis/what-is-net-neutrality-and-why-it-is-important-in-india-262120.html

with. The Facebook-Reliance proposal was a Zero rating system, where the central concept was to provide explicitly specified services for free to users in particular regions of the country.[13]

Over the past few years in India, the occurrence of censorship on the internet has expanded exponentially. India approved and passed the 'IT Rules,[14] in 2011 that augmented the IT Act of 2000. These IT rules made it a compulsorily requisite for Internet middlemen to delete objectionable and offensive content within 36 hours of getting a complaint.[15] The government's act of instructing large sites to pre-screen content and block any defamatory content from being accessible drew flak, nonetheless prevailed.

II. NETWORK NEUTRALITY ACROSS THE WORLD

A bird's eye-view of neutrality deliberations around the world can be summarized as follows;

In US, FCC (Federal Communications Commission), released the Open Internet Order that primarily sought to ensure transparency, cease blocking and disbar unjustified discrimination of net traffic. Asserting its stand on net neutrality, the FCC advanced new rules that categorized broadband under a utility and prohibited fast lanes and prioritization of traffic. Neutrality is a vexed issue as competition is confined to cable and telecom network.[16] The regulations forbid net providers from disallowing or slowing down access to applications or weighting traffic delivery.[17] The FCC was sanctioned to

[13] Shruti Dhapola ,'Net neutrality debate in India' (23 April 2015) http://indianexpress.com/article/technology/social/net-neutrality-in-india-licensing-to-zero-ratings-its-a-complicated-debate/#sthash.7l8Qz6k9.dpuf

[14] Information Technology Electronic Service Delivery Rules, 2011

[15] 'India: Digital Marketing Overview' <http://www.digitalstrategyconsulting.com/india/2012/05/google_and_facebook_forced_to.php>

[16] Hassan Habibi Gharakheiliy, Arun Vishwanath_, Vijay Sivaramany, 'Perspectives on Net Neutrality and Internet Fast-Lanes' (2016)

[17] Alina Selyukh 'Court declines to suspend US neutrality rules'(11 June 2015) http://www.reuters.com/article/us-usa-internet-neutrality-idUSKBN0OR2QJ20150611

proselytize competition, innovation, and finance networks. The ultimate aim was to ensure an open and freely accessible net in realization of that target.[18]

Europe's attitude to net neutrality has accentuated transparency and competition. The European Parliament voted to permit preference towards the creation of fast-paced paths or specialized services and regulated banning of content.[19] Post deliberations, The Body of European Regulators for Electronic Communications *(BEREC)* issued data concerning traffic control and other procedures that resulted in alterations to the Open Internet. The information highlighted the expanding tendency of providers to curtail access to services and applications.[20]

In the UK, following the ratification of "local loop bundling", there exists just competition for broadband. Healthy competition places the burden on the ISPs to secure efficient services, and several giant ISPs in the UK have sought to suppress peer-to-peer traffic by employing deep packet inspection (DPI) platforms. Nonetheless, competition between ISPs guarantees sufficient quality and performance of services. Consequently, net neutrality hasn't become a grave problem.

In East Asia, the governments of Japan, Hong Kong, Singapore and South Korea, and other surrounding nations have inspected network neutrality, with the Infocomm Development Authority *(IDA)* of Singapore even mandating that ISPs ensure that access to applications isn't unusable. Nevertheless, it doesn't prescribe ISPs slowing access to applications, without making it unusable. South Korea enforces an open and neutral net, securing competitive conditions for fueling innovation. ISP's are required to treat all data equally, without differentiating user, content format and manner of

[18] 'Net Neutrality: President Obama's plan for a free and open internet' (10 November 2014) https://www.whitehouse.gov/net-neutrality

[19] Hassan Habibi Gharakheiliy, Arun Vishwanath_, Vijay Sivaramany, 'Perspectives on Net Neutrality and Internet Fast-Lanes' (2016)

[20] 'Net Neutrality' https://edri.org/files/EDRi_NetNeutrality.pdf Accessed 10 February 2015

device.[21] It is the standard of living and effective retail competition that distinguishes these Asian nations from US's conditions.

III. LEGAL PROVISIONS IN INDIA

Net neutrality has no legal backing in India. Most rulings are made by the Department of Telecommunication *(DOT)* and TRAI. However, it would be far more meritorious if laws subsist with net access within the confines of India at its stage of conception. The country has neither participated in the forum of formal debates nor does it have any legislation/policy to effectively manage the issue of network neutrality. At the same time, India can't stay idle as phone consumers are increasing manifold and there prevails gross congestion of data traffic. Thereby, telecom companies are facing stiff pressure to divert from the core principles of net neutrality. In fact, in the month of December 2014, one of the key telecom companies in India, Airtel attempted to stray in hitherto unexplored arena. It declared its proposition of charging differently for VOIP *(voice over internet protocol)* services, as that netizens were increasingly utilizing VOIP facilities such as Skype and Viber which was dramatically devouring their investment. Post the social media uproar that opposed it vehemently, Airtel withdrew this tentative scheme, awaiting TRAI's final guidelines for the same. Competition law will not suffice in deciding matters of net neutrality. A formal legal policy's formulation is a must.[22]

Up until now, network neutrality has not been explicitly governed in India by any legislation. The last year has borne witness to progress, with regard to the formation of a network neutrality policy. TRAI solicited public opinion on consultation papers on Differential Pricing for Data Services[23] as well as Regulatory Framework for Over-The-Top Services (OTT)[24] and a Committee established by the DoT

[21] Oungil, 'Net neutrality in South Korea' http://2013.rigf.asia/wpontent/uploads/2013/09/Network_Neutrality_in_South_Korea.pdf
[22] Peeyush Agarwal, 'Net neutrality and competition law' (2015) SCC Online PL August 57
[23] 'TRAI issues a consultation paper on Differential Pricing for Data Services' MANU/TRAI/0088/2015
[24] 'TRAI releases consultation paper on Regulatory Framework for Over-The-Top Services' MANU/TRAI/0029/2015

also inspected the case of network neutrality.[25] Rules and regulations promulgated by the Government of India seeks to fortify the Information Technology Act, 2000. Neither the Information Technology Act, 2000 nor any ordinances issued there-under, have any link to the discussed topic. It is in this very context that the subject of net neutrality becomes crucially predominant. The concept of net neutrality has already been noted to involve complex legal, policy and regulatory concerns. The TRAI Consultation Paper on Regulatory Framework for Over-the-top (OTT) services including 'Net Neutrality' was initiated in India at a period when preliminary experiments surfaced among service providers.

The atmosphere and conditions in India drastically differ from that of the west. As enshrined in the constitution, India is a Sovereign, Socialist, Secular, and Democratic Republic harboring the second-largest population in the world.[26] There thrives a continually expanding mobile web in India chiefly accessed through mobile devices and even though TRAI framework for the Unified Access Service license wholly advocates net neutrality, it does not administer it. The Information Technology Act, 2000 also does not disallow corporations from redesigning their services rendered in light of their vested commercial interests.

Defiance of net neutrality is a common occurrence in India .Owing to the dearth of legal provisions concerning net neutrality, the government and TRAI recently have embarked on ascertaining numerous factors that could aid net neutrality[27]. Internet Service license and the Internet Services authorization under Unified License specifies that the user of the services shall be entitled to

[25] Jeswin Thomas, 'India opts for Net neutrality' (19 February 2016) < http://dtaconsulting.com/india-opts-for-net-neutrality/>

[26] Pavan Duggal, 'Net neutrality in India: Here's why India shouldn't jump the gun on net neutrality' (20 April 2015) http://tech.firstpost.com/news-analysis/net-neutrality-in-india-heres-why-india-shouldnt-jump-the-gun-on-net-neutrality-263311.html

[27] Peeyush Agarwal, 'Net neutrality and competition law' (2015) SCC Online PL August 57

uninhibited access to all available information on the Internet. This fails to provide a mechanism for implementing the basic principles of Net Neutrality[28]

TRAI took a revolutionary step, barring telecom service providers from imposing discriminatory data charges. The following rules *inter alia* defends and ensures open access to online information without ISP's being empowered to restrict access or create differentially paced lanes.[29]

IV. RECENT DEVELOPMENTS IN THE SPHERE: A VICTORY FOR BASIC RIGHTS IN THE CYBER WORLD

In a press release dated 8th February, 2015, TRAI ruled in favour of net neutrality and against differential prices for data services. Users would now be charged only for the data consumed, in turn, effectually banning zero rated services.

1) "*No service provider shall offer or charge discriminatory tariffs for data services on the basis of content.*"[30] This ensures that the service provider is barred from charging deferentially for VoIP calls. Data packs extending free usage of applications would also be discontinued. Instead, a single data pack will be provided which offers certain megabytes or gigabytes of utilization in acknowledgement for a certain price paid.

2) **"*No service provider shall enter into any arrangement, agreement or contract, by whatever name called, with any person, natural or legal, that has the effect of discriminatory tariffs for data services being offered or charged by the service provider for the purpose of evading the prohibition in this regulation.*" This clause ensures that operators can't find any ambiguous loophole to form an association with a service provider and charge a higher amount**.

[28] Net neutrality DoT committee report (May 2015)
[29] Gulati, Archana G, 'The Net Neutrality Debate in the Indian Context, with a Pinch of Salt' (April 30, 2015) , CIRC Working Paper No.13 < http://circ.in/pdf/Net-Neutrality-India-Debate.pdf>
[30] 'TRAI issues the Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016' MANU/PIBU/0171/2016

3) "*Reduced tariff for accessing or providing emergency services, or at times of public emergency has been permitted.*"

TRAI paved an open road to usage of these services at a reduced rate in situations of an emergency. Only during the existence of emergencies can telecom operators bring about zero rate services[31]

While TRAI has taken a clear stand on the issue of differential pricing, the authority is yet to clarify its stance on speed issues relating to net neutrality. It is crucial to note that in 2006 and 2008, TRAI had opined that the entire internet territory remain non-discriminatory, thus propagating that the net be neutral.[32]

V. CONCLUSION

Introducing an enabling clause in these terms and conditions whereby the Government is entitled to clearly enumerate enforceable guidelines is not only a viable but also an unambiguous option to prescribe internet neutrality. Without having to resort to implementation of a legislation in such a short period, this serves as a quick cure to a contentious predicament. Insertion of a provision in the ISP's license conditions would compel the licensee to strictly abide by the pivotal rules of network neutrality as stipulated by the licensor.

The present clauses of the Indian Telegraph Act, 1885 may be insufficient while handling the progress in communication technology and spurt in its services. The communications field still witnesses phenomenal expansion spurring from technological advancements as today, communication isn't limited to audio-visuals, information, programmes or voice. The constantly changing digital globe penetrates into almost all spheres of our daily life and the digital atmosphere has had a sweeping impact on consumer communication by providing the customer with multiple options and clothing

[31] Yushika Bhargava, 'TRAI Rules In Favour Of Net Neutrality' (8 February 2016) http://www.hindustantimes.com/tech/what-trai-s-verdict-on-net-neutrality-means-for-you/story-lhZrw52UkQkdB8Di5GY6FP.html

[32] Apoorva Shankar , 'The net neutrality debate in India' (9 February 2016) <http://www.legallyindia.com/blogs/the-net-neutrality-debate-in-india>

him with a radical role. It is explicitly clear then, that in an ever-changing, continually advancing and dynamic market, regulatory and monitory patterns must arise to ensure innovation and development. The monitory and regulatory standards must be equipped to welcome the rapidly evolving trends and must be sufficiently configured in order to flexibly embrace the advancing communication sector's demands. An imminent necessity lies in building a legal framework compatible with the technological progress. It must defend Net Neutrality yet conserve the Government's function of promoting national security, retaining collective order, protecting privacy and safeguarding data. When a new law is incorporated, replacing the extant provisions, it must also incorporate provisions of network neutrality. The supra standards should expound the root concept of Net Neutrality and prescribe a litmus test to check any violations.

Based on the vigorous debate on net neutrality over the past one year, the TRAI should have taken into account and effectively addressed other areas of Net Neutrality. These comprise of aspects such as blocking, throttling, legitimate network management and paid prioritization and the regulation fails to settle these issues pertaining to network neutrality.

The debate, discussions and arguments on Network Neutrality is vibrant as it delves into the future, not the past or the present. It pays emphasize on the netizens, the start-ups, the young and their businesses. Additionally, it deals with a level playing field, freedom, equality and the pertinence of regulations in today's world. Evidently, the net neutrality discourse is mufti-faceted and solutions in this space can't be one-dimensional. The only suitably feasible method to adopt in the future is the exploration for these multidimensional remedies with a holistic, national perspective to the vexed issue of Net Neutrality.

2. "DANGEROUS FOR EVERY PARADISE": A FEMINIST CRITIQUE OF FEMALE DEVIANCE IN INDIA

Author(s): Tweisha Mishra[33]

ABSTRACT

This paper introduces and studies the Indian female deviant. Various studies have been attempted to attribute, increased female offending to greater public role accorded to women as a consequence of the feminist movement. It is necessary to explore the unique patriarchal institutions in India and analyze their contributions towards increased female offending. This paper explains the rising trend of female deviance in India, through the use of latest statistics, attempts to explain the phenomenon, using both, traditional androcentric criminological theories, as well as, modern feminist theories. It explains why a new theory is required to explicate Indian female deviance, in light of the unique gendered institutions in India and recommends measures, to understand and resolve the issue of rising female deviance.

I. INTRODUCTION

Feminism is best understood as both, a world view and a social movement that encompasses assumptions and beliefs about the origins and consequences of gendered social organization, as well as strategic directions and actions for social change (Simpson 1989). Feminism, as a socio-political movement, developed in the United States of America in the mid-1800s, when women demanded the right to vote. Since then, three major waves of the feminist movement have widely been recognized. Throughout subsequent decades, the focus of the movement has shifted from demanding basic political rights, to analyzing the fundamental reasons behind discrimination against women and

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theorizing about the gendered relations and institutions in the society (Freedman 2001). Initially, feminism as a movement centered its attention upon bringing women's issues to the fore, from the perspective of women themselves. However, it has now expanded exponentially, including within its ambit, a gendered understanding of the androcentric power structures in the society, patriarchal social institutions and organizations, as well as traditions, cultures and customs, which are responsible for allocating an inferior position to women. It is important to note, that there is no *one* feminist theory (Schram and Tibbetts 2013). Feminism as a perspective comprises various points of view, sometimes contradictory, due to divergent opinions about the origin of gender-based discrimination, as well as about policies for its eradication. These divergent views may be broadly categorized into liberal, socialist, radical and postmodern feminism. However, these categories are not exhaustive, as the feminist theory is still under development and undergoing substantial changes.

Liberal feminism is associated with the perspective, that women and men are equal beings in all respects and thus, women should be provided with equal opportunities and freedoms. This requires outlawing discriminatory traditions and practices to bring women at par with men. Socialist feminism analyzes the disparity between men and women through the lens of class and patriarchy, two distinct systems of oppression that operate in a capitalist society. Radical feminism claims that, sexism is the foremost system of oppression in the society. It is also the most pervasive, affecting not only all social groups and classes, but also the criminal justice system itself. Here, women are studied mainly as victims of violent crime. Postmodern feminism is based on the instability of the concept of *truth*, or what the true definitions of terms such as identity, gender, crime and justice are. It stresses that these notions are actually cultural constructs, created by those who have the power to shape knowledge. In this context, they claim that knowledge of suppressed groups of society, including women, should be created through their own 'lived' experiences. This implies a new order of society where women's experiences are not dictated by a man's knowledge (Schram and Tibbetts 2013).

Delmar has defined the basic idea of feminism in these words: "a feminist holds that women suffer discrimination because of their sex, that they have needs which are negated and unsatisfied, and that the satisfaction of these needs requires a radical change. But beyond that, things immediately become more complicated" (Delmar 1986). Daly and Chesney-Lind have identified five key elements of feminist thought, which distinguish it from other types of social and political thought:

1. Gender is not a natural fact but a complex social, historical, and cultural product; it is related to, but not simply derived from, biological sex difference and reproductive capacities.
2. Gender and gender relations order social life and social institutions in fundamental ways.
3. Gender relations and constructs of masculinity and femininity are not symmetrical, but are based on an organizing principle of men's superiority and social and political-economic dominance over women.
4. Systems of knowledge reflect men's views of the natural and social world; the production of knowledge is gendered.
5. Women should be at the center of intellectual inquiry, not peripheral, invisible, or appendages to men (Daly and Chesney-Lind 1988).

Feminist perspectives in criminology operate on several basic principles. The fundamental source of all forms of oppression of females is identified in the socially constructed concept of gender, which is nothing, but a set of expectations associated with notions of femininity and masculinity i.e. how a man or a woman ought to behave in society. These expectations ultimately result in marginalization of women and their exclusion from all important issues of enquiry. Feminist theories, therefore, focus on examining women's issues in the context of various overlapping factors, including race, class, age, sexual orientation, culture and ethnicity. In the context of criminology, the focus is on a theory that explains female offending, victimization and criminal justice processing (Belknap 2007).

II. THE FEMINIST MOVEMENT IN INDIA: INSTITUTIONS AND PRACTICES

India has a history of discrimination on the basis of gender, much like the rest of the world (Sankaran and Madhav 2011). Since ancient times, women were in-charge of the domestic realm, whereas men went out into the 'real' world to provide for the means of sustenance, as explained by the "Separate Spheres" ideology, whereby men were placed in the public sphere and women in the private. This divergence of fundamental functions of each gender, was grounded in biological justifications. Because women could become pregnant, they were assigned the role of child-rearing, while men became associated with economic functions because of their perceived biological superiority. This basic division in the assigned roles of each gender was further reinforced with the development of traditions, customs, folk-tales and rituals which used fear and respect for culture as tools to train the psyche of the female to believe her own inferiority and insignificance. They were denied education and personal development and their lives depended on their male counterparts, economically and otherwise. Participation by men in wars and battles further increased their stature in the society and reinforced the idea of 'manhood'.

All these practices culminated into a situation that looked like this: the birth of a female was considered to be a liability because of the practice of giving *dahej* or dowry, which signified economic burden upon the girl's family. Throughout her childhood, she was not given access to education or any sort of personal training. She was never considered part of the household due to the idea that she will marry and move into another family, reflected in the practice of calling her *paraya dhan* (another's fortune). Upon her becoming an adolescent, she was married off, only to become the responsibility of her husband. She then spent her entire life serving the husband's family. If her husband died before her, she was expected to become a *sati*, or to sit on her husband's funeral pyre and burn along with his

dead body. And if this did not happen, she was condemned to the life of a widow, forbidden from remarrying or enjoying the pleasures of life. Throughout her entire life, innumerable customs were synthesized to ensure their subjugation in every sphere, using religion to ensure they could never question their position in the society (Mohapatra 2015).

The feminist movement in India was heralded, ironically, by male social reformers in the early nineteenth century, when she was still under the British rule (Sen 2000). After centuries of oppression, Indian social reformers had begun to express their independent views on how the Indian society should be structured and governed and the position of women in India was among the several critical issues raised by them. Ram Mohun Roy (1772-1833), condemned *sati*, kulin polygamy and spoke in favour of women's property rights. Ishwarchandra Vidyasagar was associated with the widow remarriage campaign (Tyagi and Tyagi 2014). Keshub Chandra Sen in Bengal and Madhav Govind Ranade in Pune were among many reformers who centered their attention on forming associations and organizations which focused exclusively on women-related issues such as prohibition of child marriage, for widow remarriage and for women's education. Their efforts assisted in women's mobilization and increased awareness about their rights and entitlements. In late nineteenth century, women themselves came forward to form organizations of their own, such as Swarnakumari Devi who formed the Ladies Society in Calcutta in 1882, for educating and training widows and poor women to enable them to become financially independent. She edited a journal, Bharati, thus earning herself the distinction of being the first Indian woman editor. Ramabai Saraswati formed the Arya Mahila Samaj in Pune and Sharda Sadan in Bombay (Ganamukhi and Vidyasagar 2014). These organizations were not limited to Hindus and the Parsis, the Muslims and the Sikhs also formed their own women's organizations. Women's main issues in pre-Independence era (before 1947) were, recognition and grant of political rights and reforms in personal laws (civil laws of each religious community). The biggest upsurge in the Indian feminist movement may be seen in the mass

participation by women in the Civil Disobedience Movement against British regime in 1930, when women stepped out of their homes, for the first time, in huge numbers.

With Indian independence in 1947 and adoption of Constitution of India in 1950, women's Fundamental Rights have been statutorily recognized and protected at par with men (Gull and Shafi 2014). However, the struggle is not even close to completion and a large number of organizations now focus on more contemporary issues, challenging patriarchal social institutions and practices, violent crimes against women, greater share in political decision making and increased educational and economic opportunities for women. The 1970s and 1980s witnessed the growth of numerous women's groups that took up issues such as dowry deaths, bride burning, rape and other forms of violence against women. They challenged oppression of women's sexual freedom like never before. One of the first campaigns that women's groups took up was the struggle for reforms in rape law in 1980. It was triggered by the highly criticized judgment of the Supreme Court, where two policemen who were accused of raping a minor girl, Mathura, in custody were acquitted on unfair and extraneous grounds. The Court acquitted the accused on the grounds that they belonged to a superior caste and the victim was a mere tribal girl who had eloped with her lover (and was, thus, 'habituated to sexual intercourse'). In the late 1970s, a movement against dowry and the violence inflicted on women in the marital home developed. Since then, the Indian feminist movement has brought more issues to the fore and sought reforms in order to transform the inherent patriarchal character of the society.

The focus of this paper is on the emergence of the Indian female deviant. The issue of female criminality in India has not gained as much significance as it should have and there are only a few studies which attempt to decode its causes and consequences. Across the world, various studies have attempted to attribute increased female offending to greater public role, accorded to women as a consequence of the feminist movement. These studies use the feminist theories of criminology to explain why a female is led to a life of crime. There are various issues involved in any such study.

These issues, such as whether female deviance in India is a new phenomenon or whether it existed before but was not recorded properly due to lack of awareness, are especially relevant in the contemporary Indian context. It is also necessary to explain the unique patriarchal institutions in India and analyze their contributions towards rising female deviance.

III. THE FEMALE DEVIANT IN INDIA

What makes a woman commit a crime? This question has gained increased significance in recent times, with a gradual rise in incidents of female offending. The national authority which publishes statistics relating to the overall crime situation in India is National Crime Records Bureau (NCRB). In 2014, the females arrested under various sections of Indian Penal Code (IPC), 1860 crimes accounted for 10.2% only. The percentage or share of female arrestees was higher for those crimes which are perpetrated on women such as cruelty by husband or his relatives (19.6%) followed by dowry deaths (20.63%) and importation of girls from foreign country (7.14%). Under the Special Local Laws, the share of female arrestees was highest for crimes under Immoral Traffic (Prevention) Act (30.33), Dowry Prohibition Act (19.74%) and Prohibition of Child Marriage Act (20.47%). The state of Gujarat has reported the highest number of female arrestees (64.7%) followed by Tamil Nadu (14.4%). The proportion of undertrial male inmates to total inmates was observed as 95.7% while that of female inmates was 4.3% during 2014 (National Crime Records Bureau 2014).

In 2013, the females arrested under various sections of IPC crimes accounted for 6.1% only. However, the percentage or share of female arrestees was higher for those crimes which are perpetrated on women such as cruelty by husband or his relatives (21.4%) followed by dowry deaths (19.4%) and importation of girls from foreign country (13.8%). Under the Special Local Laws, the share of female arrestees was highest for crimes under Immoral Traffic (Prevention) Act (37.0) and Dowry Prohibition Act (19.1%) (NCRB 2013). In 2012, the females arrested under various sections of IPC crimes

accounted for 6.47% (NCRB 2012) while in 2011, they accounted for 6.2% (NCRB 2011). A decade ago, in 2004, females accounted for only 5.8% of the total arrestees (NCRB 2004). Another decade ago, in 1994, females constituted only 3.8% of the total arrests (NCRB 1994).

In the United States of America, according to Federal Bureau of Investigation's Uniform Crime Report for 2014, 26.7% of the total arrests were of females. The percentage of female arrestees was higher for the offences of Prostitution and commercialized vice (66.3%), Embezzlement (49.4%) and Larceny-theft (43.2%) (Federal Bureau of Investigation 2014). In England and Wales, females accounted for 15% of the total arrestees and 25% of the total convictions in 2012-13 (Ministry of Justice, U.K. 2014).

These statistics are of great significance. The extreme disparity in the crime rates of men and women is alarming and it raises some serious questions. Are women inherently structured so as not to commit crimes? Or is this simply a case of under-reporting and ignorance? To look at the situation from another point of view, why is the proportion of crimes committed by women, despite being so low, on a consistent rise in India? How do we explain the "gender ratio" problem i.e. why women are less and men more likely, to commit crime? Even in the rates of crime commission among women, why is there such a wide gap between the rates of female deviance in the US (26.7%) and in India (10.2%)? Is it because women are more liberated in the US while Indian women are still restricted by patriarchal notions? Another important aspect to study is whether the traditional androcentric criminological theories may be used to explain female deviance, using an add women-and-stir approach, or whether an approach to female deviance should concentrate on the socially constructed gender roles. These are some of the challenges facing feminist criminology. The sex ratio of offending is remarkably constant, which seems to indicate the need for a theory that would account for why it is that women are so much less likely than men to offend (Britton 2000). Newer feminist work in this vein has viewed women's conformity in a somewhat more positive light, relying, for example, on Carol Gilligan's

theories of moral development to suggest that women's "ethic of care" makes them less likely to offend (Steffensmeier and Allan 1996). The next section attempts to explain female deviance in India using various criminological theories, traditional androcentric as well as modern feminist.

IV. EARLY THEORETICAL EXPLANATIONS OF FEMALE DEVIANCE: APPLICATION TO THE INDIAN CASE

Female deviance is not a new phenomenon, and many studies have already addressed the issue in detail. However, over time, many problems with these traditional approaches to female deviance were identified. The reviews and recent summaries in the works of Carlen and Worrall (1987) identified the following problems with early traditional approaches towards female criminality: women's and girls' crime and deviance were explained more often by biological factors than by social or economic forces; representations of their motives or of the circumstances leading to crime were wrong or distorted; and sexual deviance was merged with criminal deviance. Female deviance is not necessarily the result of one factor. Rather, it is shaped, influence and affected by a combination of different causes. Different criminologists have attempted to explain female deviance, based on their different perceptions about femininity and crime. While the traditional theories developed by males stress unnaturally upon biological factors, the recent theories have criticized them and explained female deviance in terms of social-structural factors.

I. Traditional (Biological) Theories of Female Criminality:

From ancient times, women have been classified into two categories signified by the Madonna/whore duality (where the typical 'good' female is represented by the Madonna figure, while the unconventional female is labeled as a whore), based upon twisted perceptions about female sexuality (Schram and Tibbetts 2013). This may be applied even to the Indian situation, where the *Savitri* image (which closely resembles the Madonna image in its characteristics of a woman being nurturing, caring,

submissive and loyal) is in stark contrast to the seductress who uses her sexuality for immoral purposes. This dichotomy is more than clearly seen in the popular representation of female characters in movies as well as on television (Tere 2012). Whereas the heroine is shown as meek, passive, sensitive, docile and intellectually inferior to the hero (representing the attributes of piety, purity, submissiveness and domesticity associated with the 'cult of true womanhood'), the negative female (popularly referred to as the vamp, or *femme fatale*) is shown as fierce, independent, aggressive, outspoken and sexually active. Such representations in popular media serve to reinforce the society's expectations of what it means to be a 'good' woman. So, when the 'vamp' commits a crime, the society can easily blame it on her unusual characteristics and punish her violently in the end as a lesson to all the 'good' girls to refrain from developing those characteristics, as they could meet with a similar fate. This leads to the obvious question raised by traditional male-centered theories explaining crime – how is a 'damsel in distress', who requires a hero to save the day, supposed to form the necessary intention to commit a crime, concoct a plan and make preparations and go forward with the actual commission of a crime, when she is necessarily psychologically incapable to do so? These theories reflect such biases against women and their claim rests upon the argument that those women who do commit offenses are judged to be either criminal by nature (Pollak 1950) or pathological because they deviate from the 'true' biologically determined nature of women which is to be law-abiding (Lombroso 1895). The following are the primary traditional theories which sought to explore female criminality through biological explanations:

1. Cesare Lombroso: In his book *The Female Offender* (1895), Lombroso took into consideration physiological, not sociological, factors to explain female crime. He identified certain specific physical characteristics that could generally be associated with all female criminals, such as short height, dark hair, moles, masculinity, hairiness and prominent jaws or cheekbones.

2. Sigmund Freud: The psychoanalytic writings of Freud identify the cause of female crime to be 'penis envy' or a sense of jealousy or revenge that females experience due to the absence of penis, considered to be a superior sex organ as compared to women's sex organs. This makes women "exhibitionistic and narcissistic", lacking a sense of justice (Schram and Tibbetts 2013).
3. W. I. Thomas: In his book *The Unadjusted Girl* (1923), Thomas sought explanations for female crime using physiological as well as social justifications. He claimed that all persons have four basic desires – the desire for new experience, for security, for response, and for recognition. Females commit crime when they seek new experience and response, leading to excitement and stimulation.
4. Otto Pollak: In his book *The Criminality of Women* (1950), Pollak perceives women as being deceitful and vengeful. He claims that "the criminality of women is largely masked criminality", as women need to use the defense of deceit to compensate for their physical weakness.

These early theories based primarily on biological or physiological explanations have now been widely discredited due to changing notions about gender roles and stereotypes and emergence of the feminist movement. It is for this reason that their applicability to the Indian case is not analyzed. We may now focus on the modern theories explaining criminality and analyze their impact upon female deviance, especially in the Indian context.

II. Anomie/Strain Theory:

The basic argument of this theory is that crime is the result of various structural factors, primarily, poverty and inequality. The society sets certain goals, such as achieving success or making monetary profits, for every member of the society, but these goals are not equally realizable by all. The means used by people to achieve the goals determine the criminality of their actions (Agnew 2001). This theory cannot be completely discarded when we put female deviance into perspective. In India, women are taught to 'worship' their husbands and put all their needs after their husbands'. This

automatically leads to the result that they are economically and psychologically, absolutely dependent on their husbands for survival. Say a woman is thrown out of her matrimonial home by her husband and his relatives. In many situations, her birth parents do not take her back and the society blames the woman for not being able to perform her 'sacred' wifely duties. This blame culture leads the woman to resort to petty crime or prostitution to feed herself and her children. The goal for earning profits is met by resorting to unlawful means in the absence of any alternative. So, the anomie or strain theory may be particularly relevant due to policy considerations of educating women and making them self-reliant economically and otherwise.

III. Social process theories:

These theories, including the Differential Association Theory (Cressey 1954) which argues that criminality is caused by the learning of criminal values and Labeling Theory (Becker 1963) which claims that the criminal label fulfils itself and leads to further criminal activity are also relevant for studying female deviance. The gender gap in criminality can be explained by the fact that females, due to overprotection, restricted freedom and sheltering, are less exposed to crime-learning opportunities. The labeling theory applies because the traditional image of a criminal is that of a young, male, uneducated person belonging to the sub-strata of the society, not a female.

IV. Control theory:

This theory argues that crime is a result of weakened social bonds, such as dysfunctional families, poor education, low financial status and non-conformity (Gottfredson and Hirschi 1990). These reasons may well apply to women, as females have a greater degree of socialization and conformity due to greater pressure and control exercised by society on women.

These theories may, contrary to popular expectations, be extended to female deviance. But the problem lies in the fact that they fail to explain certain fundamental differences in male and female crime. These differences lie in the type of crimes primarily associated with either sex, for instance,

while a higher percentage of men commit serious crimes such as murder, robbery, rape and other sexual offences, more women are arrested for cruelty, dowry harassment and deaths, immoral trafficking and importation of girls from abroad. The differences also lie in various other aspects, such as lower number of female gang leaders, lesser involvement of females in organized crimes such as robbery or dacoity, greater value attributed by females to relationships restricting them from progressing on the criminal pathway and greater respect for law and order which may be a result of the centuries-old tradition of training women to "accept" their situation as it is and learn to live with it (Schwartz and Steffensmeier 2008). All these factors exert their influence on female offenders in subtle as well as manifest ways. They are not well accounted for in the existing theories and there is, thus, a need for a theory that addresses these concerns and accounts for the delicate details associated with female deviance.

V. FEMINIST CRITIQUE OF FEMALE DEVIANCE IN INDIA

Feminist scholars and writers argue that dominant social groups create theories that put into focus their own perspective and marginalize the interests of other groups in the society. Women have historically been marginalized and excluded from all significant social inquiry, and their interests have only recently been made the center of attention. Feminists have stressed the importance of contextualizing female criminality within a broader framework of moral, political, economic and sexual spheres (Schram and Tibbetts 2013). They believe that traditional criminology has been dominated by males, consequently leading to women's subordination on the basis of their sex only. The marginalization, exclusion and suppression of women lead to outbursts in the form of crime. They argue that fundamental changes must be made in the gendered social institutions and gender based disparities must be addressed and remedied. It is, however, to be noted that there is no *one* feminist

theory about female criminality. The relevance of the different theories within the broad feminist ideology is studied hereunder, especially in the Indian context.

1. *Liberation/Emancipation Thesis* – This theory connects female crime rates with the level of liberation achieved by women through the feminist movement. Freda Adler's *Sisters in Crime* (1975) and Rita Simon's *Women and Crime* (1991) are generally associated with this theory. It argues that the increase in female crime may be explained by two changes which have occurred due to the women's liberation movement: increased opportunities to participate in the economic scene and commit economic crimes, and, development of a self-conscious identity of women leaning towards masculinity. Higher participation by women in the labor force would bring them at par with men and expose them to the same criminal opportunities that are available to men. With increased exposure, women would commit more crime. While Adler believed that females would commit more violent crimes, Simon argued that the increase would occur in the rates of property crime. However, the empirical evidence supporting this theory is weak and unstable due to which the theory has largely been discredited.

2. *Power-Control Theory* – Hagan et al combined gender gap in crime with family dynamics to create a theory about female crime (Hagan, Simpson and Gillis 1987). According to this theory, patriarchal families (where the mother enjoys a status lower than that of the father) may be distinguished from egalitarian families (where both the parents have equal status). While youth belonging to patriarchal families show greater gender differences in criminality, the opposite is true for youths from egalitarian homes. This is because in egalitarian homes, female children are encouraged, as much as sons are, to undertake risk-taking activities while in patriarchal homes, they are overprotected and controlled to a large extent. Bates et al argue that Power-Control theory begins with the assumption that mothers constitute the primary agents of socialization in the family. In households in which the mother and father have relatively similar levels of power at work, "balanced households", mothers will be less

likely to differentially exert control upon their daughters. Thus, in balanced households, both sons and daughters will have similar levels of control placed upon them, leading them to develop similar attitudes regarding the risks and benefits of engaging in deviant behavior (Bates, Bader and Mencken 2003). India has always been a patriarchal society, with less freedom and more control for females. As females are limited to the domestic realm, mothers become capable of exercising higher levels of control upon their daughters. This takes away the opportunities from female youth to commit crimes and engage in risk-taking behavior, while the same are available to sons, thus accounting for the extreme gender gap in crime rates.

These two theories may apply partly to the Indian situation. However, it is clear that the peculiarity presented by Indian female deviants would require a theory which is more specific to India. Presently, Pathways Research as a feminist method used to explore the experiences of females in the criminal justice machinery has acquired increasing importance at the international level. It analyzes the childhood experiences, such as physical or sexual abuse, to determine what events caused the woman to pursue a pathway leading up to the crime. It studies how a woman's experiences of being a woman, especially in a patriarchal society, as well as her social and psychological experiences shape her pathway to crime (Wattanaporn and Holtfreter 2014). This method of research has not gained the kind of relevance as it should have and needs to be developed and utilized in order to better understand female criminality in India. In order to expound a specific Indian theory about gendered crime, it becomes important to first understand the reasons which force a woman onto a pathway of crime. Some of these reasons may be classified into the following categories:

1. *Psychological explanations*: Women who challenge the traditional set norms of society dictating them to retain an identity of being a daughter, a wife and a mother are seen as conflicted and maladjusted. Such women refuse to internalize the designated roles and seek an independent identity. However, when the society does not provide them with opportunities to pursue an independent mind, they tend

to suppress their anger and stress, leading to emotional instability, insecurity, rejection or frustration, traits commonly found in women convicts. They may experience high levels of stress and isolation, providing a pathway to crime. A study by Green et al explored mental health needs of female criminals in the United States and found that a substantial proportion of these women suffered from high levels of exposure to trauma (98%), especially interpersonal trauma (90%) and domestic violence (71%), along with high rates of PTSD (post-traumatic stress disorder), substance abuse problems, and depression. Thirty-six percent of the women had mental disorders (Green, Miranda, Daroowalla and Siddique 2005). This situation is not unfamiliar in India. Women who become involved with the criminal justice system may have been physically and/or sexually abused, both as children and as adults, which can lead to psychological problems further leading to acts of deviance and pathways to crime.

2. *Sociological explanations*: Women in India experience inequality and discrimination throughout their lives despite constitutional equality. This leads to social oppression of women and their economic dependency on men. In most ways, crimes women commit are considered to be final outward manifestations of an inner medical imbalance or social instability (Mili, Perumal and Cherian 2015). There may be various sociological causes leading to female deviance, such as strained family relations, lack of educational opportunities and influence of superstition. Sharma argues that in India, strained interpersonal relations with husband and other family members, husband's extra-family relations, deprivation and denial of basic needs of life (like affection, security) were the main causes of frustration leading to ultimate crimes (Sharma 1993). Writers like Bilmoria have also supported Sharma's theory of family maladjustment and role conflict in family as reasons for female criminality (Bilmoria 1987). Marital conflicts with husbands as a result of their alcoholism and infidelity may lead to criminal activities among women (Maniyar 2004). Studies have also found a clear relationship between illiteracy and crime, as a large proportion of women in India are either illiterate or exposed to very few

educational opportunities (Bajpai and Bajpai 2000). In the rural areas, women may commit serious crimes under the influence of superstitious guidance of persons claiming to practice *Tantra,* asking them to offer ritualistic sacrificial offerings (sometimes, of humans) to please the deity (Ghosh 1986).

3. *Other explanations*: Besides psychological and sociological explanations, there may be other factors, primarily technical in nature, which could account for the gender gap in crime rates in India. Firstly, crimes by women may be severely under-reported. Families tend to bury episodes of female violence in order to 'save' the family's honor and prestige in the society. Secondly, even if crimes by women are reported, police officers may adopt a lenient attitude in filing a First Information Report against them, and let them off with a strict warning (this could be explained through the Chivalry hypothesis whereby the state is said to place women on a pedestal and adopt a protective approach towards them, due to the reason that they are inferior and enjoy a lower social status, thus requiring protection by the male-dominated state). Thirdly, even if police officers wish to book women under several serious offences, they may be rendered incapable to do so because the Indian Penal Code, 1860 (the primary statute codifying criminal offences in India) excludes crimes by women under various important heads. For instance, Section 375 which embodies the offence of Rape was recently amended in 2013 and the new definition begins with the words, "A man is said to commit rape", thus explicitly excluding women rapists. It goes on to define certain acts which constitute the offence of rape such as penetration of penis, or any object or any part of body to any extent, into the vagina, mouth, urethra or anus of the female victim, thus excluding violation of a man's sexuality. The 2013 Amendment also introduced new offences such as Sexual Harassment, Act with intent to disrobe a woman, Voyeurism and Stalking, all of which can be committed only by men against women. The exclusion of women from definitions of such crimes makes it impossible for the criminal justice system to recognize female offenders and punish their crimes. Due to this, the gender gap in crime rates becomes wider.

Thus, any researcher studying female deviance in India is faced with two important issues:

1. Why female crime rates in India are so low compared to the rest of the world?
2. Why are the most frequent crimes committed by women in India primarily against other women?

For the first issue, an explanation could be extended in the form of an argument that females in India have not reached the same level of economic liberation as females in countries such as the US, UK, and the Nordic countries have. The shackles of patriarchy are still deeply embedded in Indian society and citizens of India have not been able to completely liberate themselves from notions reinforcing female inferiority. This results in greater control exercised by a girl's immediate family as well as the society at large upon the activities of the girl. Since families in India generally follow a pattern where the head of the household (patriarch) is the principal economic agent and decision-maker and his wife is confined to the domestic sphere, following the patriarch's decisions, females in an average Indian family acquire a subordinate position as compared to the males. This automatically means that daughters are subjected to greater control while the sons are not. Daughters are readied for their marriages and prevented from pursuing risk-taking behavior, thus leading to the extreme disparity in crime rates by males and females. We can see the operation of both Social Control theory as well as Power-Control theory here.

For the second issue, a brief understanding of the family dynamics in India would be necessary. The Joint Family system is peculiar to India. Under this system, the head of the household (patriarch or *karta*) is the source of power and decision-making. He lives in a joint family property along with his sons, their wives and their children. His daughters are married off into other joint families, after which they become members of those families. Upon marriage, the daughter is sent off to the other family along with dowry. Section 2 of the Dowry Prohibition Act, 1980 defines the term "dowry" as "any property or valuable security given or agreed to be given either directly or indirectly (a) by one party to a marriage to the other party to the marriage; or (b) by the parent of either party to a marriage or

by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties". The dowry requirements are exorbitantly high and, not infrequently, the brides fail to meet with them. Persons perpetrating dowry-related violence are most often the mother-in-law of the bride and siblings of the husband (Singh 2013). These crimes appear to be a product of socially structured expectations about dowry assigning an inferior position, and consequently, low bargaining power to the bride and her parents; the growing urban consumerism among lower and middle classes of the society as well as the lack of effective implementation of the law are additional factors supporting the commission of dowry-related crimes (Haveripeth 2013). It is in this situation that her husband and his relatives treat the girl with cruelty, harass and torture her to bring more money, and when she repeatedly fails, burn or kill her (known as a "dowry death"). It is for these crimes that Indian females are most arrested for. They are also arrested, in large numbers, for committing offences under Immoral Traffic (Prevention) Act, 1956 and Prohibition of Child Marriage Act, 2006 which criminalize trafficking for the purpose of prostitution and child marriages respectively. Women act as useful aids in luring innocent girls into flesh trade or prostitution. It is, thus, evident that a theory explicating female deviance in India will necessarily differ from existing theories which explain female deviance in an entirely different social context.

VI. RECOMMENDATIONS

In order to properly address the issue of rising female criminality in India, the following suggestions become important.

1. Accept female deviance as a reality and expound a theory which explains the peculiar situation of India as discussed hereinbefore. A new gendered theory of crime should take into account the following four factors (Schwartz and Steffensmeier 2008):

a. The organization of gender (differences in norms, moral development, social control and other sexual and physical differences).
b. Access to criminal opportunity (differences in access to skills, associates and settings).
c. Motivation for crime (differences in taste for risk, self-control and stress levels).
d. The context of offending (differences in the circumstances of particular offences, use of weapons, victim-offender relationship).

2. Create general awareness among women, both urban and rural, about laws in India and what actions are considered to be criminal. This is important in light of the fact that many women commit crimes unknowingly and would probably resist from their commission if they knew the consequences.
3. Provide women with better opportunities to pursue education and training programs imparting necessary skills so that they can become economically independent and do not have to resort to a life of crime merely because of absence of better alternatives.
4. Make all laws gender-neutral and implement proper recording of cases of female deviance so that the real extent of crimes by women may be determined. It is only after ascertaining the extent of female criminality that an effective policy addressing the issue could be framed and implemented.
5. Greater focus to be placed on rehabilitative and restorative justice programs for female offenders by the Department of Social Welfare as well as various non-governmental agencies so that they may be able to pursue a decent life after their release. Several schemes have been introduced to this effect in Indian prisons, such as vocational training programs for the female inmates in the field of incense, dish wash, and doll-making. Some jails provide a six-month training course in the field of tailoring and embroidery, in beauty culture and stitching and bag

making from waste material. These schemes help in teaching female convicts to be self-reliant and also help them in securing gainful employment after their release.

6. Introduce specific provisions in Police Manuals regarding arrest, detention, and interrogation of female arrestees so that rules of behavior of police towards them may be properly outlined.
7. A solution must start with a conceptual framework for gender and gender relations. include gender in theories of crime, to explain men's or women's crime, or to assess criminal justice policy and practices, among other foci of criminological inquiry

VII. CONCLUSION

A detailed analysis of female deviance in India leads to an evident conclusion that the existing theories explaining gender stratification in a patriarchal society fail to explain the peculiar situation of India. The rates as well as the types of crime committed by women in India are in stark contrast to those in other countries. The crime rate of Indian females is quite low; the latest figure stands at 10.2% (for 2014) of the total arrests. Does this mean that Indian women are more domesticated, law-abiding and moralistic? Is this a statistical or a theoretical fault? Similarly, Indian women have been observed to commit more crimes which directly affect other women rather than property-related or economic offences. This is unique to India because dowry related offences and cruelty towards daughters-in-law simply do not occur in other countries. The Dowry system and the joint family system are characteristic features of Indian patriarchy. To explicate female deviance in India using existing theories is a difficult task because there are many factors unique to India which these theories fail to account for. Analyzing and resolving the problem of female deviance requires a feminist theory which studies Indian patriarchy at its grassroots, explores the long-standing customs and traditions which have worked to force and reinforce female inferiority, outlines both deeply entrenched psychological as well as prevailing sociological factors and explains why female crime in India is on the rise. It should

also include the role of the criminal justice system in reinforcing stereotypical values and the age-old blame culture which holds women responsible for their every act, simultaneously ignoring the countless forces which eventually led that female onto the pathway of crime. Measures and policies which focus on gendered violence in a patriarchal society when attempting to reduce or resolve female criminality should be promoted. It is necessary to understand the causes of rising female deviance in light of a new theory better suited to the Indian societal context.

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3. ETHICS AND ADJUDICATING DEATH: THE CASE OF SANTHARA

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ABSTRACT

Medical jurisprudence in India has primarily focused on the areas of medical negligence, consumer protection, and collection of medical evidence for testimony and the ethics of conducting different forms of medical research. A large area of focus has also been on euthanasia and the right to die, with landmark judgments holding that only passive euthanasia is legal in India. Only patients in a Permanent Vegetative State (PVS) can be removed from life support, thus accelerating the process of death which has already begun. No one may voluntarily end their life before its natural end, as the Right to Life and Liberty under Article 21 of the Indian Constitution does not include the right to die. On 10th August, 2015, the High Court of Rajasthan (in Nikhil Soni v. Union of India) criminalized the Jain practice of Santhara or Sallekhana, in which the elderly people in certain sects of the Jain Community deprive themselves of food or water until they die. The practice was held to be equivalent to suicide and thus punishable under the corresponding sections of the Indian Penal Code- Section 309 (Attempt to commit suicide) and Section 306 (Abetment of suicide). The Supreme Court of India thereafter stayed the order on August 31st 2015, with a final ruling still awaited. Much of the discussion of this judgment has been on scrutinizing Santhara under the first clause of Article 25 and 26 of the Constitution as to whether or not it constitutes an essential practice under the Jain religion, because the High Court had deemed it inessential, giving legitimacy to its restriction in the name of protecting 'public order, morality and health'. This paper attempts to move the discussion away from the constitutionality of Santhara as a religious practice and to what extent 'reasonable restrictions' can be justified, and instead focus on the reductionist approach of the High Court in bringing Santhara under the medical definition of euthanasia and ultimately concluding that it is a form of suicide. It

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seeks to show that by attempting to categorize a practice with a rich philosophy and history under medical principles and tests, the larger arena of public policy lacks a philosophical debate that is required in a country where there are so many different ways of thinking about death. A debate on euthanasia, bioethics and religion is not complete without the application of theory that moves beyond narrow definitions and a conception of medical law and ethics that is limited to organizational and evidentiary aspects.

I. INTRODUCTION

Statutes pertaining to medical law govern the following areas: Commissioning of hospitals, Qualifications, practice and conduct of professionals, the storage, sale of drugs and safe medication, biomedical research, research involving the testing of animals, management of patients, medico legal aspects, safety of patients, public and staff within the hospital premises, environmental protection, employment of manpower, professional training and research and regulations governing the business aspects of hospitals.[35]

The duty of care owed by the doctor to a patient can either be a contractual duty or a duty arising out of tort law. Even though a doctor-patient relationship is not established in some cases, Courts have imposed a duty upon the doctor. In the words of the Supreme Court, "every doctor, at the governmental hospital or elsewhere, has a professional obligation to extend his services with due expertise for protecting life".[36] However, this duty is only with respect to cases in which there is danger to the life of the patient. The Supreme Court has held that a medical professional must "bring to his task a reasonable degree of skill and knowledge" and to exercise "a reasonable degree of care".[37]

[35] Medical Law and Ethics in India, Research Foundation of Hospital and Healthcare Administration, (Sept.9, 2016, 10:00 a.m), http://www.rfhha.org/index.php?option=com_content&view=article&id=1&Itemid=51
[36] Parmanand Kataria v. Union of India, SCR (3) 997, (1989).
[37] Laxman Balkrishna Joshi v. Trimbak Bapu Godbole and Anr, SCR (1) 206, (1969).

In the case of Indian Medical Association *vs.* Santha,[38] the Apex Court has decided that the skill of a medical practitioner differs from doctor to doctor and the burden of proof is upon the appellant to prove that a doctor was negligent. Therefore, a Judge can find a doctor guilty only when it is proved that he has fallen short of the standard of reasonable medical care. Negligence must be established and not presumed. [39]The principle of *Res Ipsa Loquitur* (the thing speaks for itself) has not been generally followed by the Consumer Courts in India including the National Commission or even by the Apex Court in deciding cases under this Act. Further, it has been held in another case that "A mere allegation will not make a case of negligence unless it is proved by reliable evidence and is supported by expert evidence" [40]

A three Judge Bench decision of the Supreme Court elaborated on these principles in Jacob Mathew *vs.* State of Punjab. [41] In paragraph 41 of the decision, it was observed that: "The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence is what the law requires." In paragraphs 12 to 16 of the same case, it has been stated that simple negligence may result only in civil liability, but gross negligence or recklessness may result in criminal liability as well. These principles continue to create a problem when applied to specific cases, because experts would disagree on degrees of skill and competence, as well as what would constitute simple and gross negligence.

A patient who pays up for the treatment, or promises to do so with a consideration can seek redressal in a consumer court as it falls within the ambit of a service under Section 2 of the Consumer Protection Act, 1986. This was held by the Supreme Court in the case of Indian Medical Association vs. VP Shantha & others. [42]

[38] Indian Medical Association v. V.P. Shantha & Ors, SCC (6) 651, (1995)
[39] Kanhiya Kumar Singh *v.* Park Medicare and Research Centre, III CPJ 9 (NC), (1999)
[40] Smt. Vimlesh Dixit v. Dr. R.K. Singhal, (I) CPJ 123 (Uttaranchal), (2004)
[41] Jacob Mathew *vs.* State of Punjab and Anr, 6 SCC 1, (2005)
[42] Indian Medical Association v. V.P. Shantha & Ors, SCC (6) 651, (1995).

II. JURISPRUDENCE ON EUTHANASIA

The landmark judgment in India relating to euthanasia is Aruna Shaunbaug v. Union of India. [43] The Case was a Writ Petition filed under Article 32 at the Supreme Court.The outcome of the case is that passive euthanasia was legalized by striking down this writ petition. The Court set up a formalized system to review applications for these appeals and determine the criteria under which they could be granted.

The petitioner claimed that there was a violation of Aruna Shaunbaug's Fundamental Right, by saying that a Right to Die could be read into the Right to Life guaranteed by Article 21 of the Constitution. The court could have dismissed the case on the grounds that the petitioner had to prove this violation under Article 32 and on previous precedent that the right to life does not include the right to die. However, the issue was further examined due to its gravity, implications for the patient and in general public interest.

It was concluded after investigation that her symptoms clearly indicated that she was in a Permanent Vegitative State (PVS) which arose due to the destruction of the cerebral cortex (neural tissue around the brain) and deprivation of oxygen supply to the brain. PVS is defined as a clinical condition of unawareness of self and environment in which the patient breathes spontaneously, has a stable circulation and shows cycles of eye closure and opening which may simulate sleep and waking.

The following issues arose in the Case:

1. Should the withholding of life support therapies to person who is in a permanent vegetative state (PVS) be permitted and legally sanctioned?

[43] Aruna Ramachandra Shanbaug v. Union of India, 4 SCC 454, (2011).

2. If the patient has given prior consent to withdraw life support, should their wishes be respected when that situation arises? Where no such consent exists, who should make the decision on behalf of the patient?

With respect to the issue of who should take the decision on her behalf, two cardinal issues of medical ethics the court considered were Patient Autonomy and Beneficence.

Patient Autonomy can be exercised when the patient themselves are competent enough to make decisions and reflect a living will. In absence of this, the wishes of a surrogate acting in the patient's best interests will have to be respected. This surrogate will not have any personal convictions, motives or any other convictions with regard to the life or death of the patient. The Counsel for the petitioner relied upon two cases to substantiate his arguments to let Aruna die.

The first case was Vikram Deo Singh Tomar vs. State of Bihar, [44]in which the interpretation of Article 21 of the Indian Constitution entitled every person to live with a certain human dignity and quality of life. Secondly, he relied upon P. Rathinam vs. Union of India, [45]in which a two-Judge bench of this Honourable Supreme Court quoted stated that mere survival is not enough for living, but a good life is determined by vitality.

However, the holding in Rathinam's case was overruled by a Constitution Bench of the Supreme Court in Gian Kaur v. State of Punjab[46]. It was held in this case that the Right to Life under Article 21 of the constitution did not include the Right to Die. The rationale behind this is that the right to live with dignity would exist until the natural end of such a life. Thus, the court dismissed the petition on the grounds that under Article 32, the petitioner had not proven the violation of a Fundamental Right.

[44] Vikram Deo Singh Tomar v. State of Bihar, SCR Supl. (1) 755, (1988).
[45] P Rathinam v. Union of India, SCC (3) 394, (1994).
[46] Gian Kaur v. State of Punjab, 2 SCC 648, (1996).

The essential issue remains as to how the best interests of the patient will be determined, in the absence of a statutory legal provision in India to withdraw life support to a person in PVS or who is otherwise incompetent to take such a decision. In pursuance of further judgment, the Supreme Court referred to case laws and legislations from foreign countries regarding passive and active euthanasia. Here, it is important to draw a distinction between the types of euthanasia. Active euthanasia entails the use of lethal substances or forces to kill a person. Passive euthanasia entails withholding of medical treatment for discontinuance of life. Euthanasia can be further divided into voluntary euthanasia and involuntary euthanasia. Voluntary euthanasia is when consent is taken from the patient while in the latter it is not. Physician assisted suicide would not involve the doctor killing the patient but the patient killing themselves on the advice of the doctor.

The Supreme Court largely relied upon the British judgment given by the House of Lords in the Airedale Case. [47]This case was a point of reference with respect to carrying out passive euthanasia without the consent of the patient, because he was unable to provide the same. It was held that it is mandatory in these cases for doctors to act in the best interests of their patients, and that in pursuance of this, they were not obligated to prolong the life of a patient if all it led to was suffering. Sanctity of life is not an absolute principle.

This principle, however, does not allow for positive acts that result in the active termination of the patient's life, such as lethal injection. The judgment did not hold discontinuing nutrition or taking the patient off a ventilator as such a positive act. These would count as omissions on the part of medical

[47] *Airedale* N.H.S. Trust v Bland, A.C. 789**, (1993).**

practitioners, to alleviate their patient's suffering and the death would be seen as a cause of condition. The judgment also held that such a decision would be made by the family of the patient.

In the case of Cruzan v. Director, MDH[48], the United States Supreme Court held that in some cases, such decisions may be made my family members for selfish gains and in this case the state had a duty to protect the patient against such abuses.

The Gian Kaur judgment did uphold the Airedale case, but was not clear on the issue of who would be allowed to make the decision on behalf of the patient. It was mentioned however, that the court must be extremely careful in arriving at this decision due to the possibility that some may want the patient to die, so as to gain an inheritance or for other such selfish motives. The judgment also held that due to the rapid advancement of medical technology, doctors should not be so quick in the process of eliminating all hope for a patient.

To determine the application for passive euthanasia, the Court had to define Brain Death. Death was initially understood as the termination of breathing, or cessation of heartbeat. However, due to recent medical advancements like the invention of the ventilator and defibrillator, the present day understanding of death must imply total brain failure such that breathing and circulation is not possible. Within this case, it was understood that Brain Death would occur when breathing, heartbeat and other very essential bodily functions became mechanically induced, and when there is complete deterioration of the brain and the brain stem (which controls involuntary functions.)

It was determined that Aruna could not be said to be dead under this definition. This is because she responded to some external stimuli and her involuntary functions are not mechanised. She can

[48] Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, (1990).

breathe, excrete and digest food on her own. So, the brain and the brain stem were functional to some degree, and she had a basic level of consciousness. However, in all probability, she would remain in a PVS until her death.

This became relevant in determining the conditions under which passive euthanasia could be granted in a case where the patient is unable to provide their consent. A fair case for passive euthanasia would be made when the patient is not only unconscious, but completely dependent on medical technology for life sustaining functions. There must also be no reasonable possibility of them coming out of that stage in the future.

While the petition was dismissed in this case, guidelines were laid down for making applications for passive euthanasia and the requisite procedures to be followed. What is key to note for the purposes of developing the discussion on Santhara is the definitions of euthanasia and death that were laid down, in the same vein as previous medical jurisprudence, based on technical evidence and principle.

III. SANTHARA: A NARROW VIEW

The petitioner in Nikhil Soni v. Union of India [49] claimed that the practice of Santhara went against public order, morality and health, going so far as to say that it is 'tribal, abhorrent and against all modern thinking.'[50] The arguments begin with dependence on the cases that lay down the precedent for reasonable restrictions that the government can make for religious practices that are not essential, under Articles 25 and 26 of the Indian Constitution.[51] This paper attempts to move away from this

[49] Nikhil Soni v. Union of India, SCC 2042 Cri LJ 4951, (2015).
[50] Ibid.
[51] Jagadishwaranand Avadhuta Acharya v. Police Commissioner, Calcutta, AIR SC 51, (1984). See also; Gulam Abbas v. State of UP, AIR SC 1268, (1983). See also; Church of God (Full Gospel) in India v. K.K.R. Majestic Colony

discussion of the constitutionality and essential quality of Santhara to the Jain religion, and instead lay emphasis on the arguments from both sides with respect to categorizing Santhara into the definitions and principles of euthanasia, suicide and applying to it the tests that have been laid down in the aforementioned landmark cases of medical jurisprudence.

The petitioner relies heavily upon the landmark judgments relating to the legalization of passive euthanasia, which is accelerating the process of death which has already begun. By applying the principles laid down in these cases (Gian Kaur v. State of Punjab, P Rathinam v. Union of India, Aruna Shaunbaug v. Union of India), he claims that Santhara cannot fall under the definition of a right to die with dignity, due to the voluntary nature of the act and the fact that the elderly people depriving themselves of food and water have not already begun the process of natural death, in medical terms. Thus, by removing Santhara from the purview of passive euthanasia, the petitioner proceeds to term it as a form of suicide, and thus punishable under Section 309 of the Indian Penal Code. The judgment reads that this form of 'suicide' is disguised under the 'garb of religion', as only two communities in the Jain religion (Digambara and Shvetambara) practice this. It is claimed that under the rules set down in the case of Aruna Shaunbaug, the court acts as a guardian to decide on applications for passive euthanasia, after the requisite approval from the doctors and family members of the patient. Santhara, thus, cannot fall into ambit of euthanasia and falls outside, in the area of suicide.

The respondents representing the Jain community provide extensive evidence from scriptures to establish that the Jain philosophy behind the act of Santhara cannot be arbitrarily equated to suicide or euthanasia. To quote the judgment:

Welfare Association, 7 SCC 282, (2000). See also; N.Adithayan v. Travancore Devaswom Board, 8 SCC 106, (2002). See also; Javed & ors. V/s State of Haryana & ors, 8 SCC 369, (2003).

'Santhara is not adopted in order to obtain Moksha. It is not admitted that Santhara is a voluntary suicide. Sallekhana is the key to attain salvation in the least possible number of birth and death cycles ahead by consciously toiling to purge the soul from karmas. According to Jainism, every individual soul, by its nature, is pure and perfect, with infirm perception, knowledge power and bliss. But from eternity, it is associated with Karmic matter and has therefore become subject to birth and rebirth in numerous forms of existence. The supreme object of religion is to show the way for liberation of the soul from the bondage of Karma. The true path of liberation lies in the attainment of Right Faith, Right Knowledge and Right conduct in complete union and harmony. The basic concept underlying the vow is that man who is the master of his own destiny should face death in such a way as to prevent influx of new Karmas even at the last moment of his life and at the same time liberate the soul from bondage of Karmas that may be clinching to it then.'

The respondents also argued that Santhara is 'is not giving up life but it is very much taking death in its own stride.' The arguments then proceed primarily to refute the contention that Santhara can be equated either to euthanasia or suicide. This is where the issue lies, because deeply philosophical issues such as the Jain conception of violence, the soul and death as a celebration need to be read into the previously constructed categories of what constitutes euthanasia and suicide. However, if there are varying views on the difference between simple and gross negligence, then surely a custom that represents a different way of looking at life and death requires a deeper reading.

The respondents present the crux of the entire issue in the very beginning of the judgment, which they are then forced to elaborate on due to the application of case law and restrictive definitions. Essentially, the Jain attitude to the body is different from the Christian attitude to the body. [52] The

[52] Shiv Visvanathan, A Reductive Reading of Santhara, The Hindu, August 24, 2015.

English word 'suicide' means a deliberate killing of oneself. [53] Due to the court's strict adherence to this definition, the respondents have had to argue as to why Santhara is not suicide and why it would fall into the category of euthanasia cases where the right to die with dignity is exercised, at the time when death is certain and imminent. They have argued that suicide is characterized by emotional stress, a feeling of disgrace, a sudden death in most cases, and bereavement to kith and kin. In the case of Santhara, the act is voluntary when one realises that they cannot live life meaningfully. Those undertaking it renounce all worldly pleasures, yet do not wish for a swift death. [54]

'It is not an immolation but promotion of soul. It is in no way a tragedy. Jainism speaks of death very boldly and in a fearless tone to impress that death should be well welcomed with celebrations. Sallekhana is a retreat to peace in true sense, to be yourself entirely free from all distractions for pure contemplation and introspection.' These lines of the judgment encapsulate the thought behind the act of Santhara- the community observing the process in turn becomes enriched and enlightened.

The arguments further proceed to bring Santhara under the ambit of passive euthanasia. The respondents cite cases such as Re Quinlan vs. Superior Court, [55]McKay vs. Bergstedf Bouvia, and Bartling vs. Superior Court to substantiate their claim that courts have previously ruled in favour of the withdrawal of life support such as respirators. They also depend on Airedale NHS Trust vs. Bland, which was also a source of law in the Aruna Shaunbaug judgment. Herein lies the inherent problem, when a subjective religious practice must be defended with the use of case law based on primarily Anglo-British conceptions of law and death. By the end of the judgment, the essential non-violence

[53] Ibid.
[54] Nikhil Soni v. Union of India, SCC 2042 Cri LJ 4951, (2015).
[55] Re Quinlan v. Superior Court, 355 A.2d 647 (NJ 1976). , See also; McKay v. Bergstedf Bouvia, 801 P.2d 617, (NV 1990). , See also; Bartling v. Superior Court, 209 Cal.Rptr. 220 (1984). , See also; Airedale N.H.S. Trust v Bland, A.C. 789, (1993).

of Santhara is ignored in favour of standardised conceptions of death, dying and dignity where the practice has lost its meaning in translation.[56] This is not due to failure on the part of the respondents to prove their contentions, but due to the use of Christian theology and Anglo-Saxon law[57], following the methods of judging previous cases relating to medicine and bioethics.

This raises an interesting question as to the place of philosophy and theory in the larger sphere of bioethics and its practical application in public policy. It can be clearly noted from this case that various theoretical issues crop up, with respect to the reconciliation of subjectivity in religious custom with the state's need to maintain their stand on the right to life under Article 21 not including the right to die.

These questions arise when dealing with other issues, such as abortion or the ethics of research in the area of human stem cells. High philosophical theories such as utilitarian cost benefit analysis, Rawls, Kantian or libertarian theories do create a difficulty with respect to their application to real world policy problems, simply because of the lack of consensus about which would be the best for all parties involved. [58] An ideally just world for an ideally just world might not be immediately and directly applicable to the actual world that we inhabit.[59] Practical ethics requires concrete deliberation and decision making, and high theory may not be able to provide the guidance needed for the same.[60]

[56] Shiv Visvanathan, A Reductive Reading of Santhara, The Hindu, August 24, 2015
[57] Ibid.
[58] John Arras, Theory and Bioethics, *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition), Edward N. Zalta (ed.), (Aug. 31, 2016), <http://plato.stanford.edu/archives/sum2016/entries/theory-bioethics/>.
[59] John Arras, Theory and Bioethics, *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition), Edward N. Zalta (ed.), (Aug 31, 2016), http://plato.stanford.edu/archives/sum2016/entries/theory-bioethics/, See also; AK Sen, 1999, *Development as Freedom*, New York: Oxford University Press. , See also; I Robeyns, "Ideal Theory in Theory and Practice," *Social Theory and Practice* 34 (3): 344, (2008).
[60] Amy Guttman and Dennis Thompson, *Democracy and Disagreement*, Cambridge: Harvard University Press, (2008).

At the other end of the spectrum in this debate, are those who advocate for anti-theory in bioethics and applied practical ethics- such as casuistry, narrative ethics, feminism and pragmatism.[61] These theories favour the bottom-up approach, favouring factual particularities of a case. [62] They draw attention to cultural embeddedness, particularities, and ineradicable untidiness of our moral lives. [63] They see the interaction of policy and ethics as Wittgenstein conceived of language itself, i.e., as a haphazardly evolving city consisting of a maze of ever-expanding little streets, alleyways and squares.[64] There are also those who believe that any sort of theory has no place in public policy and applies ethics. According to Robert K. Fullinwider, the right way to think about public policy is to think about public policy, not about metaphysics, epistemology, or normative theory. Dismissing philosophical theory as "cloudland," Fullinwider argues that common sense morality and actual social practices, positive laws, and institutions should form the basis of practical ethics and social criticism.[65]

Finally, there is the school of thought that seeks to strike a balance between theory and practicality by essentially building it up from the facts at hand. For example, in the case of Santhara, a substantial portion of the petitioner's argument is dedicated to the claim that the practice can be used as an arena for exploitation of the elderly, or those who seek to elevate their status in the community. [66]In this case, those undertaking it may be coerced into doing so. The school of mid- level theory in bioethics would use the given situation to construct the meaning and moral import of such a concept as 'coercion' and how it could be applied here. The same can be done with terms such as

[61] John Arras, Theory and Bioethics, *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition), Edward N. Zalta (ed.), (Sept. 7, 2016), http://plato.stanford.edu/archives/sum2016/entries/theory-bioethics/.
[62] John Arras, Common Law Morality, *Hastings Center Report* 20 (4): 35–37, (1990).
[63] Carl Elliott, A General Antitheory of Bioethics, *A Philosophical Disease: Bioethics, Culture, and Identity,* New York: Routledge, (1999).
[64] John Arras, Theory and Bioethics, *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition), Edward N. Zalta (ed.), (Sept. 7, 2016), http://plato.stanford.edu/archives/sum2016/entries/theory-bioethics/.
[65] Robert K. Fullinwider, Against Theory, or: Applied Philosophy—A Cautionary Tale, Metaphilosophy, 20 (3–4): 222–234, (1989)
[66] Nikhil Soni v. Union of India, SCC 2042 Cri LJ 4951, (2015)

'commodification', 'harm' and 'exploitation', with respect to reproductive technology and medical research. These theories of limited scope pertaining to the situation at hand play an important conceptual and normative function in debates over abortion and euthanasia.[67]

These questions of philosophy, theory, ethics and public policy are missing from the judgment given on Santhara. Regarding the human body as sacred and suicide as a sin, in accordance with Christian theology requires the Jain community to justify their subjective experience in terms of something completely different. Unlike principles of medical negligence, consumer protection and withdrawal of life support, an issue such as this requires a much deeper philosophical debate, beyond a polarised debate of the right to life vis-à-vis the right to die, or the liberal and illiberal approach. [68] Laws in postcolonial countries do not govern every aspect of human life, and are constantly evolving as the national identity evolves. Santhara should thus be seen as a matter of this identity and freedom of the individual and custom, rather than through the lens of medicine, violence or a criminal act.[69]

Potential abuse of the practice cannot be equated to the practice itself, or justify a complete avoidance of any philosophical debate. This is crucial where the way death is seen is so essentially different from the given norm- a search for meaning where the self continues to exist after it leaves the body, rather than ceasing to be.[70]

[67] Arras, John, "Theory and Bioethics", *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition), Edward N. Zalta (ed.), (Sept 8, 2016), http://plato.stanford.edu/archives/sum2016/entries/theory-bioethics/. See also; Dworkin, R., 1993, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, New York: Knopf.
[68] Ratna Kapur, The Santhara Issue Requires a Deeper Philosophical Debate, The Wire, September 5, 2015.
[69] Ibid.
[70] Ibid.

4. THE UNRAVELLING OF CONSTITUTIONAL DILEMMAS AND SURVEILLANCE LAWS IN INDIA

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ABSTRACT

Advancements in digital and communication technologies bring about changes in the nature of surveillance which consequently affects the functioning of democracy. Major terror attacks in twenty-first century have brought out serious challenges to the Indian state. The response to those challenges unfolded profound implications on democracy in India. There had been a significant metamorphosis in the nature of surveillance at this juncture, which was re-twined under the burgeoning global terrorism and development discourse. Moreover, there was an unrelenting expansion and frenetic search for alibis to control ever larger areas of society and people. Nowadays, data collection has begun to be treated as storable material by the State to rejuvenate governance, democracy and development. Moreover, surveillance is regarded not just as a technological entity, but also as a grand narrative which has accreted as a cultural entity to reduce fear, insecurity, corruption, and provide access to speedy public service delivery and welfare. In this scenario, in order to exercise democratic rights, people need to interlace themselves with surveillance. However, production of such discourse masquerades the corrupt uses of surveillance power and corrosive effects of mass surveillance. This paper aims to explore the changes made in the domain of surveillance to face existential challenges and followed by the counter effects of deploying sovereign power on democracy, constitutionalism and rule of law. In the next section the paper begins by narrating how surveillance has enshrouded human lives. Then it moves ahead, to analyse the significant changes that have occurred in legal measures, and technological mechanisms of surveillance in India in the beginning of the twenty-first century. The legal measures contain provisions for extraordinary and ordinary situations. Whereas quest for new surveillance space ended with technological innovations in data-collection under which the state is making it technologically competent to control and

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monitor its vast territory and population, these profound changes bring out dilemma between 'Security' and 'Freedom,' as it needs to be 'balanced' between each other or 'traded off' of one over the other is discussed in next section. Later, the paper specifically analyses the challenges and implications of surveillance in Indian democracy, and whether it is an appropriate and legitimate means to defend our freedoms or often-corrosive while being operational. It is an effort to understand and conceptualize the trajectory of continual reforms, innovations, exponential advances in surveillance techniques that have occurred in the beginning of twenty-first century. It will circumscribe itself to an examination of surveillance infrastructure and its profound challenges and implications on democracy in India.

I. INTRODUCTION

In modern times, development in the technological realm has not only transformed human lives and ameliorated them, but also penetrated as a dominant organizing practice. However, such practice turned out as surveillance, which dramatically influenced ubiquitous observation and monitoring everybody's movements and actions. According to David Lyon (2008), "surveillance is the purposeful, routine, systematic, and focused attention paid to personal details, for the sake of control, entitlement, management, influence or protection". It may be direct, face-to-face or it may be technologically mediated, in which the latter is growing fast and such ubiquitous and ambiguous proliferation needs methodological understanding, because of its expansion, penetration, intensification and integration in human lives.[72] Also, its varied roles in different conditions result in diverse outcomes. It is apparent that surveillance has become a part of our lives which has become one of the human organizational and epistemological endeavours in everybody's lives.[73]

[72] David Lyon, *SURVEILLANCE STUDIES: AN OVERVIEW* (2007)
[73] Kevin D. Haggerty & Minas Samatas, *Introduction: Surveillance and democracy: An Unsettled Relationship*, in SURVEILLANCE AND DEMOCRACY 3 (Kevin D. Haggerty & Minas Samatas eds., 2010)

From time immemorial, there have been various techniques to monitor, observe, and control population. However, under the gaze of modern state, these techniques and practices of surveillance have become predominant. Now, it is not merely a technological entity, but a grand narrative, which is accreted as a cultural entity to reduce fear and insecurity, undoing misgovernance and corruption, ensuring just distribution of goods and implementing welfare, and much more. Under the post-colonial Indian state, surveillance is used as a legitimate means to protect citizens from terrorist attacks and to govern distribution of rights and entitlements, which qualitatively differs from the erstwhile colonial surveillance. To accomplish that, the state by virtue of its sovereign power directs mass surveillance by biometric identification, creating population records or census, and even arbitrarily monitoring ubiquitously. It does reflect how the state has been retreaded by amassing new treads into its structures.

A major setback occurred when there were terrorist attacks[74] in the beginning of the twenty-first century leading to a precarious situation. During this time, the Indian state introduced series of reforms in anti-terror legal regimes through which it acquired new techniques of surveillance in the form of keeping tabs on electronic traces of its population to counter terrorism. The model legislation for the interception of wire, electronic or oral communication (Section 14) follows from *Maharashtra Control of Organised Crime Act* 1999, which originated to deter organized crime. Its provisions penetrated into *Prevention of Terrorism Act* 2002 (hereinafter referred to as 'POTA') in which interception of communication (Section 36–48) was permitted and despite the laying down of specific procedures, there have been procedural lapses. While POTA was repealed in 2004, its perilous methods of

[74] The 9/11 (2001) terrorist attack in US shook the entire world, it led to adopting UNSC Resolution 1373 on September 28, 2001 mandating concerted international effort against global terror networks. Later, attack on Indian Parliament building in New Delhi on December 13, 2001. All stirred up to enact new anti-terror regimes to counter modern terror and its global networks. Again, on 26/11 (2008) terrorist attacks in Mumbai shook the Indian state, which led to major developments in surveillance technologies.

surveillance were maintained by incorporating them in *Unlawful Activities Prevention Act* 1967, like those relating to the "interception of telephone and electronic communications" (Section 46) (See Table: 1 & 2). With such legal frameworks, the Indian state equipped and empowered itself to intercept along with the ability to tap and eavesdrop telephonic conversations, scrutinize financial transactions and ban suspicious activities.[75]

In order to protect and provide adequate safeguards to extraordinary provisions from any potential misuse of interception provisions, POTA contained provisions for a review committee [Section 40, 46, 60] (See Table: 3). However, the Central government failed to set up a Review Committee until several months after the Act came into force. Apart from the institution of a Review Committee, there was another safeguard under section 48 of POTA which required that an annual report of interceptions be placed before the Houses of Parliament or the State Legislatures giving a full account of the number of applications for interception and reasons for their acceptance or rejection. It provides public scrutiny and was, therefore, a potential check on government arbitrariness. However, it was absent solely because political will was not activated.[76] Unlike POTA, UAPA does not have any provision of Review Committee or legislative review, which makes it unaccountable and non-transparent from any public scrutiny from any potential abuse.

Here, the entire legal framework of "anti-terror laws are on extraordinary procedures, which bring into existence dual systems of criminal justice (ordinary and extraordinary), as they differ in terms of

[75] Ujjwal Kumar Singh, *THE STATE, DEMOCRACY AND ANTI-TERROR LAWS IN INDIA* 70-75, 325 (Sage2007); Ujjwal Kumar Singh, *Mapping anti-terror legal regimes in India*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 439 (Michael Yew Meng. Hor, Victor Vridar Ramraj, & Kent Roach eds., 2012);Ujjwal Kumar Singh, *Surveillance Regimes in Contemporary India*, in SURVEILLANCE, COUNTER-TERRORISM AND COMPARATIVE CONSTITUTIONALISM 42-46 (Fergal Francis Davis, Nicola McGarrity, & George Williams eds., 2014)

[76] Ujjwal Kumar Singh, *THE STATE, DEMOCRACY AND ANTI-TERROR LAWS IN INDIA* 153-154. (Sage. 2007)

procedures."[77] In extraordinary law, telephone interceptions can be produced as primary evidence against an accused, which is absent in ordinary law. Evidently, it reflects that the Indian state created legal measures and appropriated surveillance powers to respond in the climate of global terrorism. Apart from provisions for extraordinary situation, there is an array of normal provisions for normal times.

Beyond terrorism related surveillance, the pre-existing laws governing wiretaps permits the government to intercept information from computers to investigate any offense.[78] Telephone tapping and snooping became a serious concern in the post-emergency era. During the tumultuous period of 1980s and 1990s, there were major revelations about the involvement of several politicians in snooping. Political snooping even led to the resignation of Ramkrishna Hegde from Chief Ministership of Karnataka in 1988.[79] Despite the guidelines given by the Supreme Court in *People's Union of Civil Liberties vs. Union of India* (1996) [hereinafter referred to as 'PUCL judgment] to regulate such political snooping, there have been massive violations. It is the legal regime which authorizes the state to intercept as per the procedure established by law and provisions such as section 5 (1) and (2) of the *Indian Telegraph Act* 1885, Rule 419(A) of the *Indian Telegraph Rules* 1951, as well as section 69 of the *Information Technology Act* 2009.[80] It empowers the state to intercept communications in case of any

[77] Id. p.314

[78] Mark H Gitenstein, *Nine Democracies and the Problems of Detentions, Surveillance and Interrogation*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 7-42 (Benjamin Wittes ed., 2009)

[79] After allegations by Chandra Shekhar, and enquiry by CBI revealed that there was widespread covert and even illegal snooping being conducted during 1984 to 1987. Not only have the phones of their political opponents but also of their political allies, MLAs, stated ministers, trade union and religious leaders. See Prabhu Chawla, *Secret report by CBI contains shocking details of phone tapping ordered by Congress(I) govts : Special Report* (1991), available at http://indiatoday.intoday.in/story/secret-report-by-cbi-contains-shocking-details-of-phone-tapping-ordered-by-congressi-govts/1/317946.html (last visited Sep 13, 2016).

[80] According to Hindu these existing laws primarily relates to interception of calls and CMS expands surveillance across Meta-Data (CDRs and SDRs). Access, transfer and retention of CDRs is weakly defined under the existing laws. See SHALINI SINGH, *Lethal surveillance versus privacy*, THE HINDU, November 20, 2015, available at http://www.thehindu.com/opinion/lead/lethal-surveillance-versus-privacy/article4837932.ece (last visited Sep 13, 2016).

"public emergency" or "public safety", or when it is deemed necessary or expedient to do so in the following instances: in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, and for preventing incitement to the commission of an offence.[81]

Unlike the United States' *Foreign Intelligence Surveillance Court* (1978) to regulate surveillance and United Kingdom's *Investigatory Powers Tribunal* (2008) and *Intelligence and Security Committee* of Parliament to oversee and examine unlawful surveillance; India does not have any of such institutional apparatus. In the 1996 PUCL judgment, the Supreme Court of India retreated from providing 'prior judicial scrutiny' and declared that it is up to the Central Government to lay down 'procedural safeguards and precautions' from unlawful surveillance. However, it directed and placed restrictions on the class of bureaucrats who could authorize interception, and ordered the creation of a 'review committee' so that the right to privacy is protected. Besides several allegations of phone tapping by politicians on their rivals, there have been few prominent incidents. The Gujarat government's surveillance on a woman architect in 2009[82] and the Radia tapes controversy of 2010 revealed a deep nexus between corporate, politics and interception,[83] whereas the illegal phone tapping by state agencies in Himachal Pradesh in 2013[84] and the clash between the two recently bifurcated states (Telengana and Andhra

[81] *Supra* note 7; Ujjwal Kumar Singh, *Surveillance Regimes in Contemporary India*, in SURVEILLANCE, COUNTER-TERRORISM AND COMPARATIVE CONSTITUTIONALISM 43-58 (Fergal Francis Davis, Nicola McGarrity, & George Williams eds., 2014)

[82] *Fresh tapes on Gujarat government's surveillance emerge*, THE HINDU, December 15, 2013, available at http://www.thehindu.com/news/national/other-states/fresh-tapes-on-gujarat-governments-surveillance-emerge/article5460462.ece (last visited Sep 13, 2016).

[83] *Leaked tapes: CBI says it has 5,851 recordings*, DNA, November 23, 2010, available at http://www.dnaindia.com/india/report-leaked-tapes-cbi-says-it-has-5851-recordings-1470650.

[84] *HP to continue with parallel phone tapping probe*, *THE PIONEER*, December 28, 2013, available at http://www.dailypioneer.com/state-editions/chandigarh/hp-to-continue-with-parallel-phone-tapping-probe.html (last visited Sep 13, 2016).

Pradesh) in a phone-tapping row in 2015[85] reaffirmed the same. It reflects the failure of proper procedural framework to provide safeguards from unlawful surveillance and corrupt uses of power.

Major innovations in India came about in the post 26/11 scenario to address challenges regarding national security and terrorism. Again, there was a quest for new surveilling space through innovations in data-collection efforts by launching Central Monitoring System (CMS), National Intelligence Grid (NATGRID), Netra (UAV) and NETRA (NEtwork TRaffic Analysis). It reflects how 'surveilling space' has been injected into the 'democratic space' of the Indian Territory. Such a massive technological establishment was to retread the Indian state. To handle such a precarious situation, Indian government launched the CMS,[86] which is equipped with unmatched capabilities for carrying out deep search surveillance including the facility to monitor mobiles, SMS, fax, website visit, social media usage, and much more. It is carried out without any assurance of a matching legal and procedural framework, because it is held that under ordinary operation of the law, individuals could hide behind the law to avoid prosecution for their illegal behavior.[87]

The 26/11 Mumbai attack exposed several weaknesses in India's intelligence gathering and action networks and therefore, NATGRID[88] was launched. It is a technical interface or central facilitation centre, with an integrated facility, which aims to link databases of 21 categories (e.g. travel, income tax, driving licenses, bank account details, immigration records, telephone etc.). In addition to this, its

[85] *Phone tapping row; MHA steps in*, THE HINDU, July 24, 2015, available at http://www.thehindu.com/news/national/phone-tapping-row-mha-steps-in/article7461295.ece (last visited Sep 13, 2016).

[86] CMS was setup to automate the process of lawful interception and monitoring of telecommunications. Kiren Rijiju, *Centralised surveillance and interception system*, April 10, 2015, Rajya Sabha Debates.

[87] Lisa Austin, *Surveillance and the Rule of Law*, 13 SURVEILLANCE & SOCIETY 295-299 (2012)

[88] NATRID will automate the existing manual processes for collation of Intelligence. It shall leverage information technology to access, collate, analyse, correlate, predict and provide speedy dissemination. Kiren Rijiju, *Status of NATGRID,* April 16, 2014, Rajya Sabha Debates.

data would be shared with 11 central agencies (e.g. CBI, IB, R&AW, NIA etc.). It is essentially 'dataveillance,' wherein the users' actions or communications are monitored and investigated, through which they can be tracked, monitored, intercepted and traced.[89] In order to facilitate efficient delivery of welfare services, the Indian state unveiled biometric marking UID (Unique Identification Number) or Aadhaar card, which contains a standard form of 12-digit identity number. It comprises of interlocking of technologies and mechanisms that serve a range of desires, including those for control, governance, security and much more. By interlocking biometric card with Intelligence Grid and the National Population Register,[90] the colossal database can be shared with various other intelligence agencies and government departments.[91] Such an interlocking and convergence reflects that Indian state is not just concerned about efficient delivery of welfare or providing safety and security, but also intends to keep a surveilling gaze on its population. Haggerty and Ericson captured such multiple, overlapping governing practices, with different capabilities and purposes, as a "surveillant assemblage."[92]

It all commenced under UPA regime- not through statutory law, but with a notification in 2009[93]. There commenced an effort to provide statutory backing only after 2 years. However, the Parliamentary Standing Committee on Finance rejected the National Identification Authority of India (NIAI) Bill 2010. The committee pointed out the absence of data protection legislation, dangers and

[89] *Supra* note 1, at 16 ;David Lyon, *David Lyon, IDENTIFYING CITIZENS: ID CARDS AS SURVEILLANCE* 50 *(2009)*

[90]The pilot project UID commenced to provide universal identity and remove ghost-beneficiaries, now it is being linked with NPR data to find out ghost residents. See *Government out to match Aadhaar, NPR data*. *INDIAN EXPRESS*, July 6, 2015, available at http://indianexpress.com/article/india/india-others/government-out-to-match-aadhaar-npr-data/ (last visited Sep 13, 2016).

[91] Ujjwal Kumar Singh, Surveillance Regimes in Contemporary India, in *SURVEILLANCE, COUNTER-TERRORISM AND COMPARATIVE CONSTITUTIONALISM* (Fergal Francis Davis, Nicola McGarrity, & George Williams eds., 2014)

[92] Kevin D. Haggerty, Richard V. Ericson, *The surveillant assemblage*, 51 British Journal of Sociology 605-622 (2000)

[93]*Notification*, PLANNING COMMISSION (2009), http://www.uidai.gov.in/images/notification_28_jan_2009.pdf (last visited Sep 13, 2016).

issues like access and misuse of personal information, surveillance, profiling, linking and matching of databases and securing confidentiality of information. Later, the BJP led NDA government, on March 2016, passed Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Bill in the parliament as a money bill despite severe furore. It does raise some serious questions as Clause 33 (2) says, "*disclosure of information, including identity information or authentication records, made in the interest of national security*" which shows an intention to use this data for national security and surveillance. In order to protect blatant misuse, this clause lays out "*an oversight committee consisting of the cabinet secretary and the secretaries to the Government of India in the Department of Legal Affairs and the Department of Electronics and Information Technology.*"[94] This committee would act as a channel to review any unlawful surveillance by the government. However, if we look into the legacy of the aforementioned committees we can understand corrupt uses of power.

An even more lethal surveilling mechanism is NETRA, an internet monitoring system capable of keyword-based detection, a monitoring, and pattern-recognition system for packetized data and voice traffic in virtual world.[95] Additionally, NETRA is also the name of aerial surveillance. These comprise of uninhabited, remotely controlled devices called UAV (Unmanned Aerial Vehicle) or Drones, to keep an eye on suspect activity from a vertical position. In India, there has been an extensive utilization of lightweight UAVs for public safety and security, patrolling, to manage violent protests, crowd management, police investigation and much more in several cities. Additionally, it is widely used by civilians for private purposes. In October, 2014 Director General of Civil Aviation (DGCA) banned

[94] The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, available at https://uidai.gov.in/images/targeted_delivery_of_financial_and_other_subsidies_benefits_and_services_13072016.pdf (last visited Sep 13, 2016).

[95] *Govt to launch internet spy system 'Netra' soon*, TOI, January 6, 2014, available at http://timesofindia.indiatimes.com/tech/tech-news/Govt-to-launch-internet-spy-system-Netra-soon/articleshow/28456222.cms (last visited Sep 13, 2016).

the usage of drones for civil applications citing safety and security concerns. Later in May, 2016 draft guidelines for drones were released in which it said Unique Identification Number (UIN) would be issued from DGCA, every drone would be inscribed with UIN and RFID tag or SIM and also need to obtain UA Operator Permit (UAOP) if operated at or above 200 feet in uncontrolled airspace.[96] It shows that "Indian government has sought to monopolize all powers of surveillance"[97] by making any electronic surveillance by private agencies and civilians an offence.

In 2013, major revelations by Edward Snowden changed the global discourse of surveillance, it swung the pendulum back to the traditional meaning as being a sinister force having "connotations of surreptitious cloak-and-dagger or undercover investigations into the individual activities."[98] His revelations were quite grievous about the scope of National Security Agency surveillance not only on U.S population but also on foreign countries, in which India was ranked in fifth.

In recent years the data protection and privacy has fallen afoul with the 'third party' (Solove, 2011) i.e. non-state actors. In 2010, Blackberry was warned by the Indian state to either provide access to security agencies to monitor the information on their services or face ban after which the company had to provide access to partial services.[99] Similarly, the Apple vs. FBI debate intensified issues

[96]On October 7, 2014 DGCA released public notice regarding formulating the regulations for certification and operation for use of Unmanned Aircraft Systems in the Indian Civil Airspace. See *Use of UAV/UAS for Civil Applications*, DIRECTOR GENERAL OF CIVIL AVIATION, 2014, available at http://dgca.nic.in/public_notice/PN_UAS.pdf (last visited Sep 13, 2016); *Draft Guidelines for obtaining Unique Identification Number (UIN) & Operation of Civil Unmanned Aircraft System (UAS)* DIRECTOR GENERAL OF CIVIL AVIATION, 2016, available at http://www.dgca.nic.in/misc/draft%20circular/AT_Circular%20-%20Civil_UAS(Draft%20April%202016).pdf (last visited Sep 13, 2016)

[97] *Supra* note 20, at 50.

[98] *Supra* note 1, at 13.

[99] In 2010 Indian government asked Blackberry to provide access to monitor their messenger, internet and enterprise service? The company responded by providing lawful access to BlackBerry Messenger (BBM) and BlackBerry Internet Service (BIS) email, but it denied decoding of its intranet facility in BlackBerry Enterprise Service. See *No secrets on Blackberry: Security services to intercept information after government gets its way on popular messenger service*, April 6, 2012, DAILY MAIL, available at http://www.dailymail.co.uk/indiahome/indianews/article-

regarding privacy and security, and it further widened the issues such as the role of state and non-state actors (corporate companies) in data protection.

II. TWO SIDES OF A COIN: CONUNDRUM OF 'SECURITY' OR 'FREEDOM'

According to David Jenkins several legal changes occurred in a decade which he calls a "long decade"[100] where legal systems evolved in reaction to global terrorism- not only in India, but around the world. Several scholars have tried to understand the nature of a surveillance state, and the conundrum between 'security and freedom'. Jeremy Waldron is one such scholar who cautions people about giving up their civil liberties and stresses on striking a balance between liberty and security as he states, "We must be sure that the diminution of the liberty will in fact have the desired consequence."[101] Reducing liberty consequently increases the power of the state, which may be used to cause harm or diminish liberty in other ways. The matter of suspicion of power under the state is seldom ever used only for emergency purposes and always liable to abuse. Instead of trading off liberties for purely symbolic purposes and consequential gains, there should be assessments about the effectiveness of such trade-offs.

However, Adrian Vermeule and Eric Posner advance a trade-off thesis between security and liberty. They argue that both security and liberty are valuable goods that contribute to individual well-being or welfare, and neither good can simply be maximized without regard to the other. One of the characteristics of emergencies or terrorist attacks will be the defensive measures wherein governments may opt to increase intelligence gathering and monitoring. Also, during such period the Executive

2126277/No-secrets-Blackberry-Security-services-intercept-data-government-gets-way-messenger-service.html (last visited Sep 13, 2016).

[100] David Jenkins, *The Long Decade*, in THE LONG DECADE: HOW 9/11 CHANGED THE LAW 3-27 (David Jenkins, Amanda Jacobsen, & Anders Henriksen eds., 2014)

[101] Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 THE JOURNAL OF POLITICAL PHILOSOPHY, 191-210 (2003).

which is swift and vigorous gets the institutional advantages along with their secrecy and decisiveness. In contrast, the Judges are at sea and legal rules may seem inapposite and even obstructive as they possess limited information and limited expertise.[102]

In similar lines, Richard Posner contends that rights should be modified according to circumstance and that we must find a pragmatic balance between personal liberty and community safety. He finds the direct connection between liberty and security as there is an automatic direct balance between them- a 'fluid hydraulic balance.' It shifts continually as threats to liberty and safety wax and wane. According to him, "privacy is the terrorist's best friend" therefore, the government has a compelling need to exploit digitization in defence of national security. The dangers of data mining such as leaks should be prevented through sanctions and other security measures to minimize the leakage of such information outside the community of national security.[103]

The trade-off thesis sees the balance between security and liberty as a zero-sum trade-off. However, Daniel Solove finds this argument to be completely flawed and argues that the balance between privacy and security is rarely assessed properly. Instead, he argues that the real balance should be between "security measure with oversight" and "regulation and security measure at the sole discretion of executive officials."[104]

Particularly in the U.S. and the West in general, the role and responsibility of judiciary in times of counter-terrorism and surveillance is considered to be crucial and despite criticisms from few quarters, it is held as the guardian of constitutionalism and human rights. It was regarded as their inherent

[102] Eric A. Posner & Adrian Vermeule, *Emergencies, Tradeoffs, and Deference*, in TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 15-57 (2007); Adrian Vermeule, *Security and Liberty: Critiques of the Tradeoff Thesis*, in THE LONG DECADE: HOW 9/11 CHANGED THE LAW 31-45 (David Jenkins, Amanda Jacobsen, & Anders Henriksen eds.,)

[103] Richard A. Posner, *Not a suicide pact: the constitution in a time of national emergency*, in NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 31-41, 143-145 (2006).

[104] Daniel J. Solove, *Nothing to Hide: The False Tradeoff between Privacy and Security*, in NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY 33-36 (2011).

constitutional responsibility to protect procedural fairness against government limitations by strengthening judicial review[105] and in order to play a greater role it needs to counter 'pull of deferentialism' which erodes the responsibility of Judges.[106] In this scenario, one of the fundamental problems is that judiciary around the world and also in India they are confronting to balance security and freedom.

In India, the concept of freedom does not merely revolve around providing security from potential terrorist attacks, which were actually addressed by several legislative reforms and introducing technologies of surveillance. Rather, it also involves freedom to access welfare schemes and entitlements, freedom from misgovernance and corruption. With this idea, the grand biometric identification project were initiated. However, such an idea diluted the notion of privacy, because there is a general agreement that there is 'nothing to hide' and that it is a 'false trade-off' of privacy in the name of welfare.

III. CHALLENGES TO CONSTITUTIONALISM AND RULE OF LAW

On February 2, 2016, Indian President Pranab Mukherjee, in his inaugural speech at the Counter Terrorism Conference 2016 in Jaipur said, "Terrorism is undoubtedly the single gravest threat that humanity is facing today. Terrorism is a global threat which poses an unprecedented challenge to all nations…important aspect of counter-terrorism strategy is capacity building to prevent attacks through intelligence collection and collation, development of technological capabilities, raising of

[105] David Jenkins, *Procedural fairness and judicial review of counter-terrorism measures*, in *JUDGES AS GUARDIANS OF CONSTITUTIONALISM AND HUMAN RIGHTS* (Martin Scheinin, Helle Krunke, & Marina Aksenova eds., 2016).
[106] Martin Scheinin, *The judiciary in times of terrorism and surveillance: a global perspective*, in JUDGES AS GUARDIANS OF CONSTITUTIONALISM AND HUMAN RIGHTS (Martin Scheinin, Helle Krunke, & Marina Aksenova eds., 2016).

Special Forces and enactment of special laws."[107] He poignantly indicated not merely the graveness of the trepidation, but also counter actions required to address that graveness by all nation-states in modern century.

For democracies, global terrorism is posing catastrophic risks and dangers to national security. In this scenario, state surveillance is tailored as a legitimate defence to protect democracy and freedom.[108] Despite severe opposition to police surveillance, it cannot be obliterated that it becomes near impossible to penetrate complex criminal organisations through more traditional police work.[109] Moreover, it is often imperative for a functioning democracy to curtail the illegal behaviours and activities which can pose a threat to democratic intuitions.[110] Therefore, in India, surveillance was unleashed with series of legislative reforms and innovations in technological measures of surveillance infrastructure to successfully investigate and prosecute such crimes. However, in the Indian subcontinent, surveillance is not merely to counter terrorism, but is also deployed to curb governing maladies and streamlining service delivery via biometric identification of every individual. Through technological innovations, rights might be governed more effectively and efficiently with the erection of modern bureaucratic systems along with informational structures of citizenship, which reflect indispensability of surveillance in modern society.

[107] *President of India inaugurates Counter-Terrorism Conference-2016,* PRESS INFORMATION BUREAU available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=136023

[108] Aftermath of Orlando Attack in U.S, D.C. Pathak (former Director of IB) contends that preventive action taken on an intelligence assessment, if questioned in the human rights plane in all cases would weaken the security of a democratic state. He further argues that intelligence set up in a democracy is wedded to an apolitical pursuit of threats to national security and its professionalism would normally not be questioned by any other wing or agency of the government. See D. C Pathak, *Orlando has lessons for the democratic world,* SUNDAY GUARDIAN, June 18, 2016, available at http://www.sundayguardianlive.com/opinion/5385-orlando-has-lessons-democratic-world (last visited Sep 13, 2016).

[109] Uday Bhaskar argues that democracies remain vulnerable and if the freedom of personal movement is not to be ruthlessly curtailed, preventive measures will have to be reviewed and appropriate surveillance procedures introduced. C. Uday Bhaskar, *London Attacks: Abiding Pattern of Global Terrorism*, July 11, 2005, INSTITUTE FOR DEFENCE STUDIES AND ANALYSES, available at http://www.idsa.in/idsastrategiccomments/LondonAttacksAbidingPatternofGlobalTerrorism_CUBhaskar_110705.

[110] *Supra* note 2, at 7

Conceptually, surveillance and democracy as concepts are antithetical, complex, contextual and multifaceted. Nevertheless, their existence makes a significant impact on our lives making it critical to understand the complexity of the relationship between each other. According to Kevin Haggerty and Minas Samatas, democracy involves a system of open procedures for making decisions in which all members have an equal right to speak, have their opinions counted, and for protecting individuals from the corrupting effects of power. Further, they assert that one of the significant things about democratic governance and surveillance is that democracies are accountable to their citizens.[111] Contrariwise, in India, in the post 9/11 and 26/11 scenarios, interception clauses penetrated through a series of legislative reforms which received lackadaisical parliamentary debate on their merits and demerits. Even if there are debates in civil society, they were eschewed in the name of national security or development of the state and were addressed with nationalist jingoism.

Such developments abridge the right to privacy and the sheer absence of persuasive jurisprudence of privacy protection supplemented with legislative silence in India complicates matters. Contrary to the absence of privacy law, there are numerous laws which trample and trespass the right to privacy. In 2012, the committee of experts on privacy, chaired by Justice AP Shah (Shah Committee) suggested several recommendations such as the constitutional basis of the right to privacy and furthermore highlighted how the differences between different forms of surveilling clauses have created an unclear regulatory regime which is non-transparent, prone to misuse, and that does not provide remedy for aggrieved individuals. The recommendations refer to the chequered history of telephone tapping and political snooping in the hands of the state and raise questions on the standard and procedural legal framework to safeguard individual privacy and personal liberty. Instead of looking at it narrowly as a privacy issue, it would be effective if we look into broader issues to canvas deeper problems. Questions

[111] *Supra* note 2 at 2

pertaining to the goals of state surveillance, what degree of penetration is proportional and what level of monitoring is required to counter terror, protect national security and to streamline service delivery are crucial.

In this scenario, the major challenges for democracy and surveillance appear around constitutionalism and the rule of law. Their basic idea is to maintain institutional restraints and insulate fundamental rights from oppressive actions by the state by turning it into a subject of the law. Under the 'long decade' these notions were transformed, in response to changing threats to national security. To evade unpredictable catastrophic risks, uncertain and unanticipated threats, or any extra-ordinary and emergency situations, the Indian state created discretionary space to respond to these situations. Such discretionary space is what David Dyzenhaus calls as legal "black hole" and legal "grey hole", the former is "a situation in which there is no law," the latter is "a facade or form of the rule of law rather than any substantive protections."[112]

The Legislature erected major intelligence organizations and surveillance infrastructure, without any legal basis or statutory existence, which is a legal "black hole." It gives enormous power to the Executive without any accountability and transparency in its functioning. Even the Judiciary exempted them by saying "they are bound to have secrets."[113] Apart from this, the Legislature, to address extra-ordinary situations and public emergency, framed laws that are basically a legal "grey hole." It is not a lawless void, but a legal space in which there are some legal constraints on executive action, but the constraints are so insubstantial, deficient and inadequate to provide substantive protections from potential dangers of unlawful surveillance and corrupt uses of power.

[112] David Dyzenhaus, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 3 (2006).

[113] On February 23, 2016, Supreme Court dismissed PIL from NGO Centre for Public Interest Litigation to bring accountability and transparency in the functioning of intelligence agencies. See *Some secrets must remain secret: SC on intel agencies,* TOI, February 24, 2016, available at http://timesofindia.indiatimes.com/india/Some-secrets-must-remain-secret-SC-on-intel-agencies/articleshowprint/51115071.cms (last visited Sep 13, 2016).

However, the discretionary space provides exemptions to the State from the ordinary operation of law. The idea is that the exemptions from the ordinary operation of the law are to uphold the law more generally during emergencies; otherwise, individuals could hide behind the law to avoid prosecution for their illegal behaviour. It needs to be emphasized that exception permits only to the extent that is necessary and proportional to its purpose of upholding the law more generally. Otherwise, the exception swallows the rule and in the name of pursuing the law, State officials would be able to operate outside of the ordinary operation of the law[114] and misuse their extraordinary powers.

The dangers of surveillance do not merely arise from its use during emergencies; rather its use for ordinary purpose is far more lethal. The presence of political surveillance turned out as a dragnet to surveil and prevent oppositions, movements and disagreements against the Indian state. It is a fact that such surveillance is employed to induce the State's ideological and developmental discourse. In doing so, it limits the possibility of alternative political constituencies to emerge or become effective which can have disastrous consequences for the prospect of nurturing a democratic public sphere.[115] According to John Tropey (2000), the State monopolized the legitimate means of movement in modern century.[116] Such monopolization gave immense power to the State to trace and monitor individuals, then prevent and expropriate right to travel and right to freedom of expression (e.g. in 2016 Gladson Dungdung's passport was impounded, in 2015 a Look Out Circular was issued on Priya Pillai and prevented to travel abroad, and in 2014 Christian Mehta was deported). That is why Ashis Nandy has argued that in the modern State, control over citizen's rights and freedoms are much more

[114] *Supra* note 16
[115] *Supra* note 2, at 5
[116] John Torpey, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP, AND THE STATE (2000).

total, with the development of modern technology, management systems and information control. Moreover, it leads to formation of a state which successfully plucks out the escape routes and maintains social order and management.[117] In doing so, surveillance not only violates right to privacy and free movement but also inhibits freedom of expression.

IV. CONCLUSION

Whilst it can be argued that such assorted forms of technological practices and proliferation of surveillance measures, mechanisms and technologies in India, create 'surveillance infrastructure' to counter terrorism, in the same vein, such an apparatus is utilized to stream-line maladies in governance by infusing modern surveillance techniques. In this scenario the use of technologies for public services and administration is blurred for the purposes more closely associated with national security and counter-terrorism.

The State using legitimate means to defend freedom in twenty-first century is becoming quite complex and murky under the present circumstances as it is addressed through ubiquitous surveillance. The major challenge for democracy in India is to strike a balance between often-corrosive surveillance measures, with civil liberties. Though the state has the power to monitor and control people, such exceptional power being operational and functional under a shadow by evading statutory law or legal framework in a democracy poses severe challenges. Even if there are laws, they are substantively fragile to protect the democratic rights and constitutional freedoms from unlawful surveillance and corrupt uses of power. In coming future, the relationship between surveillance and democracy would remain unsettled until the issues such as constitutionalism and rule of law related to them are addressed.

[117] Ashis Nandy, THE ROMANCE OF THE STATE AND THE FATE OF DISSENT IN THE TROPICS (2003).

ANNEXURE I

Annexure-IV(1) Contd.

ADMINISTRATIVE REFORMS COMMISSION

Comparison of Anti-terrorism Legislations in India

Sl.No	Item	Terrorism and Disruptive Activities (Prevention) Act, 1987	The Prevention of Terrorism Bill, 2000 (Draft Bill as recommended by the Law Commission of India)	The Prevention of Terrorism Act, 2002	The Unlawful Activities (Prevention) Amendment Act, 2004
J. INTERCEPTION OF COMMUNICATIONS					
1.	Interception of communication in certain cases	No separate provision	No separate provision	Separate chapter 5 containing provisions regarding (1) description of communication meant for interception (2) appointment of competent authority by the Central or State Government for this purpose (3) authorisation of such interception (4) review of order of interception issued by the competent authority by a review committee (5) duration of an order of interception etc.	No such provisions. However, Section 46 provides the following: Admissibility of evidence collected through the interception of communi-cations.- "Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or any other law for the time being in force, the evidence collected through the interception of wire, electronic or oral communication under the provisions of the Indian Telegraph Act, 1885 (13 of 1885) or the Information Technology Act, 2000 (21 of 2000) or any other law for the time being in force, shall be

ANNEXURE II

Annexure-IV(1) Contd.

ADMINISTRATIVE REFORMS COMMISSION

Comparison of Anti-terrorism Legislations in India

Sl.No	Item	Terrorism and Disruptive Activities (Prevention) Act, 1987	The Prevention of Terrorism Bill, 2000 (Draft Bill as recommended by the Law Commission of India)	The Prevention of Terrorism Act, 2002	The Unlawful Activities (Prevention) Amendment Act, 2004
				(6) description of authority competent to carryout interception (7) interception of communication in emergency situations (8) protection of information collected (9) admissibility of evidence collected through interception of communications (10) prohibition of interception and disclosure of certain communication (11) annual report of interceptions.	admissible as evidence against the accused in the court during the trial of a case: Provided that the contents of any wire, electronic or oral communication intercepted or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in any court unless each accused has been furnished with a copy of the order of the competent authority under the aforesaid law, under which the interception was directed, not less than ten days before trial, hearing or proceeding: Provided further that the period of ten days may be waived by the judge trying the matter, if he comes to the conclusion that it was not

ANNEXURE III

Annexure-IV(1) Contd.

ADMINISTRATIVE REFORMS COMMISSION

Comparison of Anti-terrorism Legislations in India

Sl.No	Item	Terrorism and Disruptive Activities (Prevention) Act, 1987	The Prevention of Terrorism Bill, 2000 (Draft Bill as recommended by the Law Commission of India)	The Prevention of Terrorism Act, 2002	The Unlawful Activities (Prevention) Amendment Act, 2004
					possible to furnish the accused with such order ten days before the trial, hearing or proceeding and that the accused shall not be prejudiced by the delay in receiving such order."
			K. REVIEW COMMITTEES		
1.	Review Committee	No separate provision	Clause 39 provides for setting up of review committees by the Central and State Governments to review, at the end of each quarter in a year, cases instituted by them under the Act.	Section 60 provides that the Central and State Governments shall constitute one or more review committees for the purposes of the Act.	Section 37 provides for constitution of one or more Review Committees for purposes of review of an order of the Central Government rejecting an application for denotification of a 'terrorist organisation'.

Source: *Combatting Terrorism Protecting By Righteousness, Second Administrative Reforms Commission*, Government of India, 2008[118]

5. THE CRIMINOLOGY BEHIND WHITE COLLAR CRIMES

Author(s): Aishwarya Anand & Tejendra Meena[119]

ABSTRACT

White-collar crime can be generally defined as "crime committed by a person of respectability and high social status in the course of his occupation. This article, through the various theories of criminology evaluates white collar crimes and tries to find out the basic causes of such crimes. Further this article also talks about reformation of white collar criminals and also emphasizes on their restoration.

I. INTRODUCTION

White-collar crime as a modem phenomenon was described in 1940 by Australian sociologist E.H. Sutherland, who was influenced by his observations on the commercial chicanery in elite financial circles, which contributed to the Great Depression.[120] White-collar crime, involves "the abuse of power by upper-echelon businessmen in the service of their corporations."[121] White collar crimes and corporate crimes have been studied from many different perspectives by scholars. However, there seems to be no conclusion with respect to the causes for white collar crimes or the ways to control and prevent these crimes. This ambiguity could perhaps be attributed to the lack of empirical research.

[118] http://unpan1.un.org/intradoc/groups/public/documents/cgg/unpan045484.pdf

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[120] E.H. Sutherland, *White-Collar Criminality* ,5 AM. SOCIOLOGICAL REV. 1 (1940).

[121] Gilbert Geis, *White Collar Crime: What Is It?*, 3 CURRENT ISSUES CRIM. JUST. 9, 11 (1991).

However, the global financial crises of 2008 reintroduced white collar crimes into limelight. In a survey conducted by Pricewaterhouse Coopers in 2009, it was found that the most common types of white-collar crime perpetrated worldwide were asset misappropriation, accounting fraud, as well as bribery and corruption.[122]

The study of white collar crimes becomes particularly important because the existing legal and policy framework has failed to deal with white collar crimes. The rate of these crimes is exponentially high. In most cases, white collar crimes are not even unearthed. In such a situation, it has become necessary to establish a strong theoretical basis for white collar crimes so that its causes can be better addressed. From an economic perspective, billions are lost every year due to white collar crimes. Thus, it is necessary to study the causes and the possible methods of reformation and restoration of white collar criminals.

With regard to penalization of white-collar crimes, the Sarbanes-Oxley Act of the U.S. is a one of its kind legislation. The Act, and the U.S. criminal law regime in general focus on three forms of reform for white-collar crimes viz. incarceration, fines and public shaming. This paper analyses each of these three reformative measures and lays down the respective benefits and drawbacks associated with them. A "restorative" approach to criminality and conflict has been proposed in a number of common law jurisdictions in a variety of legal contexts, both civil and criminal. However, white-collar crime is still discussed in almost exclusively retributive terms. This project work proposes and explores restorative response to white-collar crime, a response which would seek to heal the harm above all else. The authors focus on the possibilities of voluntary participation of victims and offenders and other stakeholders and focuses on future relations, rather than past offences. The author concludes that white-collar crime, by its nature, lends itself poorly to restoration. Finally, it will discuss recent theories

[122] *White-collar crime: a statistical study on its common causes,* 4(2) INT'L J. BUS., MANAGEMENT AND SOC. SCI. 44-49 (2011).

and legislations implemented to stop white-collar crime and possible solutions to deter further outbreaks in America.

Part II of this paper analyses the causes of white collar crimes as argued by various theories. Part III of this paper focuses on reformation of white collar criminals. Part IV addresses the issue of restoration. The authors present a conclusion in Part V.

II. CAUSES OF WHITE COLLAR CRIMES:

ORIGINS OF THE CONCEPT

In classical theory, man was considered to be predisposed to commit crimes. Both force and fraud were seen as means of pursuing self-interest, and the distinction between the two was not taken to be of theoretical interest.[123] The Classical school never pondered over the question of whether white collar crimes were truly crimes. This was because, according to the Classical school, man committed crimes for his own benefit and there was no focus on the nature of the offender. Thus, the rich were as likely to commit crimes for their advantage as the poor were.

With the advent of the Positivist school of thought, the focus shifted from the natural tendency to commit crimes to analysing eternal factors such as biology, psychology and even sociological and environmental factors. The major social source of such compulsion in positivistic theory was, from the very beginning, low social class, poverty, or inequality.[124] In this context, invention of the concept of white-collar crime had two desirable consequences: it falsified poverty-pathology theory and it revealed the criminality of the privileged classes and their impunity to the law.[125] The concept of white

[123] Travis Herschi & Michael Gottfredson, *Causes of White Collar* Crimes, 25 CRIMINOLOGY 949 (1987).
[124] *Id.*
[125] *Id.*

collar crimes can perhaps be explained as a reaction against the Positivist school of criminology. It shows that the intelligent, rich and the powerful are also equally prone to committing crimes.

III. SUTHERLAND'S CONCEPTUALISATION OF WHITE COLLAR CRIMES: THE THEORY OF DIFFERENTIAL ASSOCIATION

The term "white collar crimes" was coined by Australian Sociologist Edwin Sutherland. Sutherland defined white-collar crime as "crime committed by a person of respectability and high social status in the course of his occupation."[126] He disagreed with the traditional approaches to criminology when analysing white collar crimes. However, he never disagreed on the notion that white-collar crime was by all means, crime.

Sutherland's approach can be contrasted with that of Paul Tapan, who argued that white collar crimes were outside the purview of the definition of crimes. He based his argument on the fact that white collar crimes very often were not handled by the police, criminal prosecutors, or criminal courts, but through administrative courts with different procedures, legal rulings, and sanctions.[127] White-collar crime was not criminal in either a technical or social sense, Tappan implied, and to argue that it was would merely promote a political agenda.[128] The majority, however, were of the view that white collar crimes, were indeed crimes. This can be explained through the following argument by Sutherland:

> *"White-collar crime is real crime. It is not ordinarily called crime, and calling it by this name does not make it worse, just as refraining from calling it crime does not make it better than it otherwise would be. It is called crime here in order to bring it within the scope of criminology, which is justified because it is in violation of the criminal law. The crucial*

[126] E.H. Sutherland, *White-Collar Criminality*, 5 AM. SOCIOLOGICAL REV. 1 (1940).
[127] CONTEMPORARY ISSUES IN CRIME & CRIMINAL JUSTICE: ESSAYS IN HONOR OF GILBERT GEIS (Henry N. Pontell and David Shichor eds., 2001).
[128] *Id.*

> *question in this analysis is the criterion of violation of the criminal law. Conviction in the criminal court, which is sometimes suggested as the criterion, is not adequate because a large proportion of those who commit crimes are not convicted in criminal courts."*[129]

The hypothesis of differential association is that criminal behavior is learned in association with those who define such behavior favorably and in isolation from those who define it unfavorably, and that a person in an appropriate situation engages in such criminal behavior if, and only if, the weight of the favorable definitions exceed the weight of the unfavorable definition.[130] This theory argues that white collar crimes occur because law breaking in normative in certain professions and occupations. The normative nature of the lawbreaking is a result of various disorganizing factors within the general culture, such as excessive competition, the emphasis on success, rather than the means of succeeding, the impersonality of urban business practices, and the like.[131] In general, this theory views white-collar crime as a natural product of conflicting values within our economic and class structures and the white-collar criminal as an individual who, through associations with colleagues who define their offenses as "normal" if not justified, learns to accept and participate in the antilegal practices of his occupation.[132] Sutherland, shuns psychological explanations of economic crime and focuses on the influence relationships, "situations, and social bonds" within a company.[133] Thus, this theory does not classify inherent personality traits as the cause of crimes. Rather, it blames white collar crimes on fundamental learning.

Sutherland's theory has been widely criticised by a variety of social scientists and researchers.

[129] Sutherland, White Collar Criminality, 5 Am. SOCIOLOGICAL REv. 1, at 5 (1940).
[130] EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 234 (1949).
[131] Donald J. Newman, *White Collar Crimes*, 5 L. & CONTEMPORARY PROB. 750 (1980).
[132] *Id.*
[133] Tage Alalehto, *Economic Crime: Does Personality Matter?*, 47 INT.'L J. OFFENDER THERAPY & COMP. CRIM. 335, 335 (2003).

In terms of conceptual ambiguity, critics have noted that white-collar crime was vaguely and loosely defined by Sutherland.[134] Describing the reactions to this conceptual ambiguity, white-collar crime scholar David Friedrichs wrote, "perhaps no other area of criminological theory has been more plagued by conceptual confusion than that of white-collar crime."[135] It has also been argued that Sutherland's concept only minimally reflected reality. The underestimation of poverty by Sutherland has also received considerable disparagement. Another author argued that by focusing on the offender (in terms of status) and the location (the workplace) rather than the offense, the concept did not accurately reflect the behaviours that needed to be addressed.[136] It was also suggest that the vague empirical conceptualization by Sutherland created barriers with practitioners and resulted in a lack of research on white-collar crime between the 1950s and 1970s.[137]

Sociologists have also disapproved of the methodology adopted by Sutherland. He defined white-collar crime as behaviours committed by members of the upper class, but his research focused on all sorts of offenses including workplace theft, fraud by mechanics, deception by shoe sales persons, and crimes by corporations.[138] Sutherland's approach was perhaps too theoretical. It suffered disconnect from the actual developments around that time. It did not follow an evidence based approach which could guide policy decisions to tackle the issue of white collar crimes.

Despite all the criticism, the undeniable fact remains that Sutherland's approach formed the basis for the study of white collar crimes for decades to come. It was only through the basic foundational stones laid by him that the other theories were developed.

[134] Robin, Gerald, *White-Collar Crime and Employee Theft*, 20(3) CRIME AND DELINQUENCY 251-62 (1971).
[135] David Friedrichs, *Occupational Crime, Occupational Deviance, and Workplace Crime*. 20(3) CRIMINAL JUSTICE 243-256 (2002).
[136] Edelhertz Herbert, *White-Collar and Professional Crime: The Challenge for the 1980s*, 28(7) AMERICAN BEHAVIORAL SCIENTIST, 109–128 (1983).
[137] *Id.*
[138] Robin, Gerald, *White-Collar Crime and Employee Theft*, 20(3) CRIME AND DELINQUENCY 251-62 (1971).

IV. PERSONALITY THEORY

Personality, simply defined, is a person's tendency to act or react in a certain way" to different stimuli.[139] Even though Sutherland rejected any involvement of personality traits in commission of white collar crimes, this line of theory became widely popular at the beginning of the 21st century. Sociologists have defined the following types of personality traits which are associated with white collar crimes:

Interpersonal Competitiveness: This type of personality is also known as the "competitive type". Beyond an average corporate competitor, these individuals cannot bear any form of loss and thrive on defeating their rivals and ascending to the top echelons of the corporate world.[140] These people are so obsessed in their drive to win, that they ignore ethics and morals in their quest. An ultra-competitive personality, placed in a competitive corporate setting, transforms into a reckless, ambitious, and egocentric achiever who holds no regard for anything except victory.[141] Competitive, ego-driven personalities exhibit cunning and deception and mask their criminal compulsions behind a facade of hard work and dedication.[142] Thus, while theoretically this theory explains white collar crimes, it is quite weak in terms of the evidentiary support. The theory is largely underdeveloped due to lack of empirical analysis.

Positive Extrovert: People who belong to this personality type can be described as talkative, spontaneous, alert, and also manipulative and egocentric.[143] These people exhibit superior social skills

[139] Tage Alalehto, *Economic Crime: Does Personality Matter?,* 47 INT.'L J. OFFENDER THERAPY & COMP. CRIM. 335, 335 (2003).
[140] John Braithwaite, *Whte Collar Crime,* 11 ANN. REV. SOC. 1, 1 (1985).
[141] JAMES W. COLEMAN, THE CRIMINAL ELITE 185 (2002).
[142] J.M. Collins & R.W. Griffin, *The Psychology of Counterproductive Performance, in* DYSFUNCTIONAL BEHAVIOR IN ORGANIZATIONS: NON-VIOLENT DYSFUNCTIONAL BEHAVIOR. 219, 226 (R.W. Griffin et al. eds., 1998).
[143] Tage Alalehto, *Economic Crime: Does Personality Matter?,* 47 INT.'L J. OFFENDER THERAPY & COMP. CRIM. 335, 335 (2003).

and friendliness. They use these traits effectively to make connections and commit crimes. They have a low degree of self-control and little patience for morals or ethics.

The Disagreeable Businessman: Stubborn in nature, the disagreeable businessman lacks the charisma for good leadership and is prone to fits of anger when things do not go as planned.[144] Such people do not have a charismatic personality like the positive extroverts. However, they too have extremely strong ambitions and have little patience with rules and ethics. Such persons are also highly likely of committing crimes.

The personality traits theory does not explain why all people with the abovementioned personality traits do not necessarily commit crimes. It also fails to demonstrate why people who do not exhibit these traits also commit white collar crimes. Finally, another problem associated with this theory is that it only explains individual crimes. White collar crimes like anti-competitive practices and securities fraud are committed through a collusion of multiple people. These people have different personality types and the personality traits theory does not explain how people with different personality types work together to commit white collar crimes.

V. GENERAL STRAIN THEORY AND WHITE COLLAR CRIMES

Agnew's General Strain Theory has been tested across a wide range of populations and on numerous criminal and analogous behaviours.[145] General Strain Theory is a fairly new theory. Earlier forms of this theory were squarely rejected. When Merton and Sutherland first presented their respective strain theory and notion of white-collar crime, their concerns and fundamental assumptions were completely

[144] J.M. Collins & F.L. Schmidt, *Personality, Integrity, and Wffte-Collar Cime: A Construct Vafidit Study,* 46 PERS. PSYCHOL. 295, 308 (1993).
[145] Lynne E. Langton, *Can General Strain Theory Explain White-Collar Crime? A Preliminary Investigation,* UNIV. FL. 2 (2004).

at odds with one another.[146] While Sutherland's primary focus was on the crimes of the socially elite and powerful, Merton and other classical strain theorists were busy delineating a causal path between low social class status and crime.[147] General Strain Theory explains white collar crimes by focussing on the notion that "monetary strain" is responsible for white collar crimes. According to this theory, white collar criminals are driven by the fear of falling, or in others words, the stress of losing what they have worked so hard to gain.[148] Proponents of this theory argue that the inability to legitimately achieve the desired monetary success is what prompts white collar crimes.

One criticism of this theory is that it explains crimes committed by people or individuals who are actually involved in the commission; it fails to explain crimes committed by corporates and other juristic persons.[149] However, the critics of this theory fail to take into account that juristic persons do not have the necessary mens rea to commit crimes. Thus, the crime would still be committed by a natural person, though behind the veil of a corporate personality. Another criticism levelled with this theory is that it only explains low level white collar crimes such as embezzlement, wire fraud and mail fraud. Organizational theories better explain antitrust and securities violations.[150]

VI. HIRSCHI AND GOTTFREDSON'S GENERAL THEORY OF CRIMES

This emerging theory starts from a distinction between crimes as events and criminality as a characteristic of people.[151] Because the evidence suggests that the essential properties of crimes are not money, success, reduction of frustration, or peer approval (as one or another modern theory would

[146] *Id.*
[147] RICHARD CLOWARD & LLOYD OHLIN, DELINQUENCY AND OPPORTUNITY: A THEORY OF DELINQUENT GANGS 56 (1960).
[148] Stanton Wheeler, *The problem of white-collar crime motivation, in* WHITE-COLLAR CRIME RECONSIDERED 108-123 (Kip Schlegel & David Weisburd eds., 1992).
[149] COLEMAN JAMES, FOUNDATION OF SOCIAL THEORY. CAMBRIDGE 78 (Harvard University Press, 1990).
[150] DAVID WEISBURD ET AL., CRIMES OF THE MIDDLE CLASSES: WHITE COLLAR OFFENDERS IN THE FEDERAL COURTS 542 (Yale University Press, 1991).
[151] Travis Hirschi & Michael Gottfredson, *Causes of White Collar* Crimes, 25 CRIMINOLOGY 949 (1987).

have us believe) and because versatility in offenders is an established empirical fact, all crimes must share other common properties that make them appealing to potential offenders.[152] This theory defines "criminality" as the tendency of people to pursue short term goals with no regard for the long term consequences. Markers for criminality included aggression, disregard for others and impulsivity. This theory disconnects crime from the setting in which it is being committed. Thus, it gives no importance to factors such as sociology, environment, wealth, poverty or personality. With reference to white collar crimes, this theory argues that white collar criminals show a lower propensity to commit crimes as compared to other criminals. This is because occupational requirements for white collar jobs are inconsistent with the traditional traits of criminality. This theory contends that it is obvious that only white-collar workers can commit white-collar crimes, but the fact that they do so cannot be taken as evidence of their criminality unless, first, other people are given the opportunity to commit the same crimes in the same setting, or second, other settings and crimes are construed, for purposes of comparison, to be equivalent to white-collar crime.[153]

Although this theory explains white collar crimes through generalization and not as an exception, there are some issues which have still been left unaddressed by this theory. For instance, it contradicts with other theories which predict a high rate of white collar crimes. Furthermore, the differentiation amongst white collar crimes is also not explained by the theory. This theory also fails to explain why educated people with power and resources choose to commit crimes at all.

Thus, from our analysis of the various theories, we observe that no one theory explains all aspects of white collar crimes successfully. Social scientists treat white collar crimes as exceptions. There is very little empirical study on this issue. Therefore, most of these theories do not enjoy strong statistical support.

[152] *Id.* at 959.
[153] *Id.* at 961.

REFORMATION

There is no straight forward answer to the question of predicting and preventing the growth of white-collar crimes.[154] The growth of corporate crime has prompted academics and legislatures to revise and strengthen their ideas on punishment for white-collar offenders. Deterrence and incarceration are two of the strategies which are commonly used for combating corporate crime.[155]

SENTENCING

The corporate scams of the 1980s which devastated Wall Street lent momentum to the issue of lengthening prison sentences for white-collar criminals.[156] By 2002, following the cases of Enron, World-Com, Global Crossing, and Tyco, the US legislature responded to corporate fears with the most sweeping prison reforms to date.[157] The Sarbanes-Oxley Act sets new maximum sentences for federal economic crimes such as fraud and wire-tapping.[158] More specifically, the Sarbanes-Oxley Act elevates prison terms on common corporate crime, increasing mail and wire fraud from five to twenty-five years, income security fraud from one to ten years, and conspiracy to commit corporate crime to five years behind bars.[159] The act creates provisions which sentences CEOs and CFOs to ten years in prison for knowingly certifying incorrect company records, and up to twenty years for "wilfully" certifying incorrect records.[160]

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[154] DAVID WEISBARD & ELIN WARING, WHITE-COLLAR CRIME AND CRIMINAL CAREERS 143 (2001).
[155] John Braithwaite & Gilbert Geis, *On Theory and Action for Corporate Crime Control,* CRIME & DELINQ. 292, 292 (1989).
[156] Frank 0. Bowman, *Pour Encourager Les Autres?: The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and Sentencing Guidelines Amendments That Followed,* 1 OHIO ST. J. CRIM. L. 373, 387 (2004).
[157] *Id.* at 392.
[158] *Id.* at 404-405.
[159] Sarbanes-Oxley Act, 2002, § 902-905.
[160] *Id.* at § 906(a). See also Kathleen F. Brickey, *From Enron to World-Corn and Beyond: Life After Sarbanes-Oxley,* 81 WASH. U.L.Q. 357, 376-382 (2003).

Advocates of increased sentencing hope that corporate wrong-doers "respond to what they see". In cases like Bernard Ebbers - sentenced to twenty-five years in prison for accounting fraud-and refrain from crime.[161] Imprisonment also creates "significantly" more shame and embarrassment for a perpetrator that other possible deterrents do not impose.[162] Further, white-collar criminals finally receive sentences reflective of the tremendous financial losses accrued in corporate crime that will closely mirror other non-violent crimes, such as drug dealing, which involve "disproportionately heavier" prison terms.[163]

However, longer sentencing may also cause clutters to already swollen prisons with "soft criminals," corresponding with a rise in prison costs for the government and either higher taxes or a shift in funding from other needy programs.[164] Moreover, the deterrent effect of longer sentencing represents a mere hypothesis, and no data exists proving that longer sentencing will ensure a significant drop in corporate crime.[165] Criminals willing to risk their reputations, fortunes, and livelihoods to commit serious economic crimes may care little about serving extra time for their crimes.[166]

MONETARY PENALTIES

Corporate employees and officials may be fined in a variety of ways, through criminal fines, civil fines, and civil judgments.[167] An effective fine accounts for the severity of the economic harm, the costs of investigation and prosecution, and the likelihood of capture.[168] For securities fraud, corporate

[161] Greg Farrell, *Sentence's Message: Crime Doesn't Pay*, USA TODAY, July 14, 2005, B1.
[162] Jennifer S. Recine, *Examination of the White Collar Crime Penalty Enhancements in the Sarbanes-Oxley Act*, 36 AM. CRIM. L. REV. 1535, 1548 (2002).
[163] Barry Boss, *Do We Need to Increase the Sentences in White-Collar Cases?: A View from the Trenches*, 10 FED. SENTENCING REP. 124, 126-127 (1997).
[164] Rachel Barkow, *Sentencing. What's at Stake for the State*, 105 COLUM. L. REV. 1276, 1289-1290 (2005).
[165] Geraldine S. Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 955 (2003).
[166] *Id*. at 956.
[167] Phillip S. Berg, *Unfit to Serve: Permanently Barring People from Serving as Officers or Directors of Publicly Traded Companies after the Sarbanes-Oxley Act*, 56 VAND. L. REV. 1871, 1896 (2003).
[168] Jennifer S. Recine, *Examination of the White Collar Crime Penalty Enhancements in the Sarbanes-Oxley Act*, 36 AM. CRIM. L. REV. 1535, 1545 (2002).

executives who commit insider trading can face fines exceeding USD 1 million or three times their earnings, as well as criminal fines.[169] The Sarbanes-Oxley Act fines CEOs and CFOs from USD 1 million up to USD 5 million for falsifying company records.[170]

Imposing monetary fines on the perpetrator carries the advantage of conserving governmental resources because the burden falls wholly on the offender.[171] There is a limit, even for the wealthiest offenders, where the fine will offset the value of committing the crime.[172] Maximizing the benefit of imposing fines demands no monetary ceilings to ensure that even the wealthiest criminals cannot escape unpunished.[173]

On the negative side, large corporate salaries, bonuses, and stock options paid to corporate heads can make fines seem trivial and ineffective.[174] Contractual loopholes may also allow corporate executives to avoid paying their fines by shifting the burden to company stockholders.[175] Moreover, in legislations such as the Sarbanes-Oxley Act, where criminal fines cap off at USD 5 million with no increases for inflation, the value and sting of the fine loses potency as the value of the dollar decreases with time.[176]

SHAMING

Recently, academicians have begun to perceive criminal shaming as a viable alternative to white-collar deterrents, as compared to incarceration or fining.[177] With shaming, "citizens publicly and self-

[169] Phillip S. Berg, *Unfit to Serve: Permanently Barring People from Serving as Officers or Directors of Publicly Traded Companies after the Sarbanes-Oxley Act*, 56 VAND. L. REV. 1871, 1896 (2003).
[170] Sarbanes-Oxley Act § 906(a).
[171] Jennifer S. Recine, *Examination of the White Collar Crime Penalty Enhancements in the Sarbanes-Oxley Act*, 36 AM. CRIM. L. REV. 1535, 1545-1546 (2002).
[172] *Id.*
[173] *Id.*
[174] Phillip S. Berg, *Unfit to Serve: Permanently Barring People from Serving as Officers or Directors of Publicly Traded Companies after the Sarbanes-Oxley Act*, 56 VAND. L. REv. 1871, 1896-1897 (2003).
[175] *Id.* at 1896.
[176] Michael D Silberfarb, *Justifying Punishment for White-Collar Crime: A Utilitarian and Retributive Analysis of the Sarbanes-Oxley Act*, 13 B.U. PUB. INT. L.J. 95, 100 (2003).
[177] Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 367 (1999).

consciously draw attention to the bad dispositions or actions of an offender" to create embarrassment for the crime committed.[178] Common shaming techniques imposed by judges include requiring offenders to purchase newspaper advertisements, put signposts on their property or bumper stickers on their car, or wear distinctive clothing proclaiming their crimes.[179] Shaming "destroys" an offender's good reputation, causing people not to trust the person and preventing the perpetrator from reaping "future gains" in that business.[180] In *United States* v. *Ritter*,[181] the defendant pled guilty to embezzling USD 6,000 from the federal bank that employed him.[182] The judge ruled that the defendant must notify all future employers of the embezzlement conviction.[183] The Sixth Circuit Court of Appeals upheld the sentence over the defendant's argument that the requirement would both ruin his reputation and infringe his First Amendment rights.[184]

As a positive, shaming provides a cheaper means of sanctioning criminals than imprisonment.[185] This lower cost stems from the fact that shaming often involves a private cost, which is usually borne by the person shamed.[186] The primary force in shaming involves the gossip, disapproval, and negative judgments of the members of the community, which costs the state virtually nothing.[187] Further, the stigma of shame hangs over the offender much longer than the burden of paying a fine.[188] The drastic effects of loss of reputation and good standing in the community could keep the perpetrator from

[178] *Id.* at 368.
[179] *Id.* at 367.
[180] *Id.* at 370.
[181] 118 F.3d 502 (6th Cir. 1997).
[182] *Id.* at 503.
[183] *Id.* at 506.
[184] *Id.*
[185] Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 366 (1999).
[186] David J. Skeel, *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1816 (1999).
[187] *Id.* at 1816.
[188] Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 371 (1999).

engaging in that business ever again and provides a powerful deterrent for potential white-collar offenders.[189]

As a potential drawback to shaming, some white-collar crimes, such as money laundering, do not require a relationship with the victim, meaning no reputation develops to destroy.[190] Moreover, shaming potentially adds nothing to the humiliation of the criminal process, which offers public searches, "perp-walks," and trials that leave no extra need for shaming to embarrass the accused.[191] Moreover, shaming brings different results depending on the size of the community,[192] The deterrent effect of shaming strengthens in smaller, tight-knit communities where individuals are more familiar with each other.[193] However, shaming might also create hidden costs as the price of monitoring the criminal to ensure the penalty persists could use up money and resources.[194] Finally, no evidence exists that shaming actually deters criminal behaviour.[195] The possibility exists that the offender will not feel embarrassed by the penalty, or that the criminal's skills will allow him or her to find a way around the punishment.[196]

RESTORATION

Llewellyn and Howse originally described the restorative encounter as one of "truth-telling" in which, both victim and offender "relate their stories of what has happened and their experience of the event"; the encounter, they said, is "the context in which everything else happens."[197] To the extent that there

[189] *Id.*
[190] John B. Owens, *Have We No Shame?: Thoughts on Shaming, "White Collar" Criminals, and the Federal Sentencing Guidelines*, 49 AM. U. L. REV. 1047, 1051-52 (2000).
[191] *Id.* at 1053.
[192] David J. Skeel, *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1811 (1999).
[193] *Id.*
[194] Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 372 (1999).
[195] *Id.*
[196] *Id.*
[197] Law Commission of Canada, Restorative Justice - A Conceptual Framework by Jennifer J. Llewellyn & Robert Howse (Ottawa: Law Commission of Canada, 1999) at 59.

is a prototypical restorative justice encounter, a sine qua nonis an admission of guilt or acceptance of responsibility by an offender, civil or criminal. Restorative justice is not in itself a way to determine guilt or innocence, but rather a process of "repair[ing] the harm done by the wrongful act."[198] An immediate problem with applying a restorative approach to white-collar crime is the percentage of white-collar offenders who even upon conviction, deny responsibility and guilt, although Llewellyn and Howse also note that a restorative system is "not interested in establishing guilt with a view to punishment" but rather in explaining what has happened so the wrongdoing can best be resolved.[199] Michael Benson, who studied the narrative strategies of white-collar criminals, found that above all else, they deny criminal intent; they manage to account for their behaviour in ways which result in "the perplexing ability of white-collar offenders to avoid being characterized as criminals even though they have been publicly convicted."[200] Part of the explanation is that, in white-collar crimes, what determines the criminality is the intent of the actor-"there is often relatively little disagreement as to what happened"[201] - and the denial of intent is an obvious defensive strategy.

In a white-collar crime, the only participants who "accept responsibility" may be those who plea-bargain their way to a lesser sentence by testifying against other colleagues, and it is difficult to see these kinds of offenders as having participated "voluntarily" in their justice proceedings. Two high-profile examples come easily to mind, one American and the other Canadian. Consider the case of Enron, the Houston-based energy trader whose 2002 collapse eliminated USD 60 billion U.S. in company stock, USD 2 billion in employee pensions, and thousands of jobs.[202] CEO Jeffrey Skilling

[198] DENNIS COOLEY, FROM RESTORATIVE JUSTICE TO TRANSFORMATIVE JUSTICE: DISCUSSION PAPER 3 (Ottawa: Law Commission of Canada, 1999).
[199] *Id.*
[200] Michael L. Benson, *Denying the Criminal Mind: Accounting for Involvement in a White Collar Crime* (1985) 23 CRIMINOLOGY 589, 585.
[201] *Id.*
[202] "Enron's Jeff Skilling Begins 24-year Prison Term," CBC News (13 December 2006), http://origin.www.cbc.calmoney/story/2006/12112/skillingprison.html.

was sentenced to twenty-four years and four months in prison for his part in fraud, conspiracy, and insider trading. Crucial to Skilling's conviction was the testimony of Andrew Fastow, the CFO.[203] Fastow himself was charged with ninety-eight counts of insider trading, money laundering, tax violations, and other offences; he received a six-year term after pleading guilty to two counts of conspiracy to commit fraud.[204] The former head of the U.S. Justice Department's task force on Enron explained the difference between twenty-four and six years: "those below Skilling all pleaded guilty to some offences, expressed remorse and in some cases, even went on to cooperate with the prosecution."[205] Fastow's lawyer described his client as having "undergone a transformation from a man in denial of what he did to someone desperate to make amends;" and Fastow himself told the court that he was "ashamed to the core."[206] But the context of the plea bargain he and his wife (and fellow Enron employee) struck with the U.S. government is unmistakably a coercive one: Lea Fastow had already started her two-year sentence on tax evasion when her husband reached his deal, and Mr. Fastow's term was delayed until she was released so that their two young sons would have at least one parent at home during the Fastows' incarceration.

Cooley has addressed the problem of coercion, noting that even when both victims and offenders consent to a restorative justice program, coercion operates on a more subtle level.[207] Cooley admits, however, that genuine voluntariness may be a standard that is too high to achieve.[208] For a moment, I would like to consider the offender him or herself in the case of a white-collar crime and the likelihood that he would walk a restorative path without being coerced into it. The traditional constituencies of

[203] *Id.*
[204] "Ex-Enron Executive Fastow Gets 6-year Sentence," CBC News (26 September 2006), http://www.cbc.ca/money/story/2006109/26/fastowprisonsentence.html.
[205] *Id.*
[206] Barrie McKenna, "'Ashamed to the Core,' an Ex-CEO Repents," Globe and Mail (27 September 2006) B 1-8.
[207] Dennis Cooley, From Restorative Justice to Transformative Justice: Discussion Paper (Ottawa: Law Commission of Canada, 1999) 37.
[208] *Id.*

restorative justice, as they have evolved in many jurisdictions, have often been citizens from the more vulnerable socioeconomic echelons-Aboriginal peoples or the young, for example. Some have also been geographically remote, such as the Canadian north or the Australian outback, where the expensive paraphernalia of the "flying court" can motivate a more community based (and more cost-effective) approach to justice. But the white-collar offender, among other qualities, is less likely to be young and socially malleable, or on the socioeconomic margins of society-and without the resources to mount a high-powered legal defence.[209] He or she, whether high or low profile to society at large, is not among the powerless.

For the white-collar offender, the threat of incarceration, financial loss, and public humiliation-or genuine repentance-may drive cooperation in the form of a guilty plea. But the literature suggests that the overall psychology and personality traits of white-collar criminals do not mesh well with the requirement of restorative justice that they acknowledge their actions as wrongful and come without coercion to a restorative process, one of the purposes of which is the restoration of social harmony. A study by Collins and Schmidt found that white-collar offenders tend towards irresponsibility, undependability, and disregard for social rules and norms; those authors characterize the overall psychological pattern as a lack of "social conscientiousness."[210]

Cooley has argued that the mainstream criminal process encourages many offenders "to be passive and to plead guilty in order to receive the most lenient sentence possible"; as a consequence, therefore, "their crime is objectified and abstracted from the social context in which it took place.[211] Writing in 1940, Sutherland theorized that it is the social costs of white-collar crime that are the most damaging.

[209] Colleen Anne Deall & Roberta Lynn Sinclair, *The Effect of Police Investigation Time on Sentence Disposition in White-Collar Theft and Fraud Cases* (2003) 1 CAN. J. POLICE AND SECURITY 163.
[210] Judith M. Collins & Frank L. Schmidt, *Personality, Integrity, and White Collar Crime: A Construct Validity Study* (1993) 46 PERSONNEL PSYCHOLOGY 295, 296.
[211] Dennis Cooley, "Restorative Justice in Canada: Lessons Learned" (Presented at the Practical Approaches to Appropriate Dispute Resolution Conference, Canadian Bar Association, Vancouver, 8-9 March 2002) 8.

Economists call them "externalities": "A side-effect or consequence (of an industrial or commercial activity) which affects other parties without this being reflected in the cost of the goods of services involved."[212] But according to Sutherland:

> "The financial loss from white-collar crime, great as it is, is less important than the damage to social relations. White-collar crimes violate trust and therefore create distrust, which lowers social morale and produces social disorganization on a large scale. Other crimes produce relatively little effect on social institutions or social organization."[213]

In the aftermath of the "Enron et. al." cases of 2001-2004, Friedrichs adds to the "extraordinary" financial costs this series of scandals has posed the "somewhat more abstract but very real costs [of] enhanced physical and mental distress for those most directly affected; erosion of trust in major institutions; and the intensification of inter-group resentment and conflicts.[214]

In a milieu of social distrust and resentment, it may also be that the victims of white-collar crimes are themselves unlikely to seek restoration rather than retribution, feeling *schadenfreude* rather than empathy for the fallen CEO. Restorative justice scholar Braithwaite admits it is true: "our nature is to want comeuppance for those who wrong us."[215] When Lacroix received his precedent-setting twelve-year sentence in Quebec, those present in the courtroom applauded.[216] Addressing this reality at a conference on securities enforcement in Ontario, one shareholder activist stated that many investors who have been deeply hurt by securities frauds "desperately want to see offenders sentenced to jail.[217] In the Black case, the sentence awarded was significantly lower than what the prosecution had asked for (nineteen to twenty-four years), and the shareholder value of Hollinger largely vanished over the

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213 Edwin H. Sutherland, *White-Collar Criminality* (1940) 5 AM. SOCIOL. REV. I 5.
214 David Friedrichs, *Enron et al.: Paradigmatic White Collar Crime Cases for the New Century* (2004) 12:2 CRIT. CRIM. 113, 115.
215 *Id.*
216 Sean Silcoff, "Longest Term Meted Out for Security Fraud" National Post (29 January 2008).
217 *Id.*

course of the investigation and prosecution. Yet some victims of the crime expressed satisfaction with the personal outcome for Conrad Black:

> "The criminal convictions alone have provided sufficient returns on their investment. In the case of Herbert Denton, an investor and director of Sun-Times Media, seeing Lord Black behind prison bars was more important than recovering the millions of dollars he has allegedly fleeced from shareholders."[218]

As Cooley explains, in the course of restorative justice practice, "elaborate **protocols** have been developed to deal with the issue of coercion" in the pursuit of a restorative justice encounter.[219] He lists them:' almost all restorative justice programs are voluntary; participants must give "informed consent"; participants may withdraw; and participants may bring supporters to a restorative encounter. But, first of all, where a society chooses to prosecute white-collar offenders criminally-rather than encourage a regulatory, tort law, or other approach to the harm they do-all stakeholders party to whatever justice process may ensue will have been coerced to the table without a restorative option. And, second, the willingness of white-collar crime victims to seek a restorative encounter with an offender, rather than watch retribution take its course, cannot be taken for granted.

VII. CONCLUSION

Post the Enron scam, white collar crimes received renewed attention from sociologists across the world. However, the lack of empirical research makes it problematic to rely on any one theory. Empirical research is hard to find in this field of study because perpetrators of most white collar crimes

[218] Teresa Tedesco, "The Hollinger Story: 'Left Out to Dry' National Post (8 December 2007) FP7.
[219] Dennis Cooley, *Restorative Justice in Canada: Lessons Learned* 10 (Presented at the Practical Approaches to Appropriate Dispute Resolution Conference, Canadian Bar Association, Vancouver, 8-9 March 2002).

such as embezzlement, wire, and bank frauds are never apprehended. It is only the bigger crimes such as Enron, Sharda scam or the Satyam scam which receive attention.

There is no consensus among sociologists and criminologists with respect to the causes for white collar crimes. Several theories have been propounded to explain the nature and causes of white collar crimes. Although the Personality Theory and the Generalized Theory are relatively new, they offer valuable insight into the causes for white collar crimes. Another problem which persists in the study of white collar crimes is the methods of prevention and controlling white collar crimes.

The Sarbanes-Oxley Act focuses on incarceration as the preferred means of curbing white-collar crimes. Fines are still not an optimal method of punishment, given the maximum caps, contractual loopholes, and the lack of long-term consequences. Criminal shaming offers some solutions, but, as of yet, these results are untested. While more stringent laws provide a step towards tempering white-collar crime, it is too soon to accurately assess the results of the latest measures to stop corporate crime. Similarly, proponents of restorative justice also acknowledge that there are situations in which the success of a restorative approach is limited. An offender, a community, or a victim may be unwilling or unable to participate restoratively. The question of what to do in the case of the unrepentant sinner, the unremorseful offender, remains an open one.[220] One could also raise questions about the inequalities of the marketplace and the disparate power that exists between corporations and individual victims of corporate crime. Finally, there is a consistent concern in the literature on restorative justice that the process might "re-victimize" victims, through coercing them to participate, to engage offenders, to forgive.[221]

[220] *Id.*

[221] Bruce P. Archibald, *Coordinating Canada's Restorative and Inclusionary Models of Criminal Justice: The Legal Profession and the Exercise of Discretion under a Reflexive Rule of Law* (2005) 9 CAN. CRIM. L. REV. 215, 242.

There are also specific jurisdictions, the United States in particular, where various socio-political barriers exist to restorative justice. Beale identifies three current barriers: first, the market-driven media, its focus on crime, and the anxiety about public. safety which it triggers; second, the political rewards available to those who play the 'crime card'; and third, sentencing reforms which focus on the uniform and proportionate treatment of an offender rather than the harm to all stakeholders which he or she has caused.[222]

The media depiction of white collar crimes and the general public perception of the same lend more favourably to retribution rather than reformation or restoration. While there is no straight forward solution to this issue, use of reformation methods of imprisonment, fines and public shaming along with increased participation of the offenders and the victims can go a long way. With increasing number of prosecutions in the areas of white-collar crime, only the passage of time will allow the determination to be made as to where, at what pace, and how restorative and reformative justice initiatives take shape.

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[222] Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States* (2003) UTAH L. REV. 413, 413.

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REPORTS

STATUTES

6. ISSUES BETWEEN BANGLADESH AND MYANMAR

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ABSTRACT

Being a neighboring country Myanmar has always been left out of discussion due to some tensions between these two countries. In this current paper, the researcher will investigate the major challenges of bilateral relations between these two countries. What can be done to minimize the challenges for healthy bilateral relations? In addition, what are the implications, benefits, and opportunities ahead of healthy relations?

I. INTRODUCTION

Bangladesh and Myanmar share 271 kilometers of land borders to the Southeast of Bangladesh. However, other parts of Bangladesh are surrounded by India and Sea (GlobalSecurity.org, 2012, p. 1). However, being a next-door neighbor Bangladesh and Myanmar have great historical, geo-strategic, geographical, economic, religious, social, and cultural affinities in their relations. Except for land border, Bangladesh also shares the river and maritime boundary with Myanmar. Besides, after the first Anglo-Burmese War (1824- 1826), Arakan became the first British Territory on the Burmese region (Morshed). This colonial rule continued to rule until the Second World War (Hossain, 2016).

During the colonial rule of British, Japan helped to establish the Burmese Independent Army (BIA) in assistance with the Army General Aung San (Father of Aung San Suu Kyi). There is substantial evidence that Netaji Subhas Chandra Bose (Indian Nationalist Leader based on West Bengal, India) and General Aung San has underground meetings to free their own countries from the British Colonial

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rule. In Second World War, the British Colonial Ruler surrendered to Japanese and Burmese Independent Army (BIA) in Myanmar. From 1942 to 1945 Capital Rengun (that time Burma) was under the control of Japanese Army. Meanwhile, the Burmese Independent Army (BIA) forced the Japanese Army to leave Burma (Hossain, 2016).

On the other hand, after the victory of Bangladesh from Pakistan (then West Pakistan) on 16 December 1971 Myanmar recognized Bangladesh on 13 January 1972 and the first delegation of Bangladesh officially visited Myanmar in early May 1972 (GlobalSecurity.org, 2012, p. 1). That was the second state visit of the foreign minister of Bangladesh. However, the first visit was in India. Until now substantial numbers of agreements, treaties, and MoU's were signed between Bangladesh and Myanmar in different times on different issues.

However, since the independence of Bangladesh to till date the relation between Bangladesh and Myanmar has never been smooth rather undergone frequent ups and downs. For Bangladesh, Myanmar is the potential land route to East Asia (Thailand, Cambodia, Malaysia, and Singapore); and for Myanmar, Bangladesh is the potential land route for (China, Pakistan, Mainland India, Afghanistan, Nepal, and Bhutan). With the certain strategic positions, Bangladesh and Myanmar can gain 'win-win' benefits by exchanging transits (Rahman, 2014, p. 2).

Burma (now Myanmar) becomes independent on 4th January 1948. Since the liberation of this country military junta governments continued to rule until 30 March 2010. Except for China and Thailand this country didn't maintain any bilateral and multilateral relations with many countries for decades. In addition, in April 2011, Myanmar first formed the democratic government and on 30 March 2016 Myanmar's first democratic president take the oath (Prothom Alo, 2016). Since 2011, Myanmar has opened the door for the development partners and investors. However, it is still going through dramatic changes (Yesmin, 2013).

Different issues are dominating relations between Bangladesh and Myanmar. For instance- Rohingya refugee issue, illegal trade, and investment, trafficking, land border management, maritime boundary issue, etc. (Rahman, 2014, p. 2). There have been hostilities and sometimes-illegal border killings. According to some sources around 28,000 registered Rohingya refugees living in two Rohingya camps in Bangladesh. And around 300,000 Rohingyas are living among the local population in Cox's Bazar District and small numbers in Chittagong Hill Tracts (The Daily Star, 2011). The smuggling of narcotics in the Bangladesh-Myanmar border has become a critical issue. In addition, many investors have invested in Myanmar for producing narcotics targeting Bangladeshi local market. At this point, it is the major challenge to minimize the threats of bilateral relations and accept the concerns for both the countries. The policy makers have to take the pragmatic decisions to strengthen cooperation between two countries (Rahman, 2014, p. 6).

OBJECTIVE OF THE STUDY

The basic objective of the paper is to investigate the major challenges of the relations between two countries (Bangladesh and Myanmar) keeping it front the major political changes in Myanmar. In addition, by minimizing the challenges what are the implications and opportunities ahead for both countries?

HYPOTHESIS AND RESEARCH QUESTION

The hypothesis of my paper is if the policy makers take pragmatic decisions on different issues relating the relation between Bangladesh and Myanmar then that will help to build the dynamic relation between these two countries. The main research question will be, what are the challenges for the healthy relations between Myanmar and Bangladesh? In addition, what can be done to minimize the challenges of the relationship between these two countries?

METHODOLOGY

The methodology of this paper is analytical in nature. Both primary and secondary data have been used for this research paper. Relevant books, journals, newspapers, published articles, survey reports, working papers, and internet sources are used in order to make this research paper informative and descriptive.

THEORETICAL FRAMEWORK

In this paper, the researcher will explain the policy makers and the institutions related to the relation between Myanmar and Bangladesh are dominated by 'realist' view. However, if the policy makers take the pragmatic 'idealist' decision the relation can be batter and the both can gain 'win-win' position from strengthening the relation.

The realists are dominated by the idea of power. Likewise, national interest dominates the politics. In addition, historically humanity is by nature sinful and wreaked. Lust for power and dominance has been a major, all-important and all-pervasive fact of human nature. The struggle for power is the incontrovertible and eternal reality of international relations. Nations always seek power, demonstrate the power and use power (Moseley, 2016). This type of mentality of the political leaders of the both countries made this relation worthy of reconstruction.

On the other hand, the 'Idealist Approach' advocates morality as the means for securing the desired objective of making the world an ideal world. It believes that by following morality and moral values in their relations, nations can not only secure their own development but also can help the world to eliminate war, inequality, despotism, tyranny, violence and force (Wilson, 2012). Unlike the relation between Bangladesh and Myanmar, India has solved different problems and disputed issues by taking pragmatic and idealist decision. My argument would be realist decision related to the bilateral relation

between Myanmar and Bangladesh are hampering the gain and output. In this case taking the example of India-Bangladesh bilateral relations, Bangladesh-Myanmar can gain from their relations.

II. POLITICAL HISTORY OF MYANMAR

Bangladesh and Myanmar have common historical heritage and political legacy. Since the independence of Bangladesh, both countries followed cordial relations. However, the Rohingya issue and border management remained crucial. On the other hand, at the present times, the political reform and shift in Myanmar government raised hope for greater integration and development of relations.

There has been the Military rule and so-called 'Burmese way to socialism' since 1962 hampering the foreign relations of Myanmar. In 1988, State Law and Order Restoration Council (SLORC) was established by the military government. In May 1990 multi-party national election and National League for Democracy (NLD)'s performance under the leadership of Aung San Suu Kyi take attention of the world to Myanmar. However, under the indirect military rule in Myanmar, there were State Peace and Development Council (SPDC) was established in 1997 (Yousuf).

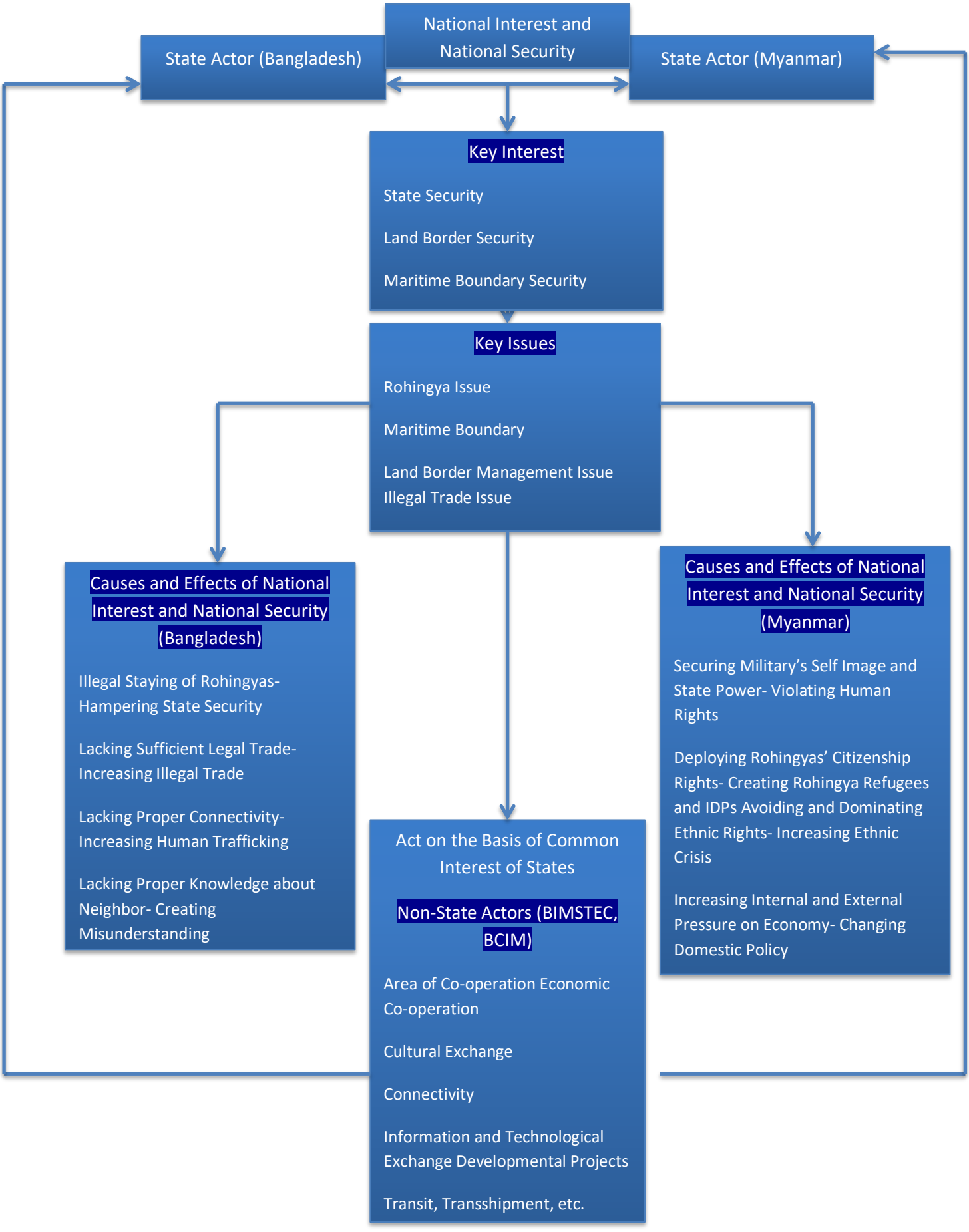
On the other hand, under the pressure from national and international military dictators were bound to take the fundamental reform initiatives for democracy in Myanmar. In August 2003, there was landmark seven-point roadmap to democracy reform. In 2008, there was a referendum on the civilian president in the constitution. In 2010 general election there was the first civilian government in 50 years of country's history. In 2011 under the political reconciliation there was the release of Suu Kyi and political prisoners, electoral legislation, the peace agreement with armed ethnic groups. In addition March 2016 there was the first civilian President in Myanmar.

III. BANGLADESH-MYANMAR RELATIONS

Due to this changes in political situations in Myanmar, there have been significant changes time to time in Bangladesh-Myanmar relations. From 1972 to 1985 there have been three significant agreements signed by both governments. The (i) General Trade Agreement (3 August 1973), (ii) Repatriation of Refugee Agreement (1978), and (iii) Land Boundary Agreement (1979) were the milestones of Myanmar-Bangladesh relations.

However, due to the political situations in Bangladesh and Myanmar, there were no significant developments in relations between these two countries. However, from 1989 to till date due to the changes in internal politics of both countries the situation have changed. On 1st June 1989, there were three significant MoUs were signed for economic cooperation, border trade, and cooperation between private sectors (GlobalSecurity.org, 2012). Promised upon these agreements and MoUs Myanmar and Bangladesh started border trade in 1995.

On the other hand, the figure bellow describes the different dynamics and facts of Bangladesh-Myanmar relations. Here, national security and interest are the dominant factors of bilateral relations between these two countries. Besides, key interests are the internal security of the state, land border, maritime boundary, economic status and power competition in the region. Similarly, issues like Rohingya, illegal border trade, human trafficking are the key to the bilateral relations. This figure also depicts that the state actors are acting with each other in a realist way focusing the issue of security and power. But the argument of my paper is to the state actors have to be pragmatic and idealist. In this case, the non-state actors (BIMSTEC, BCIM, etc.) can play a vital role. Furthermore, economic cooperation, cultural change, connectivity, IT skill exchange, development project implementation for transit and transshipment could be the area of cooperation.


National Interest and National Security
State Actor (Bangladesh)
State Actor (Myanmar)
Key Interest
State Security
Land Border Security
Maritime Boundary Security
Key Issues
Rohingya Issue
Maritime Boundary
Land Border Management Issue
Illegal Trade Issue
Causes and Effects of National Interest and National Security (Bangladesh)
Illegal Staying of Rohingyas- Hampering State Security
Lacking Sufficient Legal Trade- Increasing Illegal Trade
Lacking Proper Connectivity- Increasing Human Trafficking
Lacking Proper Knowledge about Neighbor- Creating Misunderstanding
Causes and Effects of National Interest and National Security (Myanmar)
Securing Military's Self Image and State Power- Violating Human Rights
Deploying Rohingyas' Citizenship Rights- Creating Rohingya Refugees and IDPs Avoiding and Dominating Ethnic Rights- Increasing Ethnic Crisis
Increasing Internal and External Pressure on Economy- Changing Domestic Policy
Act on the Basis of Common Interest of States
Non-State Actors (BIMSTEC, BCIM)
Area of Co-operation Economic Co-operation
Cultural Exchange
Connectivity
Information and Technological Exchange Developmental Projects
Transit, Transshipment, etc.

CHALLENGES IN BILATERAL RELATIONS

The researcher has already mentioned that these two countries have shared many common histories due to this common British Colonial Rule (Arakanrivers, 2011). The Prime Minister of Bangladesh Sheikh Hasina visited Myanmar in 2011 for strengthening bilateral relations and mutual trade between two countries (Rahman, 2014, p. 16). The Myanmar envoy is yet to visit Bangladesh since 1988. In addition, Bangladesh and Myanmar are the founding members of BIMSTEC are one of the successful regional organizations of trade. Despite all these facts contentious issues have also at times, overshadowed Bangladesh-Myanmar relations.

ROHINGYA ISSUE

Since the 1990s, the bilateral relations between these two countries have disrupted by the Rohingya issue. This issue has been a security concern for both of the countries. Most of the radical Islamist militant groups active in that region have been threating both the governments for this issue. In addition, the undocumented Rohingya people living in Bangladesh are engaged in illegal activities like arms dealing, human trafficking, drug trafficking, etc. (Bangladesh Enterprise Institute, 2013). On the other hand, there have been a reported number of cases that these Rohingya people are collecting Bangladeshi passports and going to the Middle Eastern countries and their activities are affecting the image of Bangladesh in the international arena.

Figure: Location of Rohingya (Arakan State, Myanmar and Cox's Bazaar, Bangladesh) (Rahman, 2014, p. 17)

The above map shows the geographic location of the Rohingya populated area. For this change in any issue in Myanmar, there is an impact on Bangladesh and vis-à-vis. There have been violent riots in Myanmar and forced migration lead people to come to Bangladesh. However, this current democratic government has to take initiative about this issue. The problem-solving capability of this government will increase their goodwill to international arena (Bashar, 2013).

MARITIME BOUNDARY

The debate between Myanmar and Bangladesh about their maritime boundary has been long standing. However, the International Tribunal For The Law Of The Sea has resolved these issues on 14 March 2012 (INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, 2012). This is one of the positive developments of the relations between two countries. This maritime boundary issue has been affecting the relations between two countries. There have been a reported number of the abductions of fishermen from Bangladesh by Myanmar security forces, exchange of bullets by both parties, and much more (Bissinger, 2010). Now it is time both the governments to act pragmatically.

LAND BORDER MANAGEMENT

There have been a number of disputed areas of land border management between Myanmar and Bangladesh. These two countries have mutually agreed that Myanmar can build 40 kilometers of border fence just to stop the illegal trade of drugs from Myanmar. In addition, the evidence shows that the Rohingya people are being widely recruited for carrying drugs (The United Nations office of Drugs and Crime, 2013). In addition, Rohingya militant groups are major security concerns for Bangladesh. These groups have the network and beyond the control of any of the governments.

TRADE BETWEEN TWO COUNTRIES

Being the neighboring country the trade haven't reached the expected level. In addition, until now the trade relation between two countries have been dominated by Myanmar. And which is not good for bilateral relations. Moreover, there are three types of trades between these two countries. They are- official trade, border trade, and informal trade (Yousuf A. S.).

Since Myanmar used to be a closed economy, Bangladesh couldn't get the advantage of the market of the Myanmar. Since the change of the political leadership and economic liberalization situation have changed. In addition, Myanmar government has agreed to export electricity to Bangladesh. Though there are some challenges due to Rohingya conflict and other border issues, both the countries should expand the helping hand toward each other (Rahman, 2014).

However, if we track the following table we will see, until now the trade relations between Bangladesh are being dominated by Myanmar. The table explains the imports and exports of Bangladesh and Myanmar from 2005 to 2013. The trade volume between these two countries has reached almost 100 million US dollars. Likewise, the nature of trade volume went through ups and downs in the course of time. Export to Myanmar from Bangladesh has always increased from the previous years except for the year 2010-11. On the other hand, import from Myanmar has always been through the ups and

downs. So it is evident that trade relation between these two countries didn't follow any pattern. The pattern went through ups and downs. In 2010-11 there was the maximum trade gap (1:18.67) and the lowest gap was in 2006-07 (1:3.46).

Table 1: Bangladesh Myanmar Trade Statistics (Dhaka Chamber of Commerce and Industries, 2014) Values in Million Tk. (Million USD)

Year	Export	Import	Trade Ratio
2005-06	346.13 (5.14)	1983.6 (29.57)	1:5.75
2006-07	409.35 (5.93)	1419.4 (20.56)	1:3.46
2007-08	658.56 (9.6)	7944.5 (115.81)	1:12.06
2008-09	632.96 (9.2)	4885.5 71.01	1:7.72
2009-10	693.87 (10.03)	4818.9 (69.65)	1:6.94
2010-11	688.14 (9.65)	12847 (180.51)	1:18.67
2011-12	1063.97 (13.45)	5161.5 (65.25)	1: 4.85
2012-13	1092.51 (13.67)	6703 (84)	1:6.14

CONNECTIVITY

Having 271 kilometers of the boundary, still there is no way inland to travel to Myanmar from Bangladesh and vis-à-vis. Only way Bangladeshi citizens can travel to Myanmar through different land borders from Thailand. Or the travelers have to take the expensive air flights (BD Tours, 2016). In addition, there are also restrictions for the foreigners traveling in the country and want to cross the border of Bangladesh and Myanmar. This is one of the major obstructions of 'people to people' connectivity.

Similarly, connectivity is considered one of the important dimensions of the bilateral relationship. In addition, due to the military government in Myanmar and state monopoly in road construction works the connectivity remained far cited. However, due to the change in national politics and liberal economic policy Myanmar has concentrated on building road networks (Ahmad, 2013). Likewise, in 2007, Bangladesh and Myanmar agreed to construct 25 km road. This road can link Bangladesh to Kunming, China through Myanmar internal link roads. In addition, there is a proposal of building the bridge over river Naaf for better connectivity in the border are of Bangladesh and Myanmar (Hassan, 2012).

On the other hand, Bangladesh has taken into consideration on the proposal of Myanmar Government to play '25 small capacity' of non-conventional small vassals between Sittwe, Myanmar, and Teknaf, Bangladesh. In addition, the proposal of establishing links between Chittagong Sea Port and Sittwe Sea Port is under consideration (Hassan, 2012). In addition, after the state visit by Prime Minister Sheikh Hasina in 2011 in Myanmar the direct air flight between Dhaka/Chittagong to Yangon has been started. Moreover, the proposal from Bangladesh Government, building Teknaf-Maungdw-Sittwe link road on the plain land across the coast of Bay of Bengal, is under consideration of Myanmar

Government. Except for these bilateral initiatives Bangladesh and Myanmar are also involved with South Asian and East Asian regional organizational initiatives and networks.

ENERGY SECTOR

Myanmar's hydropower projects are still untapped. In addition, most of the rivers in Myanmar run from north to south and they are, the Ayeyarwaddy (Irrawaddy), Chindwin, Sittaung, and the Salween. According to the Director General of the department of Hydroelectric Power and Dams, U Win Kyaw, "with eight major schemes under construction and 16 more planned, Myanmar is a major program of hydropower development. The Government regards hydropower as a priority, both to meet domestic needs and to export to neighboring countries. With only about 2 per cent of hydro resources currently developed, there is much work ahead". The total potential is estimated to be a gargantuan 100,000 MW and Naypyidaw understandably have plans for a big target of 35,000 MW for the future (Dhiya & Behuria, 2012).

In September 2010, there was a MoU between Myanmar and Bangladesh to build two new dams in Arakan State, Myanmar. The locations of these dams are in Marmchaung (Michuang) and (Lemro) areas. There was a commitment of supplying of electricity from those power plants to Cox's Bazaar district of Bangladesh. The total expected quantity of electricity is 575 megawatts. However, no timetable and no structured have ever been disclosed (Yousuf & Rahman, 2013). In addition, Thailand, China, and India invested in Myanmar's hydroelectric power projects but Bangladesh has missed the chance. Bangladesh could have ensured 2000 megawatts of electricity from these projects.

NATURAL RESOURCES

After the 2010 general election democratization of Myanmar government system and opening up the economy has increased the opportunity for investment. In addition, The Sanskrit name Suvarnabhumi,

meaning "Golden Land" has been associated with Myanmar for over two millennia (Allan & Berger, 2013). Today, Myanmar's natural resources include oil and gas, various minerals, precious stones and gems, timber and forest products, hydropower potential etc. Of these, natural gas, rubies, jade, and timber logs are the most valuable and currently provide a substantial proportion of national income.

ETHNIC CONFLICTS

From 1962 to 2015 there has been this military government in Myanmar and which have provoked the separatist movement in Myanmar. In addition, until now any major treaties between the government of Myanmar and major ethnic groups have never been implemented. For this reason, the separatist movement progressed in different parts of the country. At present the major problem of Myanmar (national and international) is Rohingya. Here Bangladesh is the direct stakeholder with this conflict. In addition, there have been 15 different groups fighting against the Myanmar government. For instance- Kachin Independence Army (KIA), Shan State Army (SSA), and much more. The military junta government didn't care for the ethnic minorities they have concentrated only 68% of Burmese (majority) total population those are Burmese in origin (Hossain, 2016) (Insight on Conflict, 2016).

TRADING OF ILLEGAL DRUGS IN BORDER AREA

The evolution of drug trafficking in the 'Golden Triangle' has forged new transport routes in the region and has brought abandoned routes back into service, such as those previously used by communist guerrillas. Other pathways were never abandoned. Traditional caravaners such as the 'Haw of Thailand' and Hui (Panthay) of Burma are very active in the regional illicit drug trade, and still use routes today that their forebears used at the end of the 19th century (Rahman, 2014, p. 60). Bangladesh is one of the attractive points for drug smuggling. National governments, ASEAN, UNODC, and

NGOs are working hard against trafficking and smuggling but to achieve the significant result the government has to address its causes. The following table explains about the illegal drugs seizure in Bangladesh.

Table 2: Narcotic seizure statistics in Bangladesh

Name of The Drug	Unit	2006	2007	2008	2009 (April)
Heroin	kg.	16.288	20.856	29.013	21.19
Charash	kg.	0.26	-	0.125	240
Popy Plant	No.	-	60038	-	1450210
Illicit Distillation	Liter	23582.2	22959.4	23597.6	22671.05
Codeine (Phencidyl)	Bottle	46995	28241	53239	58875

Source: (BIPSS, 2010)

ARMS TRAFFICKING ROUTE

Except for drug trafficking this area has faced decades of conflicts and wars and it is still going on. Bangladesh and Myanmar are the countries of the trading route of small arms. This is a major security concern for the countries in the South Asia and South East Asia Region. The following graph shows the arms trading routes in different countries (Rahman, 2014). From the graph, we can see the small arms comes to Bangladesh from Afghanistan, Pakistan, China, Thailand, Cambodia, Malaysia, and Singapore. As already mentioned, this is considered as a safe station to the small arms smugglers. After docking in Bangladesh stations those small arms go to their desired destination (small group insurgents) in Sri Lanka and Northeast parts of India. And both destinations are crucially important for strategic positions for India and China. And it is considered one of the major security concerns for India, China, and Bangladesh.

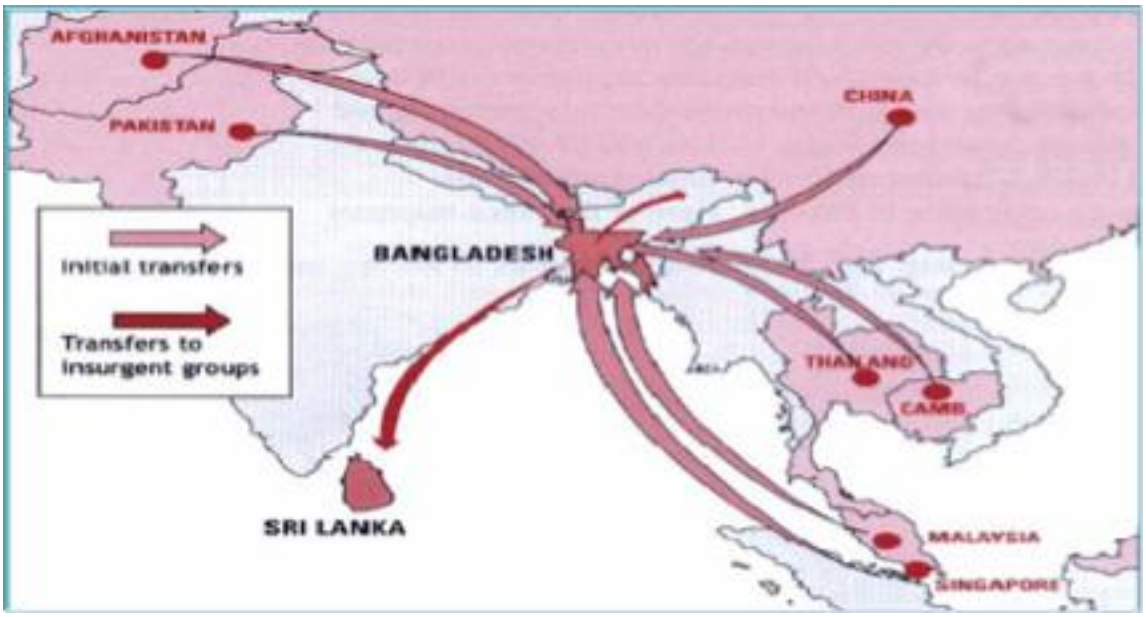


Figure: Arms Trafficking Route Through Bangladesh (Rahman, 2014, p. 62)

GARMENTS INDUSTRY

Myanmar has become the competitor of the Bangladesh in Garments industry. The tragedies of Rana Plaza and Tazreen fashions have downgraded the image of Bangladesh in the international labor market. For this region, USA has cut the GSP status from Bangladesh. On the other hand, Myanmar has got the GSP status from EU for their reputation of cheap labor (Rahman, 2014).

Except for these issues, there are some other issues like- buildings up of infrastructure for garments industries, transit issues between Myanmar and Bangladesh. Now it is high time to address the issues and take necessary steps since there is the democratic government is in the power of Myanmar. They have to think about the development of the country and the people.

IV. LAND BOUNDARY AGREEMENT BETWEEN INDIA-BANGLADESH

In June 2015, India and Bangladesh have made a landmark in the history of International politics (Bhari, 2015). They have solved the issues of the enclave and adverse possessions. This is one of the major examples of pragmatic idealist politics in international relations. This agreement made the history between the relations between two countries. It has proved that the integration is possible with the help of law and treaty. I would say most of the issues between Myanmar and Bangladesh are similar in nature. In this case, I would say the pragmatic decision from the policy makers from both countries would solve the problem. In this case, realist decision will not bring any fruitful development as it has shown in the last few decades. Now it is time to move forward (The Indian Express, 2015).

V. SOLUTIONS

From the above discussion, it is now evident that 49 years of junta rule has made the country less development of political institutions, less democratic polity and more vulnerable to the separatist. As a close neighbor of Myanmar, Bangladesh has also suffered some implications of the activities and policies of Myanmar government. In addition, the recent development of Myanmar's internal government made the world hopeful for changing the situation. In this changing situation, Bangladesh has to be watchful about selecting schemes with Myanmar and negotiating its benefit.

The major issue dominates the relation between Myanmar and Bangladesh is Rohingya issue. In addition, most of the issues are discussed above have a direct and indirect link with the issue of Rohingya. If this issue is resolved then the majority of the issue will be resolved easily. To resolve the issue high-level talks are necessary. It was not possible to negotiate with the military government of Myanmar nor were they interested. In addition, after the change in 2010 election in Myanmar National League for Democracy (NLD) lead by Suu Kyi has formed the government. Likewise, after forming

the government in 2016 NLD government declared its activities for 100 days. In those activities, the government lead by Suu Kyi emphasized on the issues related to ethnic conflicts resolution, free media, realizing state prisoners under political consideration, and economic development (Hasan, 2016). Now there is a hope for resolving the issue. In a democratic process, but it takes time. However, through the help of the negotiation, international organizations, and treaty this problem can be solved.

On the other hand, the route for drug trafficking has to be taken under control by the security forces of the both countries. Otherwise, this will create another tension between them. In addition, a joint force can be formed comprising the security forces of the two countries to minimize/ stop illegal drug trafficking. About the illegal small arms dealing, some literature says it is beyond the control of the governments. However, in this case, the governments have to seek international help for stopping illegal arms dealing in that region. Since this is one of the major security concerns they can ask help from UN bodies.

The relation between the two countries, India is another major actor. The relation of Myanmar and Bangladesh is also the major security concern for India. Since all the three countries share the border. In this case, I would suggest both the country should take the consent from India or if possible involve India with their plans. This would be a pragmatic decision from the policy makers of the both countries.

Since the government of Myanmar has opened their border and economy for international investors. Bangladeshi private investors can take the opportunity. Moreover, Bangladesh government can provide lone to the private investors to invest in Myanmar. On the other hand, Bangladesh has to open the economy for Myanmar investors too. This will make the balance and establish 'win-win'.

From the literature, it is evident that different Islamic militant groups are active in the Myanmar and Bangladesh border. Since, Myanmar is a pro-Buddhist country the Islamic Militant groups are calling for 'Jihad' in Myanmar, which is alarming not only for Myanmar and Bangladesh but also in South Asia and South East Asia. Bangladesh has addressed the security concern for India and I hope Bangladesh will address the security concern for Myanmar. If they can do this, the border integration is possible since it has happened in the case of India.

On the other hand, without proper rail, road, water, and air connectivity bilateral relations are 'good for nothing'. To take the most advantage of the bilateral relation between Myanmar and Bangladesh both the countries have to develop the infrastructure in the border area. If they can do this, the border link will develop along with trade and transit. And about the transit, Myanmar can be the land and water getaway for Bangladesh to South East Asia. For the proper implementation of the transit policy proper survey is required. There can be another 'motor vehicle agreement' between Bangladesh and Myanmar as it happened among Bangladesh, India, Bhutan and Nepal (Government of India, 2015).

Tourism, land border ports and customs houses in the border of Myanmar and Bangladesh will bring another significant expansion in their bilateral relations. In addition, there are no treaties of prisoners exchange between two countries. This is another important instrument to strengthen the relation between the neighbors. Likewise, there is no data of illegal migration from Myanmar to Bangladesh or Bangladesh to Myanmar. Governments have to come forward and take the initiative to minimize these issues.

Last but not the least, at the present time bilateral relational development between India and Bangladesh is one of the best examples of bilateral relations among states around the world. Bangladesh and Myanmar can take that bilateral relation as the standard and can improve their relation. For this, the policy makers have to take pragmatic and idealist decision.

VI. OPPORTUNITIES AHEAD

International communities including USA and EU have appreciated the recent political developments in Myanmar and they have uplifted the sanctions from Myanmar. Neighboring countries like Bangladesh are keen to develop their relation with Myanmar in this changed stage. ASEAN as a regional organization has been working on these issues of Myanmar. From this point, there are lots of opportunities waiting for Bangladesh. However, these opportunities are depending on the pragmatic and idealist decisions of the policy makers of the both countries. Many international network organizations including ASEAN have adopted the constructive policy to develop democracy and human rights condition in Myanmar (Haacke, 2008). If this positive development continues in Myanmar there are lots of opportunities for international communities including Bangladesh. However, the following opportunities are depending on the maintenance of bilateral relations between these two countries.

- If Rohingya issue is resolved the existing tension between these two countries will be resolved and the image of human rights condition in this region will improve. Along with this, the 'people to people' solidarity will increase which is really important for productive bilateral relations.
- Both the countries are concerned about their national and international security. If the governments address these issues, then they will be able to take the step forward in their relations.
- There are problems with the 'visa' for the citizens of both the countries. In addition, foreigners living in Myanmar and Bangladesh cannot cross the country through land borders. If these restrictions being relaxed then tourism can be popularized in this region.

- If the terms and condition are made relaxed for the traders for both of the countries then the trade imbalance can be resolved and trade volume can be increased.
- At present times, Bay of Bengal Initiatives for Multi- spectral Technical and Economic Cooperation (BIMSTEC) is one of the successful associations of trade in this region. Bangladesh can take more advantage if bureaucratic corruption in trade sector is minimized. In addition, Myanmar wants to be a full member of SAARC. In this case, Bangladesh can increase their cooperation in every sector with Myanmar with the help of SAARC.
- There is an opportunity of establishing three nations (Bangladesh, Myanmar, and India) trading cooperation. With this trade imbalance among the nations can be minimized.
- If transit issues are resolved and connectivity is being strengthened between these two countries then Bangladesh can explore the opportunities in East Asia and Myanmar can explore the opportunities in South Asia.
- On the other hand, Bangladesh can get cheap and nonstop 'hydroelectricity' from Myanmar.
- If border security is increased the Islamic militant threats will be resolved and the separatist movement can be renegotiated with the different ethnic groups. Since Myanmar has 150 different ethnic groups and among them there are different groups are fighting against the government. National integration is the key to regional integration for Myanmar.

However, all these opportunities are depending on the successful implementation of the commitments by the policy makers of the both countries. In addition, here the realist move will increase the vulnerability of the bilateral relations as it did in the previous times. In this case, the pragmatic decision from the political leaders and idealist move of policy makers can bring the fruitful output. Since it materialized in the case of India-Bangladesh relations.

VII. CONCLUSION

There are different dynamics of Bangladesh-Myanmar relations. Unlike India, Myanmar has the small land border with Bangladesh with a complex web of 'systems'. However, if the political leaders of the countries are aware of the situation than any problem can be resolved. In this case, the political development in Myanmar has given a new hope to the policy makers of the countries. Now it is time for both the countries to renegotiate the issues between and bring a pragmatic solution. The following figure shows how the bilateral relation can be strengthened and for this the policy makers of this region need the pragmatic ideal move. It portrays how 'people to people' interaction can be increased by connectivity in Bangladesh and Myanmar.

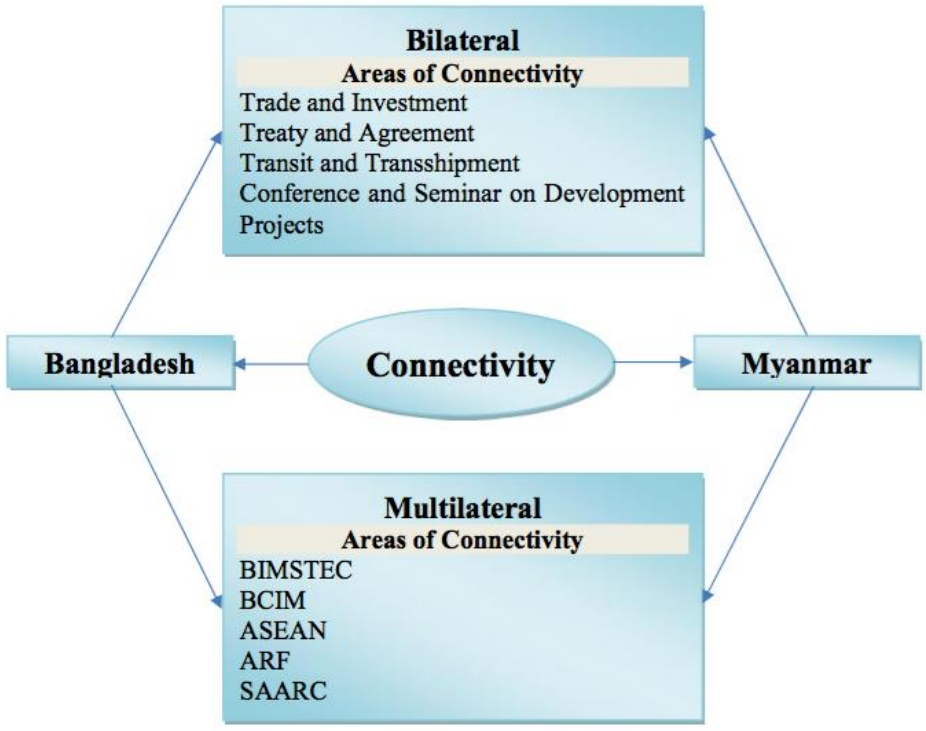


Figure: How bilateral relations can be strengthened (Rahman, 2014, p. 91)

7. THE CONSTITUTIONAL PHILOSOPHY OF RULE OF LAW – COMPARISON BETWEEN INDIA & UK

Author(s): Alifya Vora[224]

ABSTRACT

Rule of Law is one of the basic tenets of modern Constitutional Law. Although it is not specifically mentioned anywhere in Indian Constitution, Rule of law is one of the governing principles of Indian Constitutional Philosophy. In its judicial pronouncements, the Indian judiciary has held Rule of law to be basic structure of Indian Constitution. This paper seeks to highlight the ubiquitous nature of Rule of Law in Indian Constitution. The applicability of this doctrine is studied in detail to emphasize on the importance of this philosophy in modern jurisprudence. To accentuate the same it has been analyzed in a comparative manner. The country chosen for this comparison is UK because the philosophy of Rule of Law developed here. Furthermore, the fact that the legal structure of these two countries is very similar is also considered. Roz's and Dicey's conception of Rule of law has been considered as theoretical parameters for the comparison. Recognizing that the conception of Rule of Law has widened and changed dramatically over the years, 'thick' conception of Rule of law is also considered and these two countries have been compared on these parameters as well. Finally, the paper concludes with the differences and shortcoming in the application and conception of rule of law in these countries.

I. INTRODUCTION

"Where-ever law ends, tyranny begins"[225]

This quote by John Locke forms the basis for the rationale behind Rule of Law. Accordingly, Rule of Law embodies the doctrine of supremacy of law. This concept has its roots in the writing of ancient

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[225] John Locke, *Second Treatise of Government* (1690), Chap XVII, s.202 (Cambridge University Press, 1988), p 400.

philosophers and jurist like Aristotle and Plato; in his seminal work Republic extolling the importance of law Plato wrote, "Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state."[226] Aristotle also discussing the supremacy of law with respect to governments wrote, "Law should govern and those in power should be servants of the laws"[227]. Similarly Rule of Law was not unknown in Ancient Rome. Furthermore, with the fall of the Western Roman Empire the concept of supremacy of law did not come to an end; in 1214 Magna Carta, which was the first codified restraint on the absolute power of a monarch, came into existence. It was predecessor to Rule of Law, it was based on the notion that no person, including the sovereign, is above the law and that all persons shall be secure from the arbitrary exercise of power of the government. These limits on the absolute power of the sovereign further intensified during the seventeenth century especially during the term of Sir Coke who placed Common law restriction on sovereign powers. Furthermore in 1689 the Bill of Rights was passed which was another crippling restriction on the sovereign power of the King. Furthermore in 18th century, the social contractualist like Locke provided philosophical justification for Rule of Law. Thus, it can be seen that Rule of Law is not a completely modern concept it was conceived as a measure against tyranny of the majority even before the democracies as we know them now came into picture. However, the modern conception of rule of law was propounded by British jurist Albert Venn Dicey in his book *Introduction to the Study of Law of Constitution.*

In the first part of this paper the author has discussed the development of Rule of Law with respect to the works of Dicey and Roz. In the next part the author focuses on the development of Rule of

[226] Plato, *Republic*, Available at- www.inp.uw.edu.pl/mdsie/Political_Thought/Plato-Republic.pdf , Accessed on- 20 July 2016
[227] Aristotle, *Politics*, Available at- files.libertyfund.org/files/819/0033-02_Bk_SM.pdf, Accessed on – 20 July 2016

law in India and UK with reference to judicial pronouncements. In the next part the author taking these two conceptions as base forms parameters for theoretical conception of Rule of Law and analyzes the application in India and US based on these parameters. In the fourth part author compares the application of thick conception of Rule of Law in India and UK. The final part deals with the concluding remarks and recommendation.

DICEY'S RULE OF LAW

A.V. Dicey is credited with being the person who popularized rule of law. While defining rule of law Dicey attributed three meanings to it; this latter became the essentials or characteristics of rule of law. Accordingly, to him rule of law was, 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power'[228]. This has come to mean different things over a period of time; the main implication of this would mean that law has to be clear and certain and most importantly codified to check discretion and ambiguity.

According to him Rule of Law also means, 'equality before the law, or the equal subjection of all classes to the ordinary law administered by the ordinary law courts'[229]. This basically means that law should treat everyone as equals. There can't be different law for different people. Rule of Law prohibits discrimination. This has become an important aspect of current human rights jurisprudence.

Finally, according to Dicey the Rule of Law entails that 'the laws of the constitution … are not the source but the consequence of the rights of individuals, as defined and enforced by the courts'[230]. While interpreting this aspect of Rule of Law, it is generally understood that Dicey presumed the pre-existence of some form of rights in the society, however this is not true. What Dicey meant was that there has to an independent judiciary to protect the above two aspects of Rule of Law in the society.

[228] AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn (London:Macmillan, 1961) p 202.
[229] Ibid
[230] Ibid

Thus, Dicey was the first jurist to define the concept of Rule of Law in concrete terms; however his theory of Rule of Law was not free from criticism. It was criticized on the ground that it was vague and uncertain and that it did not define Rule of Law in concrete terms. Also, it was argued that it defined Rule of Law in positivist terms and ignored the requirement of natural law. Thus, various other jurists like Hayek and Raz gave their own conceptions of Rule of Law.

RAZ'S POSTULATES OF RULE OF LAW

Raz gave eight postulates of Rule of Law. They are as follows- 1) all law should be prospective, open and clear; (2) law should be relatively stable; (3) the making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules; (4) the independence of the judiciary must be guaranteed; (5) the principles of natural justice must be observed; (6) the courts should have review powers over the implementation of the other principles; (7) the courts should be easily accessible and (8) the discretion of the crime-preventing agencies should not be allowed to pervert the law.[231]

Although Raz's Rule of Law, is based on the Dicey's conception of Rule of Law and thus most of his principles emanate from Dicey's definitions; for instance as already mentioned the logical corollary of predominance of law over arbitrariness is that the law must be clear, stable and prospective so that it is not known to all and does not cause ambiguity, thus principles one and two emanate from the first meaning.

Furthermore, principles four, six and seven emanate from the third meaning propounded by Dicey. Raz recognizing the need for naturalism while defining Rule of law makes it an explicit characteristic. Also, Raz makes provision for discretion provided to administrative authorities, as long as it is within the constraints of law, this was not recognized by Dicey as a part of Rule of Law.

[231] J Raz, 'The Rule of Law and its Virtue', in J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979)) p 210.

Hence, Raz's concept of Rule of Law is more wide and clear and the author for the purpose of a comparative analysis takes these postulates as parameters.

II. RULE OF LAW IN INDIA & UK- A COMPARISON

The word Rule of Law is not used specifically anywhere in Indian Legal system, although it forms a part of the complete fabric of Indian Constitution, it has been left to judiciary to interpret the same. The Judiciary has played an extremely important role in the development of Rule of law in India. The court has invoked these principles while dealing with administrative action.[232]

In *Keshavananda Bharati v. State of Kerala*[233], while propounding the doctrine of basic structure the Supreme Court held that Rule of Law forms a part of basic structure of Indian Constitution. In a subsequent nine bench decision in January 2007 in the case of *I.R. Coelho* vs. *State of Tamil Nadu*[234] Rule of Law is regarded as part of the basic structure of the Constitution. Consequently Rule of Law cannot be abolished even by a constitutional amendment. This manifests the high status accorded to the Rule of Law in Indian constitutional jurisprudence.

However this does not mean that in the intervening period between these two cases there was no judicial action around Rule of Law in India, the most enduring argument given for rule of law in India was Justice Khanna's minority judgment in the *Habeus Corpus case*[235] . This case is considered the darkest period in Indian Constitutional as well as administrative history where the majority refused to grant *Habeus Corpus* on the ground that right and remedy under Article 21 stands suspended in light of the Emergency under Article 359. However, the only silver lining in this judgment was Justice Khanna's observation with regard to Rule of law, according to him, "Rule of law is the antithesis of arbitrariness..

[232] Chief Settlement Commissioner Punjab v. Om Prakash, AIR 1969 SC 33
[233] AIR 1973 SC 1461
[234] AIR 2007 SC 861
[235] *A.D.M. Jabalpur v. S. Shukla,* AIR 1976 SC 1207

rule of law is now accepted norm in all civilized societies."[236] According to him, rule of law was a part of Indian legal structure before the Constitution was enacted and although Articles of Constitution provide for the protection for similar rights. However, the purpose is to provide a higher level of protection and not abrogate rule of law. Hence the remedy under Constitution can be suspended but not under Rule of law. Thus, he provided a parallel as well as overlapping meaning to rule of law in India.

Another, important judgment which dealt with the same was *Indira Gandhi* v. *Raj Narain*[237], in this case the election of the then Prime Minister was challenged on the ground of rule of law amongst other things. Although the election was adjudged to be valid however rule of law was upheld by the Constitution. Clause (4) of the Constitution 39th Amendment Act, 1975 as unconstitutional and void on the ground that it was outright denial of the Right to Equality enshrined in Article 14, It was held by the Court that these provision were arbitrary and were calculated to damaged and destroy the Rule of Law.

There have numerous other cases where the court has drawn upon rule of rule to render complete justice.[238]

Although the development of Rule of law has been somewhat different in UK, however the courts of equity have always played an extremely important role in upholding and developing the rule of law. For instance, in *Entick v. Carrington,*[239] it was held that in absence of statute and common law authority, the actions by representative of King are unlawful; this case propounded the Principle of supremacy of law before Dicey. Similarly the court exercised power over the home secretary in *M v Home Office*[240] when they held the Secretary had committed contempt of court by not allowing a Zairean teacher

[236] Ibid, para 154
[237] 1975 AIR 865
[238] These cases have been discussed with reference to each attribute of Rule of Law in the following sections.
[239] (1765) 19 St Tr 1030
[240] [1994] 1 AC 377

back into the United Kingdom. The development of all principles of rule of law can be traced in a similar manner to the judgments of court of equity. Thus, development of rule of law in UK is a result of judicial action and the social change

However, in UK the courts have been somewhat hesitant to apply this principle of rule of law in cases of national security where there is a climate of great public fear and concern; in *R v. Secretary of State for Home Department, ex parte Brind*[241] the House of Lords refused to concern itself with a broadcasting ban aimed at political parties sympathetic to paramilitary organizations in Northern Ireland.

III. SUPREMACY OF LAW & CLARITY, OPENNESS, PROSPECTIVELY AND STABLENESS OF LAW

As already mentioned above, Raz's 1st and 2nd postulate is the logical corollary to Dicey's first conception of Rule of law. This is because law exists in the society to guide individual actions; this entails that the law must be prospective, open and clear.

A law is said to be retrospective in effect which changes the legal consequences of acts committed or the legal status of facts and relationships that existed prior to the enactment of the law. In India the rule of prospective laws is partially followed so much so that, *Article 20(1*) provides that no person is to be convicted of an offence except for violating 'a law in force' at the time of the commission of the act charged as an offence and a greater penalty cannot be imposed than was present at the time of committing the offence. The term to be noted here is offence, this means that this protection is available only in case of criminal matters and not civil matters; hence a retrospective tax has held to be valid[242]. This does not apply to procedural law.

[241] (1991) 1 AC 696
[242] *Sundararmier & Co. v. State of Andhra Pradesh,* AIR 1958 SC 468

In UK there is a comparatively lax attitude towards retrospective laws; as in India retrospective laws are allowed in case of civil legislature. Furthermore although UK is a signatory to *European Convection of Human Rights* which prohibits retrospective application of criminal law, there has been a rare exception; retrospective criminal liability was imposed under the *War Crimes Act 1991*, which allowed proceedings for murder, manslaughter or culpable homicide to be brought against anyone, regardless of nationality at the time, who had committed a war crime in Germany, or territory it occupied, during the Second World War.

Openness of law is seen in context of public access allowed to it. In India, law is partially open to people, this can be said with reference to publication. Under *Article 368* of the Indian Constitution a bill becomes law when it is signed by the President of India; there is no requirement of publication of such a law. The same is followed in case of judicial law making; however when it comes to delegated legislature either prior publication or publication as soon as the rules are made is required[243].

The situation in UK is identical to India with regard to openness, as both the countries follows Parliamentary system the bill becomes an act as soon as it receives the royal assent. Similarly, in case of sub-ordinate legislature there is requirement of publication as soon as the rules are made.

Clarity of law is strictly followed in India, clear laws as a protection against arbitrary power form a part of *Article 14* of the Indian Constitution and thus there have been cases where the courts have struck down laws on them being violative of *Article 14*.

In India laws are relatively stable as the legislative process is strong and stringent; as per the provision of *Article 368* of Indian Constitution in order to amend the constitution there needs to be a 2/3rd Majority, in certain cases consent of half of the states are required. Similarly in case of an ordinary law as well, simple majority is required. Furthermore, all the bills have to go through at least two readings

[243] *Harla v. State of Rajasthan* AIR 1951 SC 467

along, this gives plenty of time for debate and discussion thus ensuring that laws are stable and are not changed as a result of a whim.

The UK also follows Parliamentary system of governance; furthermore all the bills go through the same legislative process as they do in India and hence the legislative stability is ensured. However since there is no written constitution, it can be amended by way of a simple enactment (ordinary law), no special procedure is required.

IV. PREDOMINANCE OF LEGAL SPIRIT: JUDICIAL INDEPENDENCE, ACCESSIBILITY & REVIEW

An independent judiciary is an essential characteristic of Rule of Law; judiciary is needed to ensure that supremacy of law is maintained and that legislature and executive follow law of the land. A strong judiciary also maintains a balance of power between different branches of the government. However, independence of judiciary is not the sole consideration; an independent judiciary would be quite useless if it is not accessible to all. Furthermore, to act as check against legislative and administrative authority they should have the power to review their actions.

In India, independence of judiciary permeates the constitutional fabric; *Article 124(4)* provides for the process of removal of Supreme Court Judges, according to this clause a judge can only be impeached on ground of proved misbehavior and incapacity by majority of not less than two thirds of the members of the house present and voting. *Article 217* provides the same security of tenure to High Court judges. In case of lower court judges though they are appointed by Public Service examinations which are conducted by the executive; however, after the appointment they cannot be removed by executive and security of tenure is ensured. Furthermore, in order to ensure independence the appointment of all the levels of judiciary are controlled by the judiciary itself, thus in case of *Article 124(2)* consultation has been attributed the same meaning as concurrence. There is similar provision

in *Article 217* for High Court Judges. There are similar provisions in the constitution which provides for salaries and terms of service of the judges which cannot be changed for worse during their tenure. There is independent judiciary in England as well; senior judges are not appointed on grounds of their political affiliations and they are granted protection against summary dismissal by the *Act of Settlement, 1701*. Also, considering the fact that UK follows the doctrine of Parliamentary Sovereignty, judiciary has played an extremely proactive role checking the legislature and executive. Furthermore, like the provisions of Indian Constitution there are conventions in UK constitution which ensure independence of judiciary; for instance there is a convention holding that ministers should not directly criticize judicial decisions (this is similar to Indian Constitutional provision which prohibits discussion on judges on the floor of the house). Thus it can be observed that although judiciary is independent in both the countries but in theory it is more so in India as in UK the doctrine of Parliamentary Sovereignty takes precedence over independence of judiciary. Moreover, in UK there is no codified constitution and most of it in form of conventions, and conventions although generally followed are sometimes broken and there is legal remedy against the same.

The second aspect of independence of judiciary deals with the access to courts and the ambit of review available to the courts. In Indian, aspect theoretically any person may approach the courts for the violation of his rights under *Article 226* and *32*, however the same is not absolute, this right to move to court can be suspended during emergency (same has been discussed in detail with reference to ADM Jabalpur case above). Furthermore this right is subject to a lot of other practical obstacles as well, for instance not everyone has the resources or the knowledge to move to the court of law for a violation of their rights, however this has been remedies to some extent by dilution of the doctrine of locus standi and the subsequent development of public interest litigation. Furthermore, in criminal justice system the shortcomings of adversarial system have been overcome by providing free legal aid.

Judicial review of administrative as well as legislative action has also been held to be part of basic structure of Indian Constitution.[244]

In UK, as well judicial review is available[245]; however its scope is greatly restricted. In UK owing to the prevalence of doctrine of Parliamentary Sovereignty judicial review is not available for all kind of actions, it is not available in UK against primary legislation (acts of parliament). It is available only against acts of public authorities, i.e. administrative authorities. However, this situation has been somewhat remedied by the *Humans Right Act, 1998* and the treaty obligations imposed by the European Convections of Human Rights which UK courts to construe all legislation, both primary and secondary, consistently with Convention rights and requiring the UK courts to make a declaration of incompatibility upon which the Government can take remedial action for an Act of Parliament to be amended.

V. ADMINISTRATIVE CONTROL - CLEAR, STABLE AND OPEN RULES AND ADMINISTRATIVE DISCRETION

Under Dicey's conception of Rule of Law he refused to acknowledge the existence of administrative law; however, in modern social settings it is impossible for the legislature as well as the judiciary to deal with all spheres of their respective actions. Hence, there is need to delegate certain tasks to specialized authority, to exercise the same there is a need to equip these authorities with discretion, via postulate number 3 & 8 Roz seeks to regulate the same within the sphere of rule of law.

Rules here refer to the delegated legislature; these rules have to be guided by open, stable and clear legislature. This means that the legislature must define broad policy framework, and the delegated legislature must just fill the gaps in this framework.

[244] *L. Chandra Kumar v. Union of India,* 1997(2) SCR 1186
[245] *R v HM the Queen in Council, ex parte,* (1988) Env LR 415

In India, stricter standards are applied while reviewing delegated legislature. In *Shrilekha Vidyarthi v State of U.P.*[246] it was held that reasonable and non- arbitrary exercise of discretion is an inbuilt requirement of law and any unreasonable or arbitrary exercise of it violates Article 14.

Furthermore, in *Delhi Laws Act, 1912, re*[247] it was held that there is a limit beyond which delegation may not go. The limit is that essential powers of legislature which consists of of the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct cannot be delegated.

Furthermore, the court has exercised its plenary power of judicial review and has held delegation to be unconstitutional in a number of cases; *Hamdard Dawakhana V. Union of India*[248] was the first case in which the court held a Central act unconstitutional because of excessive delegation. In *Harakchand Ratanchand Banthia v. Union of India*[249], the Supreme Court held that the power conferred on the administrator was legislative in character there was no guidance in the act nor there was any legislative supervision. Thus after, much judicial interpretation and creativity the courts have developed two tests against which a statue challenged on the ground of excessive delegation is tested: 1) whether it delegates essential legislative functions or powers 2) whether the legislature has enunciated it policy and principle for the guidance of the delegate.

However, in UK there is no such limit; the Parliament may delegate to any extent its power of law-making to an outside authority. As a matter of law, Parliament may surrender all its power in favour of another body as it actually did in 1807 when the English and Scottish Parliament passed acts of Union providing for the coming into existence of a new body, Parliament of Great Britain. The limits

[246] (1991) 1SCC 212
[247] AIR 1951 SC 332
[248] AIR 1960 SC 554
[249] AIR 1960 SC 554

of delegated legislation in the English Constitution remain a question of policy and not a justiciable issue for the courts.[250]

VI. PRINCIPLES OF NATURAL JUSTICE

Justice is of two kinds legal justice, i.e. justice according to the laws present at that time and natural justice i.e. justice as per the provisions human and moral values. Dicey's conception focused on legal justice and ignored natural justice. Roz in his conception of Rule of Law gives due importance to principles of natural justice, these principles are certain procedural safeguards to which ensure that the ends of justice are met. For the purpose of this paper these principles are narrowly construed and hence are limited to two principles no one should be judge in his own cause and that everyone should be provided with the right to fair hearing.

In India, the word natural justice is absent from the whole corpus of Indian Constitution, however the judiciary has always been guided by them it has become a part of the Indian Legal system. In *A.K. Kraipak Vs. Union of India*[251] Indian judiciary applied rule that n one can be a judge in his own cause and struck down the appointment of a forest official. Furthermore, judiciary has also read the same into the constitutional provisions; in *Maneka Gandhi v. Union of India*[252] , Supreme Court held that an order depriving a person of his civil right passed without affording him an opportunity of being heard is in violation of principle of natural justice and hence falls under the mischief of Article 14.

In *Delhi Transport Corporation v. DTC Mazdoor Union*[253], the apex court opined that the right of audi alteram partem under Article 14 is available not only in front of judicial and quasi-judicial authorities but also against administrative authorities.

[250] M.P. Singh, *V.N. Shukla's Constitution of India,* 12th ed (Eastern Book Company, 2013)
[251] AIR 1970 SC 150
[252] AIR 1978 SC 597
[253] AIR 1991 SC 101

Similar situation exist in UK as well; since UK does not have a written constitution it is nowhere explicitly mentioned anywhere in UK documents. The first notable case where the principle of audi alteram parti was applied in public law was *Bagg's Case*[254]; here Sir Coke struck down the dismissal of a public official by the Mayor as a violation of principle of natural justice. The same was reiterated in Ridge *v Baldwin*[255] However, Article 6(1) of the *European Convention of Human Rights* provides "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Thus, in UK as well by the virtue of this Convention as well as the *Humans Right Act, 1998*, these principles of natural justice extend to administrative authorities as well.

DICEYAN EQUALITY BEFORE LAW

Equality before law is the second principle of Dicey's conception of Rule of law, it could be argued that equality before law comes under the broader framework of principles of natural justice; however these principles are just procedural requirement and hence does not apply to legislative action; hence for the purpose of current study this is considered as a separate parameter.

In India, this principle is given the status of a Fundamental Right and is protected under Article 14 of Constitution. This article takes broad conception of equality; it talks about equality before law and equal protection of law. Equality before law means is a declaration of equality of all persons in the eye of law, implying an absence of any special privilege in any individual. Equal protection of law is the protection or guarantee of equal law. The underlying principle behind this clause is that equals must be treated equally and unequals differently. Furthermore this principle has been widely applied by Indian courts and hence has been extended to juristic individuals as well.

[254] (1615)
[255] (1964) AC 40

In UK, the principle of equality before law is a common law principle which was developed by the court over period of time. The important case which established the same is *Kruse v Johnson*[256] where it was held common law principle of equality prohibited unequal treatment based on distinctions which were not properly justified. Furthermore, *Article 14* of the *ECHR* as incorporated into UK law by the *Human Rights Act 1998* prohibits public authorities discriminating against individuals 'in the enjoyment of their Convention rights'. Furthermore in order to regulate administrative action in this regard the Equality Act 2010 was passed codifying a complex set of anti-discrimination enactments dated back to 1964 which prohibits public authorities discriminating in the performance of their public functions, unless specifically authorised to do so by primary legislation.

VII. APPLICATION OF 'THICK' RULE OF LAW IN INDIA & UK

As already mentioned, the main purpose of Rule of law is to impose legal restraint on all forms of government action, be it legislative, administrative or judicial. This done to ensure that there is no overreach by one branch of government and a balance of power is maintained. Thick conception of Rule of law looks at the deeper connection between rule of law and the rights based democracy. A "thick" definition defines positively the rule of law as incorporating such elements as a strong constitution, an effective electoral system, a commitment to gender equality, laws for the protection of minorities and other vulnerable groups, and a strong civil society.[257] In other words, thick conception of Rule of Law deals with how the principles of rule of law interact in the pragmatic setting and is it able to achieve the desired outcome. This section analyzes the applicability of Rule of Law in India and UK in this context.

[256] [1898] 2 QB 91

[257] Linkages between the rule of law, democracy and sustainable development (Discussion on- Thursday, 19 April, 2012), Concept note available at- http://www.idea.int/un/upload/Concept-Note-IDEA-IDLO-Italy-rev-5-0-Final.pdf Accessed on- 22 July 2016

The World justice project each year publishes a Rule of law index which measures countries on the how the rule of law is experienced in everyday life. It uses eight parameters to adjudge the same- constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.

India was globally ranked 59 amongst 102 countries and UK has been ranked `12. This difference in rank shows how rule of law is actually felt in Indian and UK society and its correlation to the governance as well as fundamental rights.

India's performance for criminal justice places it at 44 rank globally, whereas UK is ranked 11. While adjudging criminal justice the survey analyzed factors like analyzed whether the criminal investigation and adjudication system is effective, whether it was impartial and free of corruption and whether the rights of the accused were protected.

In stark contrast, the corresponding ranking in civil justice for India and UK is 88 and 13 respectively; the survey looked at accessibility to civil justice, which includes general awareness of available remedies, availability and affordability of legal advice and representation, and absence of excessive or unreasonable fees and hurdles. It also asks if the civil justice system is free of discrimination and corruption and whether it is subject to unreasonable delay.

India ranks high in the category of Open Government, placing it 37th globally UK is placed 8 on the same list. The open government index uses four dimensions to measure government openness — publicised laws and government data, right to information, civic participation and complaint mechanisms. In law and order category it was placed at 90, UK was placed at 19.[258]

[258] Jayant Sriram & Rukmini S, *Rule of Law Index: India Scores a mixed bags,* The Hindu,(03 June 2015) Available at- http://www.thehindu.com/news/national/rule-of-law-index-india-scores-a-mixed-bag/article7275999.ece Accessed on- 22July 2016

VIII. CONCLUSION

Rule of law is an important aspect of any legal system, it is not only applicable to administrative law but is a thread which runs through every part of the everyday life. It takes the form of principles of fair trial when applied in criminal law. However, it is of special importance in Administrative law because it one of the most important and universal control on discretionary power.

It can be seen that the way Rule of Law germinated and grew is completely different in India and in UK; in UK it started off as a check against the absolute power of the King. In India, there was no such concept; kings were usually governed by shastras and dharma. Rule of Law became a part of Indian legal system with the coming in force of the Indian Constitution; rule of law was weaved into the very fabric of Indian Constitution. This is where the first and the most major difference crops up in the application of rule of law in India and UK.

Although UK does not have a written constitution, and it does not adhere strictly to some of the theoretical parameters which are discussed above, however in practice rule of law is more strictly followed in UK than in India.

The reason for this anomaly lies in the way rule of law has developed in India and in UK. In UK the rule of law developed as an action of the court whereas in India the courts are tasked with the duty to protect it. In UK rule of law forms the very fabric of the UK society and hence is a way of life whereas in India it has permeated just at the constitutional level and is yet to tickle down into the society.

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8. THE TALE OF TWO RIGHTS: A CASE STUDY OF NET NEUTRALITY IN INDONESIA

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ABSTRACT

The aim of this paper is to argue that it is important, when discussing net neutrality, to bring both human rights namely right to privacy and right to freedom of expression into careful scrutinize. To put it into clearer context, not only this writing will examine the nature of right to privacy and freedom of expression in accordance with both international legal instruments and Indonesian regulations, but also this writing will explain the matter of net neutrality issue in Indonesia. Net neutrality itself can be construed as a principle to make fair and free internet. It means that information and any other details in the internet must be treated equally as it will be uncensored and there no 'gate keeper' of the internet. It requires no blocking, no throttling, and no paid prioritization according to Federal Communication Commission of the United States. The notion of a neutral network will bring the internet as a sphere for the right to freedom of expression to the fullest. However, it cannot be neglected that by having fair and free internet, it will put forward another important right into public attention; that is the right to privacy. In Indonesia, cases are varied. In one case, it is often forgotten that with freedom of expression comes a potential violation of right to privacy. In the other case, the spirit to protect the right to privacy impedes the freedom of expression. This writing will further elaborate net neutrality in relation to Law No. 11 of 2008 on Electronic Information and Transactions and its implementing regulations namely Ministerial Decree of Communication and Information No. 19 of 2014 on Websites with Negative Contents Control. This Ministerial Regulation arguably will bring impact to net neutrality in Indonesia as it permits blocking to be carried out.

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This article concludes that the notion of net neutrality cannot be taken for granted as it involves two significance rights for society in this digital era. Specifically for Indonesia, this paper suggests that it needs more in-depth discussion so that it can embrace net neutrality with good faith.

I. INTRODUCTION

The term of "network neutrality" or net neutrality was claimed to be used for the first time in 2003.[260] For Indonesia, the term and the issue related to net neutrality began to familiarize in 2016 as civil society organisations started to bring the matter into government's attention.[261] Moreover, when Netflix started to expand to Indonesia, concerns were raised regarding how providers treated data.[262] Although, it is worth to be noted that the debate on internet freedom has been quite a time in Indonesia since there are 53.236.719 internet users in Indonesia as of 1 July 2016 with penetration rate up to 20.4% from its total population of 260.581.100 people.[263]

Net neutrality in Indonesia can be linked to the enactment of the Law No. 11 of 2008 on Electronic Informations and Transactions (hereinafter referred to as 'EIT Law'). The law was passed with the intention to make Indonesia as a nation be more globalized since internet becomes necessity and one of unavoidable needs.[264] It hopes that advancement of technology particularly internet will enhance

[260] See "A Timeline of Net Neutrality" (accessed on 26 August 2016 9.32 PM), URL: http://whatisnetneutrality.org/timeline. It was first used by Professor Tim Wu in his paper "Network Neutrality, Broadbanc Discrimination". See Wu, Tim, Network Neutrality, Broadband Discrimination. Journal of Telecommunications and High Technology Law. Vol. 2, p. 141, 2003. Available at SSRN: http://ssrn.com/abstract=388863 or http://dx.doi.org/10.2139/ssrn.388863

[261] The Jakarta Globe, "Activitsts urge govt to ensure net neutrality in Indonesia", (accessed on 26 August 2016 9.39 PM), URL: http://www.thejakartapost.com/news/2016/06/09/activists-urge-govt-to-ensure-net-neutrality-in-indonesia.html

[262] Further reference can be found here http://www.beritasatu.com/iptek/342444-netflix-bisa-munculkan-masalah-net-neutrality.html and http://www.internetnetral.com/

[263] Internet Live States, "Indonesia Internet Users", (accessed 31 August 2016 10.39 AM), URL: http://www.internetlivestats.com/internet-users/indonesia/

[264] Consideration Part of the Law No. 11 of 2008 on Electronic Information and Transactions, the law can be found at this URL: https://www.bu.edu/bucflp/files/2012/01/Law-No.-11-Concerning-Electronic-Information-and-Transactions.pdf

nation's development and enrich people's well-being.[265] In spite of the law's purpose, the law itself has been controversial ever since.

Provisions in the EIT Law are very abstract hence it creates legal uncertainty. The uncertainty is in term of it leaves a huge gap for interpretation which will impact the policy making power to the government to the extent that it is possible to regulate about net neutrality abusively. This does not mean that the government is a corrupt government or already has bad intention towards the law, rather to critically analyze possible scenarios created from such provisions in relation to net neutrality and two pivotal rights correlate with it, namely the right to privacy and the right to freedom of expression.

This paper will be divided into four parts. The first part is briefly introduce net neutrality and Indonesia's current issue with it. The second part will describe how international and Indonesia's legal instruments set down the right to privacy and right to freedom of expression. The third part will analyze specific to the EIT Law and Ministerial Decree of Communication and Information No. 19 of 2014 on Websites with Negative Contents Control. The analysis comprises of pointing out problematic provisions in those two legislations. Those provisions ignite query about how the protection of the right to privacy and freedom of expression that co-exist being entailed. The last is the conclusion part which based on the discussion in part one until part three of the writing, it emphasizes the importance to take two rights namely right to privacy and right to freedom of expression into account when talking net neutrality, especially in Indonesia.

[265] *Id.*

II. INTERNATIONAL AND INDONESIA'S LEGAL INSTRUMENTS OF THE RIGHT TO PRIVACY AND FREEDOM OF EXPRESSION

This part will only highlight major legal instruments both international and in Indonesia about the right to privacy and the right to freedom of expression as the purpose of this part is giving compact depiction of mentioned rights.[266]

a. The Right to Privacy

Relevant to the right to privacy, two main sources of international law namely the Universal Declaration of Human Rights ('UDHR') in its Article 12 and International Covenant on Civil and Political Rights ('ICCPR') in its Article 17 state, in essence, that everyone has the right to be not arbitrarily interfered or attacks on what is deemed to be his or her privacy and he or she is entitled for protection with regard to such interference or attacks.[267] Furthermore, in the General Comment No. 16 towards Article 17 of ICCPR, it explains that to be not arbitrarily interfered ot attacks, there must be legislation justifying those actions.[268] In other words, those actions must be conducted legally (either by enforcing legislation, warrant issued by the court, etc).

Nevertheless, report of the Office of the United Nations High Commissioner for Human Rights ('UNHCHR') to UN General Assembly ('UNGA') on 30 June 2014, it asserts even though there is legal document to support those kinds of action like warrant, that cannot be taken for granted as it is often happen the legal document or the legal action to justify those actions is a mere formality; give

[266] The author believes many references out there related to the right to privacy and freedom of expression that take in depth discussion of both rights. This part exists because it is strongly relevan when analysing the issue of net neutrality and those rights in the context of Indonesia.
[267] UDHR can be accessed here: http://www.un.org/en/universal-declaration-human-rights/index.html, ICCPR can be accessed here: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.
[268] UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, (accessed 30 August 2016), URL: http://www.refworld.org/docid/453883f922.html.

the permission without throroughly scrutinize why those actions are being carried out.[269] In short, to legally permit a limitation of the right to privacy does not always be conducted in well-founded reasons. One should take closer look towards actions conducted inasmuch as it still potentially breach the right to privacy itself.

In Indonesia, the right to privacy is laid out in the supreme legal source of the land that is the 1945 Constitution of the Republic of Indonesia[270]. The Article 28G Paragraph (1) and (2) of the Constitution mirrored Article 12 of the UDHR and Article 17 of ICCPR. It declares in its Paragraph (1), "*Everyone shall be entitled to protect themselves, their family, honour, dignity, and assets under their control, and to the sense of security and protection from threat of fear to act or not to act anything being the rights".*[271]

Article 28 of the Constitution does not stand alone. One must put Article 28I Paragraph (1) and Article 28J (2) Paragraph of the Constitution into the spotlight. The Article 28I Paragraph (1) makes the right to privacy is not included as one of non-derogable rights. Therefore, in Indonesia, the right to privacy can be limited. The viable reasons for limitation can be found in Article 28J Paragraph (2) of the Constitution which says "*In implementing their rights and freedom, everyone shall adhere to the given limitation in the law solely intended to guarantee the recognition and respect of the rights and freedom of the others and fulfil fair demands in accordance with morel considerations, religious values, security, and public order in a democratic community.*"[272] EIT Law is a concrete example when right and/or freedom is limited. Further analysis on the clash between right and freedom in relation to net neutrality and the irony of limitation given will be more discussed in the next part of this paper.

[269] United Nations General Assembly, "The Right to Privacy in the Digital Age: report of the Office of the United Nations High Commissioner for Human Rights", A/HRC/27/37, 30 June 2014, p. 13.
[270] The Government of the Republic of Indonesia (1), Law No. 12 of 2011 on Legislation Making, URL: http://luk.staff.ugm.ac.id/atur/UU12-2011Lengkap.pdf, Article 7.
[271] The Article stated in English is an authorized translation from the Government of the Republic Indonesia, URL: http://peraturan.go.id/inc/view/11e44c4f8dcff8b0963b313232323039.html.
[272] *Id.*

b. The Right to Freedom of Expression

Freedom of expression is one of the earliest human rights recognized as it is stipulated in the Article 19 of UDHR. The spectrum of freedom of expression comprises of "*freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regarless the froniers'*[273]. On top of that, Article 19 of ICCPR also sets down the right to freedom of expression. The Article 19 of ICCPR further detailed allowable limitation to freedom of expression namely (a) reputable of others and (b) national security or public order.[274] Additonally, General Comment No. 10 of Freedom of Expression (Article 19) elaborates that freedom of expression is indeed can be restricted with note that the permission exists should not hamper the essence of exercising such right and justification is needed for such permission.[275]

The right to freedom of expression in Indonesia is contained in the Article 28 of the Constitution. The Article states "*Freedom to unite and gather, express opinions orally and in writing and the other shall be stipulated by the virtue of law.'*[276] The Article provides a clear hint that freedom of expression cannot be exercise not in accordance with the attribution from the law. This hint generates contradiction which what is the essence of freedom of expression when to express it, the law plays major role to determine what can be expressed, rather than the decision from the people itself. Once again, EIT Law will be quite an example of this situation.

[273] UDHR, Article 19.
[274] See ICCPR, Article 19 Paragraph (3).
[275] Office of the High Commissioner for Human Rights, "General Comment No. 10 of Freedom of Expression (Article 19): 29/06/1983. CCPR General Comment No.10", (accessed 30th August 2016 10.39 PM), URL: http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo10.pdf.
[276] The Article stated in English is an authorized translation from the Government of the Republic Indonesia, URL: http://peraturan.go.id/inc/view/11e44c4f8dcff8b0963b313232323039.html.

III. EIT LAW IN INDONESIA: IT'S ISSUES RELATED TO NET NEUTRALITY AND HUMAN RIGHTS

a. Law No. 11 of 2008 on Electronic Informations and Transactions

There are at least three problematic provisions in EIT Law. Firstly, Article 27 Paragraph (1), (2), (3), and (4) of EIT Law. The Article stipulates that whoever distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents against properiety, gambling, affronts and/or defamation, and extortion and/or threats.[277] The Article can be contrued as a way for government to create legislation or policy in limiting contents in internet by prohibiting contents that are deemed to not proper, gambling, and others mentioned in each Paragraph of the article. There are two problems with it. One, the Article againsts the general premise of net neutrality in which the internet does not favor to any kind contents.[278] Instead, the Article lets the only contents exist in internet are those that desired to be there by the government. In other words, people are controlled by the policy and regulations on what they want to see and/or read in the internet. With limited access to whatever contents people want, it can backlash the purpose of the law itself that is to enhance people's well being. The more vary contents people get, the more they can find creative spaces for themselves, the more room for right to freedom of expression.[279]

Second problem is the determinant factors of the government to state one content is not a content against propriety, gambling, affronts and/or defamation, and extortion and/or threats. People do not know how and why their rights in the internet are being limited. However, it also can be argued that

[277] The Government of the Republic of Indonesia (2), Law No. 11 of 2008 on Electronic Information and Transactions, Article 27.

[278] See Wu, Tim, Network Neutrality, Broadband Discrimination. Journal of Telecommunications and High Technology Law. Vol. 2., 2003, p. 145.

[279] See Victor Cerf, "Father of the Internet: Why we must fight for its freedom", URL: http://edition.cnn.com/2012/11/29/business/opinion-cerf-google-internet-freedom.

not publishing the determinant factors is part of government authority and such authority is used for protecting public interests which one of them can be about privacy. Privacy in the sense of those prohibited contents may hamper someone's life.

In 2004, the Constitutional Court of the Republic of Indonesia (hereinafter referred as to 'Constitutional Court') through its Decision No. 006/PUU-I/2003 said that the right to privacy is not not limited and as long as there is regulation and procedural arrangements to rule privacy, the limitation is justifiable.[280] Hence, even though, on one hand the limitation of contents in EIT Law is unclear so that it affects people to exercise their freedom of expression to the fullest, on the other hand, it is can be done for the sake's of public interests and government's as well.

The other two provisions of EIT Law that came into scrutinize are Article 28 and Article 29 of the EIT Law. Both Articles lay the same logic of the Article 27 that is to limit what contents to exist in the internet. Nonetheless, Article 28 ayat (1) highlights the importance of consumers. If there is consumer loss caused by any person who knowingly and without permission to spread information that is false and mislead in electronic transaction can be punished.[281] Whereas, Article 29 is about when any person disseminate knowingly and without authority video containing threats or scary contents that are aimed personally can be punished as well.[282]

b. The Ministerial Decree of Communication and Information No. 19 of 2014 on Websites with Negative Contents Control

[280] The Constitutional Court of the Republic Indonesia, "Risalah Sidang Perkara Nomor 1/PUU-VIII/2010 dan Perkara Nomor 5/PUU-VIII/2010", (accessed on 30 August 2016 1.01 PM), URL: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/risalah/risalah_sidang_Putusan%20No.%201%20&%205.PUU-VIII.2010,%20tgl.%2024%20Feb%202011.pdf, p. 18.
[281] The Government of the Republic of Indonesia (2), Law No. 11 of 2008 on Electronic Information and Transactions, Article 28 Paragraph 1.
[282] *Id*, Article 29.

Towards more practical matters, the Ministry of Communication and Information of the Republic of Indonesia (hereinafter referred to as 'Ministry of Communication and Information') imposed Ministerial Decree of Communication and Information No. 19 of 2014 on Websites with Negative Contents Control.[283] The Decree aims to provide clean and comfortable internet for the society.[284] The Decree itself is further stipulation of EIT Law.[285] It is paramount to note that the Decree is in the process of a judicial review (as of this writing) in the Supreme Court of the Republic of Indonesia which signals that the Decree is potentially premature.[286]

The substantive of the Decree can be divided into three. First and foremost, provision related what it meant by negative contents in the internet. Article 4 of the Decree stated that pornography and other contents that are deemed to be illegal in national legislations (which includes the provisions in EIT Law) are regarded as negative contents. Furthermore, the Decree also take society's roles in making the internet clean and comfortable by providing mechanism to report if there is negative contents which Article 10 of the Decree said public can report through e-mail or online platform provided by the government.

The last important substantive part of the Decree is about the role of Internet Service Provider (hereinafter referred to as 'ISP'). Article 8 of the Decree regulates that ISP can do independent blocking or using service provider for internet blocking. The blocking itself is aimed for sites that are

[283] The document can be accessed here, URL: https://jdih.kominfo.go.id/produk_hukum/view/id/215/t/peraturan+menteri+komunikasi+dan+informatika+nomor+19+tahun+2014+tanggal+17+juli+2014

[284] The Government of the Republic of Indonesia (3), "Ministerial Decree No. 19 of 2014 on Managing Internet's Negative Contents", Considerant Part.

[285] In Indonesia legal system, the hierarchy of legislation is established by the authority issued that kind of legislation and the content (general to specific/practical) which Ministerial Decree is lower hierarchy than the Law. The highest in the hierarcy will be the 1945 Constitution of the Republic of Indonesia. Law No. 12 of 2011 on Legislation Making, URL: http://luk.staff.ugm.ac.id/atur/UU12-2011Lengkap.pdf, Article 7 and Article 8.

[286] See Hukum Online, "Civil Society Groups File Judicial Review on Negative Content Regulation", http://en.hukumonline.com/pages/lt54742f759ddd4/civil-society-groups-file-judicial-review-on-negative-content-regulation

listed in government's database called "TRUST Positif ".[287] If the ISP does not do required blocking, then the ISP can be sanctioned according to the law.[288] Moreover, according to Article 9 of the Decree, ISP must renew its data at least once a week and for urgent renewal, it is must be done within 24 hours.

There are two major issue of the Decree. One, the Decree allows blocking of what regarded as negative contents based on government's lists. Even, the ISP that supposed to be neutral party that it cannot block what users want to look upon in their internet, is made to actively involve doing the blocking. There are three conditions for neutral network or an open internet namely no blocking, no throttling, and no paid prioritization.[289] The Decree which allows blocking hamper the first condition. As a result, the freedom of expression cannot be carried out to the fullest in the internet as blocking occurs. It is the people who have the decisions on content, not the government let alone the ISP.[290]

Second major issue is that the Decree puts "privacy" as one of the reason of blocking which brings a direct clash between the right to privacy the government is willing to protect versus the right to freedom of expression that is being degraded by the existence of the Decree. Article 10 Letter (c) of the Decree regulates that "*Report from the public can be categorized as urgent report if the report links to: 1. privacy; 2. child pornography;…".*[291]

[287] 'TRUST Positif", URL: http://trustpositif.kominfo.go.id/?lang=en#tabUtama-4.
[288] The Government of the Republic of Indonesia (3), "Ministerial Decree No. 19 of 2014 on Managing Internet's Negative Contents", Article 8 Paragraph (3). Sanction here is administrative sanction from written warning to permit annulment. Further reference Law No. 36 of 1999 on Telecommunication, URL: http://www.postel.go.id/content/EN/regulasi/telecommunication/uu/law36-1999.pdf.
[289] These are clear, bright line rules according to the Federal Communication Commission in their report on "Report and Order On Demand, Declaratory Ruling, and Order" that was adopted in 26th February 2015 and released 12th March 2015. URL: https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1_Rcd.pdf.
[290] Additionally, internet or media literacy must be implemented so that it can help people to decide wisely.
[291] Translation is independently conducted by the author of this paper. Original sentence of the Article 10 Letter (c) of the Ministerial Decree No. 19 of 2014 on Managing Internet's Negative Contents stipulates "*Pelaporan dari masyarakat dapat dikategorikan sebagai pelaporan mendesak apabila menyangkut: 1. privasi; 2. pornografi anak; 3. kekerasan; 4. suku, agama, ras, dan antargolongan (SARA); dan/atau 5. muatan lainnya yang berdampak negatif yang menjadi keresahan masyarakat secara luas".*

Moreover, the Decree did not specifiy what is construed by privacy. It is important to determine what construction of privacy will be used as a basis to block one's internet content or to recognize it as negative for two reasons. First reason is privacy has many dimensions.[292] Privacy, in general context, can be construed as to be absent from interference. When it comes to legal context of privacy, there is a need to have a comprehensible construct of it.[293] It perhaps what is individual can exercise from privacy in broad conditions cannot be accepted by the legal notion of privacy.[294]

Second reason is the absence of constructual breakdown of what privacy means according to the law (in this case is the Decree) can open a room for corrupt individuals to use their powers to abusively interpret the term. As the old equation says, "corruption equals monopoly plus discretion minus accountability".[295] In connection with the lack of explanation of privacy in the Decree, individual who is in the position to enforce the law may use his or her personal interpretation of what it meant by privacy and use it as a sentiment to block one's content on the internet without having a system that requires him or her to provide reasons of such interpretation and to disclose such reasons in accountable manners to the public.

Those two above reasons why the Article 10 Letter (c) of Ministerial Decree of Communication and Information No. 19 of 2014 on Websites with Negative Contents Control is problematic can make normative clash between protecting privacy and freedom of expression even worse especially in answering these intriguing questions: to what extent privacy can be used as a justifiable reasons to limit freedom of expression in Indonesia? Letting the term "privacy" in the Decree without any

[292] Carolan Eoin, The Concept of a Right to Privacy (July 19,2011). Available at SSRN: http://ssrn.com/abstract=1889243 or http://dx.doi.org/10.2139/ssrn.1889243.

[293] *Id*, p. 4.
[294] *Id*, p.6.
[295] Robert Klitgaard, "A Holistic Approach to the Fight againts Corruption", (accessed 2 September 2016 4.45 PM), URL: http://www.cgu.edu/PDFFiles/Presidents%20Office/Holistic_Approach_1-08.pdf

explaination open chances to abusively interpret what privacy is. The impact is freedom of expression will also be cold-heartedly degraded.

Additionally, questions like "how free is freedom of expression in Indonesia so that it is not disrupting privacy of others?" and "who should decide in both cases, is it the people, government, or the private entities so that the right to privacy and freedom of expression will be fairly assess?" might put forward immaculate (and almost endless) debate toward the co-existence of those two rights in Indonesia. Even though existing legal instruments both international and in Indonesia itself seemingly have given the answers, yet those problematic questions still stand when real case happens.

One of the case is all ISP in Indonesia must block *Vimeo* as it deemed to have pornographic contents.[296] It was argued that the blocking hampered people's creative as *Vimeo* is one of the way for people to freely articulate and express themselves and their creativity, whether in form of arts, speech on politics, and many more.[297] The other side of the argument was it is more important to protect public interests from the bad impacts of pornography.[298] The decision to block was based on the investigation by the TRUST Positif team that said *Vimeo* contained explicity pornography.[299] This was one of the case where people ask for their freedom of expression to be protect and fulfilled, but the government had different view.

Then, for the case of using breach of privacy as a ground to block negative contents in the internet, this writing has not been found any case yet in Indonesia. There was a debate upon the lack of

[296] Tech Asia, "Fokus Perundangan E-Commerce, Rudiantara tak boleh abaikan isu pemblokiran website dan privasi", (accessed 31 August 2016 1.02 PM), URL: https://id.techinasia.com/menkominfo-rudiantara-kebijakan-pemblokiran-website-privasi.
[297] *Id.*
[298] Tempo Co, "Ini Alasan Pemblokiran Vimeo", (accessed 31 August 2016 11.09 AM), URL: https://m.tempo.co/read/news/2014/05/12/173577087/ini-alasan-pemblokiran-vimeo.
[299] *Id.*

protection for consumers' privacy in a site of mobile application's terms and conditions in 2016.[300] Notwithstanding, as of this writing, there was not found any official report based on the Article 10 letter (of) of the Decree yet towards that site of mobile application.

IV.CONCLUSION

In summary, the dialogues on internet issue is developing in Indonesia. Recently, discussion on network neutrality came into light. Indonesia national law namely EIT Law and Ministerial Decree of Communication and Information No. 19 of 2014 on Websites with Negative Contents Control still not consistent with one of the principle of net neutrality that is no-blocking. On top of that, the prescription in both legislations bring right to privacy and freedom of expression into a normative clash. There are still many unanswered questions. Two of them are what is deemed as privacy according to both legislation and to what extent it is supportable to use the right to privacy as a ground to limit freedom of expression. Being the case, the discourse of network neutrality in Indonesia must carefully embody the importance of the co-existence between right to privacy and freedom of expression.

[300] Further reference: "Ngerinya Pelanggaran Privasi Yang Dilakukan Go-Jek dan Grabbike Terhadap Penumpang Mereka", (accesssed 2 September 2016 8.26 PM), URL: http://aitinesia.com/ngerinya-pelanggaran-privasi-yang-dilakukan-go-jek-dan-grabbike-terhadap-penumpang-mereka/.

9. GENDER EQUALITY: ACCESS TO WORSHIP PLACES

Author(s): Cheenu Sharma[301]

ABSTRACT

Only women can empower women. Today, emphasis is laid on empowering women and gender equality, but how do we plan on achieving it in a country where women have always been put down and seen subservient. Change can only happen if there is awareness at our individual level. We need to make women aware of their rights, educate them and make them realize that they are equally important. We need to shake them and let them know that it's okay to say no to your husband, brother, son or father. It's okay to want to live your life on your own terms. If women themselves do not realize their worth, then very little can be expected from the opposite gender people. It is agreeable and is equally important to know and to take a note that men and society play an important role in empowering women but that is exactly why we must profess women to treat their own kind better.

I. INTRODUCTION

Defining the word 'gender' is a simple task but, when we emphasize on the meaning of 'equality' then it is a bit complex task. In colloquial terms, Gender means any sex – be it male, female or any transgender and Equality means treating everyone equal in the eyes of law irrespective of any caste, colour, race, sex, religion, and region. A blend of these two words leads to a wider concept of "Gender Equality[302]".

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[302] Ibid.

'Access' means entry or way to reach a particular thing and 'Worship place' denotes any place to which some religious sentiments are attached or is specially designed structure or consecrated space where individuals or a group of people come to perform acts of devotion, veneration, or any religious study. By putting some legal reflections on these terms, we get some wider connotations related to Gender equality and Access to worship places. According to our Indian Constitution[303], Equality before the law means that equality among equals and that the law should treat everyone equally be it while giving punishments or while protecting rights. The right to sue and be sued, for the same kind of action should be same for all citizens of full age[304].

Our Constitution also gives us Fundamental rights[305] which explicitly prohibits any form of discrimination and also gives liberty to Indian citizens. Right to freedom of religion is one such Fundamental Right which includes freedom of conscience and free profession, practice, and propagation of religion, freedom to manage religious affairs or freedom from religious instructions in certain educational institutes.

Women are constantly fighting a battle for this equality irrespective of the fact that our Constitution expressly provides for it. Also, they are currently fighting to be treated as equals in the eyes of their Gods. Indian feminism has always been a unique debate, owing to various ethnic influences that are a characteristic of the cultural minefield that India is[306]. However, this issue encompasses not only feminism, but also religious practices and their conflict with our Constitutional law.

[303] Article 14 –Equality before law- The State shall not deny to any person equality before law or the equal protection of the laws within the territory of India.

[304] Uma, *Right to equality – A Fundamental right*, available at http://www.legalservicesindia.com/article/print.php?art_id=1688 (last visited on 2nd august , 2016 at 08.05 PM)

[305] Fundamental Rights are a charter of rights contained in the part 3 of Constitution of India and it guarantees civil liberties such that all Indians can lead their lives in peace and harmony as citizens of India.

[306] Mehta, kavita. *Gender equality: freedom of access to worship places,* available at http://www.pressnote.in/literature-news_314517.html (last visited on 15th july,2016 at 05.10 PM)

Banning menstruating women from entering places of worship by priests is not a new thing in India. What is intriguing is that a few fundamentalist forces still want to nurture and continue this unscrupulous practice in the name of religion and cultural practices[307]. What requires be questioning or arguing is whether these priests or fundamental forces have the right to decide the right or appropriate behaviour for women in religious places. Secondly, whether these various forces are or see themselves above the Constitution and the constitutional rights[308] given to its citizens by the state expressly? Finally, what is the role of the state in protecting and ensuring the rights of its citizens? Also, we need to raise a question that Mystifies gender equality – Are we accepting the change?

II. HISTORICAL FLASHBACK

Since time immemorial, God as well as worship places have been in existence. Each religion has its own worship place according to their Gods and a particular procedure which states who can enter and worship the idol. These places differ in their infrastructure, idols, structures, priests and prayers in order to have their own significance. But what is common thing among all of them is how most of them prohibit women from accessing these places of worship. It is rightly quoted by ***Letty Cottin***[309] that,

"When men are oppressed, its tragedy. When women are oppressed, its tradition"

Since ancient times, all this has been the same and even today, nothing has changed. Women are always considered to be weak and incapable of doing those jobs which men do. All we could see is male priests in temples, mosques, churches, etc. and we rarely could have seen any female priestess. If

[307] Kumar, Anant. *Menstruation, Purity and Right to worship,* available at,http://www.epw.in/journal/2016/9/web-exclusives/menstruation-purity-and-right-worship.html (last visited on 21st july,2016 at 04.08 Pm)

[308] These include individual rights common to most liberal democracies, such as equality before law, freedom of speech and expression, and peaceful assembly, freedom to practice religion, and the right to constitutional remedies for the protection of civil rights by means of writs such as habeas corpus.

[309] Letty Cottin Pogrebin (born June 9, 1939) is an American author, journalist, lecturer, and social activist.

a woman cannot become one, that is another issue, but the main question is even something as basic why mere access is banned for them? Isn't God the same for all humans? Be it male, female or any transgender.

In this patriarchal society, men have always been the first choice, be it to write an epic or be the subject of one or become a priest. Men are the ones who have decided everything for themselves, and for women and for whole family according to their own convenience. As stated in a poem of ***Maithilisharan Gupt***[310]***,***

"Nar krit shastron mein sab bandhan, hain naari ko hi lekar, Apne liye sabhi suvidhayein, pehle hi kar baithe nar."

This is exactly what we see when it comes to worship. Men are the ones who make rules for worshipping still and women are bound to follow them without questioning. It seems like a dictum which has to be followed and nobody can raise his or her voice against it. This has been going since a very long time and women have accepted it. Even if they don't want to, they ought to because there are many superstitions associating to this issue in every religion which people still believe upon and are adamant in not making an alteration.

III. NOTION OF WOMEN'S IMPURITY

One main notion is about menstruation[311]. It is believed that women are unclean, filthy and possess negative energy during their menstrual cycle, so they should be in solace or must remain outside or far away from any worship place.

The common thread that runs through these excuses is patriarchy which is postulated upon the notion of women's inferiority and impurity, which then becomes a justification for their subordination and

[310] Maithilisharan Gupt (3 August 1886 – 12 December 1964) was one of the most important modern Hindi poets.
[311] Menstruation, or period, is normal vaginal bleeding that occurs as part of a woman's monthly cycle.

subservient position. The other connected thread is the perception that women are devilish seductresses who have the strength to tempt men even while they are engrossed deeply in prayer and worship or in simple words women can become an obstacle in meditation or prayers or priests.

The recurring example of Eve, who brought about the fall of the mankind by luring Adam into sin and was ejected forever from the Garden of Eden, a concept rooted in Judeo-Christian tradition, becomes a theme across various civilizations and religions.

The concept seems to have been brought up during the later **period** of civilization when **patriarchy** was taking roots, when political power came to be conferred in kings and private ownership of agricultural lands was introduced, ousting the previous civilization of the food gathering stage, with common living and common ownership of land as its main essentials.

It is during this passage of time that women appeared to have lost their superior position which they had at the dawn of civilisation. It was a belief that women are spurred with the divine power of reproduction and the incarnation of this power was their menstrual cycle which coincided with lunar cycles. Hence, the seeds which were sown were blended with the life providing menstrual blood.

The *Vedas*[312] refer to menstrual blood indirectly as *kusum* (flower), *pushpa (blossom)* and *jivarakta* (the giver of life). The woman was the embodiment of strength or power, — *Shakti* — and could even kill

[312] The Vedas are a large body of texts originating in ancient Indian subcontinent. Composed in Vedic Sanskrit, the texts constitute the oldest layer of Sanskrit literature and the oldest scriptures of Hinduism. Hindus consider the Vedas to be *apauruṣeya*, which means "not of a man, superhuman" and "impersonal, authorless".

evil spirits in the form of Durga and Kali. There is also mention of women like Gargi who challenged a profoundly wise person Yajnavalkya on religious philosophy[313].

In ancient Greek religion, there were women priestesses who organised and managed many festivals and performed religious rituals. Women priestesses worked as oracles, the most famous of them was the Oracle[314] of Delphi. The prominence of the priestess of the Temple of Apollo at Delphi had unfurled throughout the Greco-Roman world.

Feminist anthropologists and historians endorse to the belief that patriarchy introduced the idea of women's impurity to reinforce male supremacy over them. Gradually, as patriarchy took root, women were chastised for their strength of healing and foreseeing. During the medieval ages, many healers and midwives were burnt as witches.

IV. WORSHIP PLACES WHERE ACCESS OF WOMEN IS BANNED

There are many varied places in India where entry or access of women to worship the idols of their respective religions is banned. This ban is not restricted to worship places only but also to educational institutions as well. *One biggest example* of this is very prestigious *Aligarh Muslim University*. The VC[315] of the concerned university said that,

"***There would be four times more boys in the library if girls were allowed in because boys will get attracted to them and discipline issues will crop up***".

[313] Flavia, Agnes. *Temple or Dargah, Restrictions on Women Are Nothing But Ways of Imposing Patriarchy* ,available at http://thewire.in/21007/temple-or-dargah-restrictions-on-women-are-nothing-but-ways-of-imposing-patriarchy/ (last visited on 5th august, 2016 at 06.15 PM)

[314] A priest or priestess acting as a medium through which advice or prophecy was sought from the gods in classical antiquity.

[315] Vice Chancellor

So, these kinds of statements undermine the very essence of EQUALITY of our constitution. Few main worship places where entry of women is banned are as follows:-

- HAJI ALI DARGAH SHRINE, MUMBAI-The Dargah is open to women but its most sacred inner sanctum is barred to females. The shrine's authorities claim that it is "un-Islamic under the *SHARIA LAW*[316]" for women to see or visit graves and that they were rectifying a mistake that had allowed women to enter this area.
- LORD AYAPPA TEMPLE, SABARIMALA-The Lord Ayyappa temple in Sabarimala in the state of Kerala ban the entry of women aged 10 to 50, the age in which they are most likely to be menstruating.
- JAMA MASJID, DELHI-At Jama Masjid Delhi[317] women are not allowed to enter after sunset.

- SREE PADMANABHASWAMY TEMPLE, KERELA-Women are not allowed to enter the temple vaults. Even a female official from the Archaeological Survey of India was barred from entering the chamber for inventorying the treasures.
- LORD KARTIKEY TEMPLE, PUSHKAR- According to myth, women who visit this temple in will get cursed instead of being blessed by the lord; hence the ban was put on entry of women.
- PATBAUSI SATRA, ASSAM- Women aren't allowed inside the temple to preserve its "purity" and "sanctity", particularly as menstruating women are considered "unclean" and "filthy". In 2010, JB Patnaik[318] decided to break the rule and he entered with some women, but the ban was again re-imposed.

[316] Sharia law is the body of Islamic law. The term means "way" or "path"; it is the legal framework within which the public and some private aspects of life are regulated for those living in a legal system based on Islam.
[317] India's largest mosque.
[318] Governor of Assam since 2009.

- JAIN TEMPLES, GUNA, MADHYA PRADESH- Jain community leaders in Guna district of northern Madhya Pradesh do not allow women who wear "western" attire, mainly jeans and tops, from entering any of the jain temples.
- NIZAMUDDIN DARGAH, NEW DELHI - Nizamuddin Dargah, women are not allowed enter into the sanctum and they are confined at the periphery of the dargah.
- BHAVANI DEEKSHA MANDAPAM, VIJAYAWADA- ***Jayanthi Vimala*** was appointed as a priestess at the temple following death of her father, a hereditary priest. As her father had no sons, the government appointed her *"vamsa paramparya archaka"* (hereditary priest) at the temple in 1990[319]. She is the only woman priest appointed by the government in that state but she too is not allowed to enter into the sanctum of the temple, like all other women of the respective state.
- SHANI SHINGNAPUR TEMPLE, MAHARASHTRA- According to a 400-year-old tradition followed by people of India, women are restricted from entering the inner sanctum of the shrine. But, over the past few months, women from all over Maharashtra as well as from other parts of India have been storming the village to protest against gender bias.
- RANAKPUR TEMPLE, RAJASTHAN- A large board is put outside the entrance of the temple defying when and how women can enter the temple.

V. LEGAL PERSPECTIVE

There are many places where the access of women is completely banned. Some of them are in limelight for barring women from worshipping and entering the temples and for infringement of their constitutional right. **Article 25 (1)** provides and guarantees to all persons (citizens of India) the right

[319]Saha, devanik. *9 places in India that restrict entry of women,* Available at, http://www.thepoliticalindian.com/women-not-allowed/ (last visited on 30th decemeber,2015 at 11.05 Pm)

to freely profess, practice, and propagate their religion. **Article 26 (b)** grants to religious denominations the right to manage their own affairs in the matter of religion[320]. However, **Article 25 (2)** allows state intervention in religious practice, if it is for the determination of "social welfare or reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus". But these provisions do not, however, entirely resolve the issue.

The right to freedom of religion under **Article 25(1)** is enforceable against the state, and not against other individuals, or corporate bodies. But this does not mean that one cannot file a suit relating to this Article as the Supreme Court has held in the *Sabarimala temple case* that if one private party chokes another private party from exercising her constitutional right, then it is the duty of the State to accomplish or protect her right by restraining the former from continuing with its obstruction. **This prohibition of entry for women in Sabarimala shrine was being protested by many women throughout India and being contested by lawyers in the Supreme Court which may lead to the opening of a Pandora's Box for other faiths too.** Actually, the management of the temple was not interested in the modern approach of allowing women to fight for themselves or procure their fundamental rights; they were obsessed only in the patriarchy and in old traditions.

At another level, a group of Muslim women staged a protest demanding their entry into the inner sanctum sanctorum of the historic Haji Ali dargah, claiming that the ban is of recent origin and is arbitrary or unreasonable since several dargahs in Mumbai allow women to enter the inner sanctums of a dargah. In response to a petition filed by two Muslim women which is pending before the Bombay High Court, the representatives of the trust which **manages and controls** the affairs of the dargah

[320] Article 26 of our Indian Constitution : Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-
(a) to establish and maintain institutions for religious and charitable purposes;
(b) to manage its own affairs in matters of religion;
(c) to own and acquire movable and immovable property; and
(d) to administer such property in accordance with law

stated that women are provided with separate entrances to "ensure their safety". They also claimed that if men and women are allowed to mingle, it would not only distract men but also would be against the tenets of Islam. But the women have spurned at this claiming that the discrimination is based on patriarchy and not religion[321]. The trustees also said that the ban was aimed at 'protecting' female worshippers from sexual attention because when they bowed, the pallu [loose end] of their saris fell, exposing their chest area which seduced the men who might be looking at them and in turn would distract them. The case was filed by *Bharatiya Muslim Mahila Andolan*.

The question of *gender justice* in religious institutions is the charter of the State which is accountable to enforce the Constitution. Being a secular state, the governments have not and have never interfered in the areas of individual religions which are administered by their respective religious bodies. The ramification of the judgement in these two cases will be then to find means or ways which will advance the Constitutional assurance of equality, non-discrimination and freedom of religion. This issue needs a special attention and wide dissection from legal point of view because, only then we can save the basic sanctity of our Indian state of being a 'socialistic' and 'democratic' state.

VI. SOME IMPORTANT CASES AND RULINGS

- *S. Mahendran vs. the Secretary, Travancore* [322] ***(Sabarimala Temple Case)*** - A three-judge had said that denying entry to women based on traditions are completely against the principles of the Constitution. The court was hearing a Public Interest Litigation (PIL) filed by the 'Indian Young Lawyers' Association', probing access of women in the Sabarimala temple. The hearing came close on the heels of the Bombay High Court order directing

[321] Agnes, Flavia. *Temple or Dargah, Restrictions on Women Are Nothing But Ways of Imposing Patriarchy*. available at http://thewire.in/21007/temple-or-dargah-restrictions-on-women-are-nothing-but-ways-of-imposing-patriarchy/ (last visited on 22nd june,2016 at 10.10Pm)

[322] AIR 1993 Ker 42

Maharashtra Government to ensure and take care that women are not denied entry to/at any temple. Defending the ban, the Sabarimala temple administration earlier said the tradition is connected to some paramount religious practice. Supporting the temple administration, the Kerala Government told the court that beliefs and customs of devotees cannot be modified through a judicial process and that the opinion of the priests is and will always remain final in matters of religion.

- *Dr. Noorjehan Safia Niaz & Another V/s State of Maharashtra & Others*[323] (***Haji Ali dargah shrine case)*** **-** A petition in the Court had sought an interim relief by way of allowing women to enter the inner sanctum at Haji Ali Dargah.
- *Smt.Vidya BAL & Anothers Vs. The State of Maharashtra & Ors*[324] (***Shani Shingnapur Temple case***)- A 400-year-old ban on entry of women into the shrine's core area was removed by the temple trust following advocacy group Bhoomata Brigade's agitation against gender bias and the Bombay High Court order upholding the equal rights to worship.
- *Kerala Hindu places of Public Worship (authorisation of entry) Rules, 1965*- The ban on entry of women inside various Hindu temples was enforced *under Rule 3 (b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965* (women at such time during which they are not by custom, tradition and usage allowed to enter a place of public worship). But, the Kerala High Court had upheld this ban under the above mentioned rules in 1991 and directed the Devaswam Board to implement it.

[323] PIL NO.106 OF 2014 in Bombay High Court
[324] PIL No.55 of 2016 in Bombay High Court

- *S.P. Mittal Etc. vs. Union of India and Others*[325]- CHINNAPPA REDDY, J. Gave his views on religion stating that –Every person has a particular religion, or at least, a view or a window on religion, be he a bigot or simple believer, philosopher or pedestrian, atheist or agnostic. Religion, like 'democracy' and 'equality' is an elusive expression, which everyone conceptualizes according to his preconceptions. What is religion to some is perfect and real dogma to others and what is religion to others is pure superstition to some others. As a worshipper at the altar of peace, I find it complex to reconcile myself to religion, which throughout the ages, has justified war calling it a Dharma Yuddha, a Jihad or a Crusade. I believe that by getting blended up with religion, ethics has lost much of its point, much of its drift and a major portion of its spontaneity.

VII. CLIMBING QUESTION -WHY THIS DISCRIMINATION?

It was Manu who firstly talked about subservient position of women in our India society. Before Manu's works, all philosophers have talked or written about the strong roles of women like Kali, Durga etc. When God created this universe, he included human species on Earth but, he proposed the concept of equality not gender inequality. All of us are equal in the eyes of law and in the eyes of God as well. So, why do we humans consider ourselves above the almighty God and started treating people unequally or discriminate on varied basis of class, colour, religion, sex etc.

Although this discrimination or subservient position of women is a part of our society from time immemorial but, it took rigid and cruel shape since the concept of patriarchal society arose. The conflict is obvious and also expected, where priests are openly announcing strictures or rules that menstruating women will not be allowed to enter the place of worship. But the rapacious thing in this

[325] AIR, 1 1983 SCR (1) 729

conflict is that the State has become a mute spectator and is playing along with the unreasonable rules set by the priests. Although the Supreme Court in its various judgements has pronounced that such a prohibition is unconstitutional and arbitrary; still the Kerala state government stood to defend the ban on the entry of women in Sabrimala temple. This was a very surprising and parsimonious step on the part of a government whose duty is to treat its citizen's equal in a democratic state.

In a secular and democratic country like India, which promises and gives surety that it will protect the rights of its citizens to practice religion and faith of his or her choice, such rulings are a violation of one's rights. The recent ruling by the Sabrimala temple in Kerala is that it will only allow women to enter into the temple if a scanning machine is designed and placed outside the entrance of the temple to ensure none of them are menstruating .The temple has currently prohibited the entry of all women in the menstrual age group (10-50) because it believes that bleeding makes them impure and unhygienic which is not only an attack on women's rights, but it is a question of one's privacy. We can call this Hindu majoritarianism, where a few wants to edict what should be done and what not.

It is a serious issue where these forces, like temple managements authorities or some other concerned religious committees which are proclaiming themselves as supreme power above the State, although not in words but in acts. We actually do not know whether the State is supreme or these fundamentalist forces, but surely we want to know.

In today's 21st century modern world, where we talk about a woman as our Prime Minister, astronaut, scientist, fighters, judges etc., how one can one not see them not as equal to men. If males think that menstruation is impure then, they should not expect children from women. Because women are given equal rights of access to worship places and to do prayers or offer anything of their choice to their

respective gods or goddesses by our Constitution expressly. It is rightly said by ***Japleen Pasricha***[326]that,

"This isn't about if I want to go to a temple or mosque or church or if I'm religious or not; this is about my right to walk into any building, institution, temple regardless my vagina is bleeding or not."

But, nowhere is it written that they are obliged to give birth to children in order to continue the lineage of their husbands. If males can't see women equal to them or call the creator of human race as impure then, I think males should stop marrying any female and should also stop expecting any successor or any children in their families. Also, one of the greatest lies of patriarchy is claiming and framing the father as life giver. In relation to this a Muslim philosopher[327] has rightly quoted that,

"Women does not emerge from a man's rib's, not ever, it's he who emerges from her womb"

So, it was the old time when women were oppressed by males but today, women are no more subservient as they are very well familiar with their rights and duties.

VIII. CONCLUSION AND SUGGESTIONS

The State should take strict action against those *brahmanical zealot forces*; otherwise they are developing the ground for *Hindu talibanisation*. Different groups of women and organisations have come forward and challenged this whole notion of "purity-impurity" and are protesting against this unjust commanding by the temple heads in the name of god, religion, culture and practices. However, one should not forget that it is not their fight only. There is a need to fight against this whole design of fundamentalist forces to break the social web of society. Patriarchal impulses are re-emerging to

[326] Founder and Editor-in-chief of *Feminism in India.*
[327] Nizar Qabbani

marginalise, exclude and control women's mobility and access to institutions. Today, it's for women only, tomorrow it will be for others, particularly the marginalised and excluded population groups. Although traditions go out of date very hardly in a country like India, but it will take some time to accept new traditions. People should be made aware that India is a country of villages, and to make it prosper, education is needed so that people can be aware of their rights and fight for them. Government is also taking many initiatives to open schools and colleges. Also, they are giving girls more scholarships and stressing on it. Therefore, girls altogether have been accepting the odds and are aware of their rights. They have started educating other women and are fighting for themselves and others too for their rights. **The *First lady Michelle Obama* has rightly highlighted the women power through her saying that,**

"Girls sometimes think words like power have nothing to do with them- but that couldn't be further from the truth. The truth is, being you is powerful. Doing the thing you love, whether that is coding an app or writing a poem or earning money for college at an after school job, is powerful. Helping others, whether it's helping a younger sibling with homework or reaching out to folks struggling in your community or standing up for a classmate who is being bullied, is powerful and most of all, communising to your education and working as hard as you can is powerful because that's how you will ensure that you can be anything you imagine and make sure your voice will be heard in this world."

Only women can empower women. Today, emphasis is laid on empowering women and gender equality, but how do we plan on achieving it in a country where women have always been put down and seen subservient. Change can only happen if there is awareness at our individual level. We need

to make women aware of their rights, educate them and make them realize that they are equally important. We need to shake them and let them know that it's okay to say no to your husband, brother, son or father. It's okay to want to live your life on your own terms. If women themselves do not realize their worth, then very little can be expected from the opposite gender people. It is agreeable and is equally important to know and to take a note that men and society play an important role in empowering women but that is exactly why we must profess women to treat their own kind better.

It is only in Christianity today that, women are allowed to insinuate to the church during their periods. Obviously this was not the case before. In the light of the recent observations in Supreme Court on women's equal right to worship, a section of Christians takes a hard look at the patriarchal notions in the church. So why cannot we allow them in temples and mosques or any other worship place. Also, there is no such ban in Sikhism from entering any gurudwara's while menstruation. It was rightly embedded by **GURU NANAK DEV JI** in **Shri Guru Granth Sahib**[328] that,

"So keo manda akhiye, Jitt janme rajaan"

So, we need to make a modification to this age old traditions and norms, so that this world can be a better place for women to live in. "Deeds not words" will help us in reaching this goal of empowering women. Also, it is important to affirm and work for a secular India and work with all women of all faiths, especially with women of minority religious communities, to dismantle patriarchy and caste in all religions and to work for economic, political and social justice for all in the country[329]. The quest for equality of status, not only for women but for the socially unprivileged too, has always been the prime driver of change. The challenge to status quo is a mark that the society is intellectually alive and kicking. The hope for change is still burning inside and not dead yet.

[328] Holy Book of Sikhs.
[329] Abraham, Samuel. *Daughters of Eve.* Frontline newspaper (May 13,2016)

10. CYBER-TERRORISM – CYBERSPACE, A TOOL FOR GLOBAL TERRORISM

Author(s): Shramana Dwibedi and Shivam Shukla[330]

ABSTRACT

Cyber-terrorism, an analysis of the word provides us with a clear meaning- to execute terrorist activities using cyberspace-computers and its aided technologies, primarily the Internet. The term is gaining prominence with the growing impact of abuse in the field of cyber technology, however in the absence of any prevailing laws in the Information Technology sector, most countries are failing to gauge the outcome of such attacks and regulate the same, in turn, endangering cyber and national integrity and security. Hence, a study to incorporate cyber-terrorism in the Information Technology laws of India becomes essential. The Internet has global access and is dynamic in its reach. Its user-friendly interface has encouraged terrorist organizations to make use of this mechanism, allowing them to realize their militant ideologies and conduct cyber-attacks on a global level causing widespread destruction to lives, property and resources. Cyber-terrorists are a threat to various countries as they are adept at hacking into protected computer systems, leaking valuable private data relating to a nation's security and defence. This paper shall focus on recounting and analyzing activities that constitute cyber-terrorism. The use of cyberspace is done not only to materialize terror attacks but also to spread radical ideologies over the Internet with an aim to recruit young minds (special focus on the Islamic State's influence over Indian youth) and to procure funding and financing for the militant groups. The role of cyber technology in facilitating terror acts in the modern day such as the Mumbai attacks of 26/11 and the controversial topic of the possible involvement of cyber-terrorism in the disappearance of the MH 370 shall also receive mention in this paper. How terrorist organizations are spreading their roots throughout the world over Internet communication shall also be analyzed. Cyber-terrorism can wreak havoc in the public domain if not brought under immediate check, and for this purpose, certain methods shall be advised in the

[330] Symbiosis Law School, Hyderabad

paper to combat cyber-warfare effectively. India, therefore, has to along with other countries, under the effective leadership of the United Nations devise legislations and special combat forces to fight cyber-terrorism on a united front.

I. INTRODUCTION

[331]"Cyber terrorism is the convergence of cyberspace and terrorism. It refers to unlawful attacks and threats of attack against computers, networks and the information stored therein that are carried out to intimidate or coerce a country's government or citizens in furtherance of political or social objectives. Further, to qualify as cyber terrorism, an attack should result in violence against persons or property, or at least cause enough harm to generate fear. Attacks that lead to death or bodily injury, explosions, or severe economic losses would be examples. Serious attacks against crucial infrastructures could count as acts of cyber terrorism, depending on their impact."

[332]Dorothy E. Denning's attempt above at defining cyber-terrorism mainly talks about pure cyber terrorism that essentially deals with threats or attacks against a computer system with an aim of damaging its physical structure and its attached networks. This is done primarily to utilize the computer system as a tool, a weapon for destruction or to affect adversely the information stored on that particular computer system.

However, describing the elements of cyber terrorism is certainly more exhaustive than it appears. Hence, with an objective to assimilate the different aspects involved in this form of cyber warfare, other **notable definitions** of the same shall be seen.

[331] Cyber terrorism: The Logic Bomb versus the Truck Bomb, Dorothy E. Denning, Global Dialogue Vol 2 No. 4 Autumn 2000, Terrorism: Image and Reality

[332] Sarah Gordon, Cyberterrorism?, Symantec, available at https://www.symantec.com/avcenter/reference/cyberterrorism.pdf, Page 4 Para 3

- [333]**The United States Federal Bureau of Investigation (FBI)** defines cyber terrorism as, "The premeditated, politically motivated attack against information, computer systems, computer programs, and data which result in violence against noncombatant targets by sub-national groups or clandestine agents."
- [334]**The North Atlantic Treaty Organization (NATO)** in 2008 defined cyber-terrorism as, "A cyber-attack using or exploiting computer or communication networks to cause sufficient destruction to generate fear or intimidate a society into an ideological goal."
- [335]**The US National Infrastructure Protection Centre**, a part of the Department for Homeland Security defines it as, "A criminal act perpetrated through computers resulting in violence, death and/or destruction, and creating terror for the purpose of coercing a government to change its policies."
- [336]**James Lewis (Centre for Strategic and International Studies)** defines cyber terrorism as, "The use of computer network tools to shut down critical national infrastructure (such as energy, transportation, government operations) or to coerce or intimidate a government or civilian population."

All the definitions cited above, re-iterate one common factor i.e. the use of cyber-space as a medium to carry out terrorist activities.

Now, an analysis of the above definitions to present a thorough picture of cyber-terrorism is provided. An act so planned or achieved by an individual or a group of people, barred by law to create a fear in

[333]Dr. Mudawi Mukhtar Elmusharaf, Cyber Terrorism : The new kind of Terrorism (**April 08, 2004**), available at http://www.crime-research.org/articles/Cyber_Terrorism_new_kind_Terrorism
[334]Cyberterrorism Defined(as distinct from "Cybercrime"), available at http://resources.infosecinstitute.com/cyberterrorism-distinct-from-cybercrime/
[335] Supra 3
[336] Supra 3

the public domain or cause actual destruction of property and loss of lives, can be called as terrorism. Such acts dominantly disrupt public peace and national security and an environment's natural setting. The use of cyber technology and its connected networking features, primarily, the Internet, in the different phases of a terrorist attack can be termed as cyber-terrorism.

Cyber terrorists are traditional terrorist organizations that exist for their subjective reasons. Most terrorist organizations have as their agenda Jihad- their understanding of Jihad is peculiar in its sense, they wish to establish a dominant Islamic Caliphate, a ruling religion over all other religions. They believe that an Islamic rule can be established by empowering the Muslim / Islamic population to carry out menacing destruction over places which refuse to accept Muslim domination. The sad part is that their idea of Jihad is actually a rigid autocratic rule that these staunch terrorist leaders attempt to establish. Hence, the fight ensues between such organizations and anti-terror combating units such as various countries.

Technology is one of the strategic factors driving the increasing use of the Internet by terrorist organizations and their supporters for a wide range of purposes, including recruitment, financing, propaganda, and training, incitement to commit acts of terrorism, and the gathering and dissemination of information for terrorist purposes. While the many benefits of the Internet are self-evident, it may also be used to facilitate communication within terrorist organizations and to transmit information on, as well as material support for, planned acts of terrorism, all of which require specific technical knowledge for the effective investigation of these offences.

II. UNDERSTANDING THE REASONS BEHIND GROWTH OF CYBER-TERRORISM

With the evolution of man, scientific inventions have always progressed at an impressive pace. The concept of Internet is intriguing to terrorist organizations because of the facilities it provides.

- **User-friendly interface:** Usage of computers and the Internet is a child's play. Equipped with a user-friendly interface, shortcuts and help taskbar that teaches the mechanism for using this technology, ample sources providing knowledge of the same are available in books as well as the web.
- **Possibility of Global Communication:** The Internet has given its users the scope of communication that can take place on a global level. Either by way of e-mails, or broadcasting features, people can connect with each other while residing even in the most remote places. Users can connect with others from any part of the world. All this has been facilitated by the features an Internet connection provides. The terrorist organizations use this feature to connect with other such groups or fresh recruits to plan out their terror attacks. This way of communication allows users to transcend physical state boundaries to connect with a wider audience worldwide.
- **Easy Access:** Creating an e-mail account or a Facebook or Twitter account is simple and involves certain guided steps. Such facilities come free of cost and hence, registering is easy. Also, there is no bar on the number of accounts that can be possibly made for an individual. In the absence of any such regulation, multiple accounts can be made in a very short period of time.
- **Faster Communication:** Communication over phones and messaging happen instantaneously and hence, is a preferred mode of communication by the terrorists. Emails take a very brief period of time and are therefore much used. Such instantaneous modes of communication come in handy as information is received and sent very quickly.

- **Secure method:** Communication happening over the Internet via emails and broadcasting are not lost in transit as in the case of traditional mail or post and are delivered to its desired receiver without any delay.
- **Encryption of Data:** Sites like Facebook and Twitter as part of their privacy scheme encrypt the information and data on their sites belonging to their users.[337] Encryption means to transform the data being transferred by their users into a form of code that cannot be easily deciphered. This is done to ward off hackers who wish to access, without authorization, the private information of other users. This feature makes it difficult for governmental agencies to track any information pertaining to terrorist activities being transferred over the Web. The Apple Company also provides strong encryption in its manufactured mobile phones. This feature allows terrorists to convey messages and terror plans and designs over the web without a fear of getting caught.
- **Sending Coded Messages:** The advancement of technology has seen excellence. One such mechanism is the art of coding and decoding. Terrorist organizations have developed their own coding methods, using the same, they transfer data to each other. Since, such coding schemes are alien to others, they fail to understand the hidden message which is realized only by the desired receiver. This method aids their increased need for security and privacy of the data being sent.
- **Applications (Apps):** Certain apps like Google Maps and Google Earth have preserved the locations of places in minute details and present them to users in the way of virtual maps. Such

[337] Vangie Beal, available at http://www.webopedia.com/TERM/E/encryption.html

an app is used largely by terrorists to get an idea about the location that they aim to attack. This helps them in planning and designing an attack.

III. FOCUSING ON INDIA - A VULNERABLE POSITION

India is at a more serious threat of cyber-attacks than can be gauged for because of the following reasons:

- **Dispute over occupation of Kashmir:** Dispute over occupation of Kashmir has often led the two neighboring countries of India and Pakistan into war. Terrorist organizations have taken this as an agenda to launch terror attacks on India repeatedly. Infiltrants from Pakistan have given effect to massive terrorist attacks such as the 26/11. These terrorist groups wish to widen the gap between the Hindus and the Muslims hereby, disrupting the harmony among them.
- **Potential threat from Bangladesh:** Bangladesh is a known hub of terrorist organizations that infiltrate into the Indian landmass illegally to carry out attacks. Often these attacks are a joint venture by terrorist groups from different parts of the world. A cyber- attack is a probable incident.
- **Inciting the Youth population:** India harbours a large youth population. Often terrorists incite the young over the Web by advertising their ideology and encourage them to execute an attack within India. Hence, India is not safe within.
- **Increased diplomatic relations between India and the USA:** The United States of America is on the hit-list of terrorist organizations for their pioneering attempts at combatting terrorism. India has always supported the USA in such schemes which have angered the militants.

Hence the **United Nations Office on Drugs and Crime (UNODC)** in collaboration with the **United Nations Counter-Terrorism Implementation Task Force** have prepared a report, **'The use of the Internet for terrorist purposes'** whereby they have highlighted the important role that Internet continues to play in sketching out terrorist activities.

[338]**Yury Fedotov, Executive Director (UNODC)** in the Foreword of the report has stated- The use of the Internet for terrorist purposes is a rapidly growing phenomenon, requiring a proactive and coordinated response from Member States.

Cyber terrorism involves different phases. Devising a terror attack employing cyber tools to facilitate the same may form the back bone of the definition of cyber-terrorism but it is definitely not the sole definition aspect of it.

[339]The **United Nations Office on Drugs and Crime (UNODC)** in collaboration with the **United Nations Counter-Terrorism Implementation Task Force** have prepared a vast exhaustive report by the name **'The use of the Internet for terrorist purposes'** whereby they have stressed on the different aspects or elements that also form a part of cyber-terrorism. The following have been discussed in details below:-

- **<u>The role of cyber-technology in recruiting young minds</u>**

  Internet communication is used for:

  - Propaganda advertising using social media
  - Recruiting youngsters in the terrorist regime
  - Inciting youngsters to join terror organizations

[338] Available at http://www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf, Foreword
[339] Available at https://www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf,Pages3-8

The above has been explained with a special focus on the Islamic State and India:

The ISIS has utilized cyber technology from its inception when they uploaded beheadings of hostages on the Web and continue to do so even today.

[340]ISIS member Mohammad Shafi Amar (alias Yusuf al-Hindi's) gave effect to his terrorist propaganda by advertising about the organization on the web. Youngsters who liked his Facebook page would receive personalized messages from him where he would attempt to prejudice the person's brain to follow their radical tendencies. He would organize meetings via Skype chats with the young recruits under false identities.

In the year 2014, a Twitter account belonging to an ISIS member was tracked down to Bengaluru, India. This account belonged to 'Mehdi Masroor Biswas' by the account name- @ShamiWitness. This man was responsible for advertising the Islamic State agenda to the Indian youth by way of cyber social channels. He lured in young recruits by emphasizing on the concept of Jihad as perceived by the terrorist organizations. Sometimes, men from economically weaker sections are roped in by offering money to their families. A former National Security Advisor has opined that close to 100 Indians are engaged in the activity of publicizing the Islamic State propaganda with a purpose of attaining fresh recruits over cyber-space.

Failed Attempt of Attacks- A threat of an attack, as a consequence of standing by the USA in its fight against the militants of the Islamic State, has already been received by India.

The Islamic State aims to unite terrorist organizations in Pakistan and Afghanistan to launch collaborative attacks on the USA and its allies in combating terrorist attacks. This is an open threat to India's security.

[340] Manoj Gupta, Revealed: How ISIS recruits and trains Indian youngsters for terror strikes (Feb 1, 2016, 8:51 pm), available at http://www.ibnlive.com/news/india/revealed-how-isis-recruits-and-trains-indian-youngsters-for-terror-strikes-1197835.html

[341]A report published in the USA Today (reported by American Media Institute) states that a 32 page document in Urdu which was seized from a Pakistani citizen with connections in the Pakistani Taliban when translated in English states that preparations for an attack in India are underway.

[342]This threat was perceived prior to the event of Republic Day in India, 2016, 18 suspected ISIS terrorists were detained from all over the country by counter-terror raids conducted by intelligence agencies. The imminent attack that was thwarted off successfully was to attack Prime Minister Narendra Modi and disrupt the Republic Day parade.

- **Communication over encrypted coded messages**

The various online sites such as Twitter and Facebook among many others use encryption as part of its privacy feature to achieve data security. The data that is transferred using these sites or the communications taking place are translated into a secret code described as encrypting. To get an access to such encrypted data, it is necessary to possess a secret key or password. This was done to ward off hackers from getting unauthorized access to users' accounts. However, this has been duly used by terrorist organizations to secure their own communication that often contains imminent terror plans and designs. They make use of such sites for communication throughout the militant domain in the world. Using these channels keep their data secure and private. The National Investigative [343]Agency had reported that the recruits of the Indian Mujahideen use proxy servers to hide their true

[341] PTI, ISIS preparing to attack India, likely to spark Indo-US confrontation: report (July 29, 2015, 8:50pm), available at http://indianexpress.com/article/india/india-others/isis-preparing-to-attack-india-spark-indo-us-confrontation-report/

[342] Arunoday Mukharji, Delhi on high alert over ISIS threat to Modi, Hollande during R-Day celebrations (Jan 22, 2016), available at http://www.ibnlive.com/news/india/delhi-on-high-alert-over-terror-attack-threat-to-modi-hollande-during-r-day-celebrations-1193019.html

[343] Anthony Cuthbertson, Are Isis hackers trying to destroy the internet?(December 16, 2015 12:56 GMT), available at http://www.ibtimes.co.uk/are-isis-hackers-trying-destroy-internet-1533332

geographical location and complex codes to communicate. They set up e-mail accounts that disappear if not accessed again within 24 hours of the first use. Riaz Bhatkal, an Indian Mujahideen terrorist has been known to run a hi-tech command centre from Karachi to establish links with other terrorist groups in Nepal, India, Sri Lanka, Bangladesh and the Maldives. They transform their messages in the form of certain codes that are only known within the terrorist organization so that they cannot be deciphered by the governmental security agencies, even if they are intercepted.

Obtaining finances to aid terror acts - Not only are terrorist attacks planned out or communicated via these channels, financing deals and arrangements are achieved and sponsors for such acts are gathered from different parts of the world by approaching them over Web communication. Hence, transaction deals take place via encrypted messages. Apple Company provides this feature in its mobile phones. [344]In the present situation, the US government is demanding weakened encryption of data by companies such as Facebook, Twitter and Apple so that they are able to efficiently track down terror suspects and get access to their transmitted data. A creation of a software that shall allow guessing of passwords of mobiles which are have been used by terrorists is being asked for, particularly after an iphone 5C used by a San Bernardino shooter was traced by the FBI but due to Apple's security measures, they could not break into the phone. However, the said companies refuse to budge from their stand as weakened encryption could mean losing the confidence of users in their privacy scheme.

- **Creation of new androids to safeguard communication**

With the world's eye on Facebook and Twitter as sites used by terrorists to communicate propaganda, the ISIS has gone one step ahead by creating a new android app called [345]'Amaq Agency' that provides

[344] Facebook and Twitter back Apple in phone encryption battle with FBI, available at https://www.theguardian.com/technology/2016/feb/18/apple-fbi-encryption-battle-iphone-facebook-twitter-san-bernardino-shooting

[345] Pierluigi Paganini, Amaq, the new ISIS Android App for secure communications (Jan. 14, 2016), available at http://securityaffairs.co/wordpress/43578/intelligence/amaq-android-app.html

a more secure broadcasting feature with strengthened encryption mechanisms as compared to Twitter and others. This feature has been made available on mobiles too with an aim of carrying on protected communication and sharing of ideologies and terror plans. It has been made available for downloading post publicity through Twitter. However, after analysis by Ghost Security Group (a counter terrorism network), it has been seen that the app's encryption is not full-proof and is a failure. What is alarming is the attempt of ISIS to achieve such technical feats such as creating android apps to realize their menacing goals. The other terrorist organizations can also take a cue from the Islamic State.

- **Initiation of Technical Glitches: Denying service**

Distributed Denial of Services (DDoS)

[346]DDoS is a mechanism which involves denying web service to the users. To achieve this, the targeted website must be overwhelmed in a certain way so that it is unable to show the required content as demanded by the user.

In the recent DDoS attack on BBC's website which made it unavailable to users for hours, instead of the desired information appearing on the page, an error message could solely be viewed. This cyber-attack was not carried out by any traditional terrorist organization rather it was carried out by a group terming itself as 'New World Hacking'.

Following the above logic, terrorist organizations hold the potential to execute such attacks on media houses, defence headquarters, Presidential building or the Prime Minister's Office. This shall lead to stalling of work. Also, surveillance systems can be affected in the same way. This will prevent surveillance, temporarily providing infiltrators with a chance to enter into foreign territories to execute

[346] Mark Ward, Web Attacks (Dec. 09, 2010), available at http://www.bbc.com/news/technology-11957622

attacks. This can be a serious threat as disabling systems can take place using cyber technology from any part of the world.

Cyber security experts are of the opinion that the Amaq Agency app developed by the ISIS is responsible for a DDoS attack on 13 Internet root name servers that wholesomely support the entire Internet network. This attack perceived, to have been carried out between November 30 and December 1, 2015, is being seen as an ISIS backed attack. The app developed by them was used to flood the targeted servers with five million queries per second hereby, stalling the network.

According to an assessment by the US intelligence officials, the terrorist organization Al Qaeda has the economic resources to recruit professional experts in the field of hacking and encrypting and decrypting. If experts are employed in this regard, not only by Al Qaeda but also other groups with similar ideologies, it is possible that DDoS attacks can hamper the electric grid of a country, its water delivery system, its defence sector as well as financial departments.

- **Using communication technologies for communication purposes- The use of technology in implementing the 26/11 Mumbai terror attacks**

Cyber technology used in terror attacks does not always have to involve complex coding or decoding. It can employ simple day to day devices such as mobile phones as well. The 26/11 attacks in Mumbai was such an event where the terrorists communicated with each other over mobile phones. Using these, they devised the plot of attack and also used it while the attack was underway for communication purposes. The masterminds behind the attack followed its media coverage and kept the terrorists involved in the attack informed over the mobiles itself about any combat mechanism by the Indian government and army.

The app termed as Google Earth was used by them to pre-acquaint themselves with the locations which they had targeted. Google Earth, which provides minutely detailed maps of locations around

the world, came in efficient use to the terrorists who successfully obtained an idea about the location and whereabouts of their target places prior to the attack. This app facilitated their work.

USAGE OF PRIVATE VOIP

Cyber excellence by way of private Voice over Internet Protocol (VoIP) has helped or facilitated the communication mechanisms of terrorists. Terrorist organizations often make use of VoIP for communication. [347]One such instance is that of Lashkar-e-Toiba (LeT, terrorist group) leader Zaki-ur Rehman Lakhvi who uses private VoIP to communicate via audio and video conferencing with other LeT cadres through his smartphone in spite of being in prison. [348]Private VoIP is used as they provide encryption of data being transferred during a phone call, audio or video call. Hence, these are termed as secure gateways which cannot be intercepted by intelligence agencies easily. The data being transmitted is present in an encrypted format and hence, cannot be easily decoded or understood by others. This increases the level of security and privacy of the data transmitted that cannot be obtained in an ordinary phone call.

- **E-Mail Threats forwarded**

The Indian Mujahideen in the past has carried out terrorist attacks such as the May 13, 2008, Jaipur (Rajasthan) bombings, the July 25, 2008 Bengaluru (Karnataka) serial blasts, the July 26, 2008 Ahmedabad (Gujarat) serial blasts, the September 13, 2008 Delhi serial blasts, the Pune German Bakery blasts of February 13, 2010 and the Mumbai serial blasts of July 13, 2011. Before setting these plans into action, the Indian Mujahideen had sent e-mail threats about the future possibility of such events to media houses.

[347] Cyber Terrorism: The Fifth Domain, Sanchita Bhattacharya, SOUTH ASIA INTELLIGENCE REVIEW Weekly Assessments & Briefings Volume 10, No. 48, June 4, 2012
[348] PRIVATE VOIP SERVER, available at http://www.securevoicegsm.com/private-voip-server/

- **Using cyber-capacity in facilitating traditional terrorist acts -Traditional terrorist activities and Cyber Technology**

Traditional terror acts like bomb explosions can be done using cyber technology too. A bomb in any corner of the world can be detonated using a computer controlled remote. Such devastations can be regulated or executed by computer systems.

- **The emerging concept of cyber-hijacks- Theory of Cyber-Terrorism in the disappearance of the MH-370**

[349]British anti-terror expert Dr. Sally Leivesley has contributed to the theory of possible involvement of cyber-terrorism behind the MH-370 disappearance incident terming it as the world's first possible cyber-hijack. The said flight had vanished en route from Kuala Lumpur to Beijing on March 8, 2014. Exhaustive search for the flight yielded no positive result. The use of a mobile phone or a USB stick is being contemplated still. The mobile could be used to initiate signals that would have changed the plane's speed or led it to change its direction of path or a different altitude than aimed for. Using the flight's onboard entertainment system, it is possible for hackers to gain access to the flight's main critical system and create new instructions. It is possible to de-mobilize the plane's flight controls using such a sophisticated technical medium like a mobile phone and making it crash. Concluding this point, it can be well understood that such cyber-hijacks are now endangering flight security. Control over flights can be taken via cyber-hijacks and can be directed towards residential complexes or places of importance like the army headquarters, reputed hotels to gain control over hostages or large offices or sky-scrapers. All this is aimed at causing mass destruction and damage.

[349] James Fielding and Stuart Winter, World's first cyber hijack: Was missing Malaysia Airlines flight hacked with mobile phone? **(** March 16, 2014, 00:00), available at http://www.express.co.uk/news/world/465126/Missing-Malaysia-Airlines-plane-may-have-been-cyber-hijacked-using-mobile-phone

The 9/11 attacks involved flights crashing against the Twin Towers. Though this hijack was achieved manually, the same can now be done using the cyber-space and tools. Hence, this is a matter of grave concern and India might be forced to tackle such a situation any day.

POSITION IN INDIA

India has realized the impact of cyber warfare and has implemented certain standards apart from including it as a punishable offence in the Information Technology Act, 2000

There has been a considerable increase in the number of cyber- attacks on Indian computer systems over a period of the last three years. This has been all the more aggravated with the inception of 3G fast Internet services in 2009. Since these services have come into vogue, the number of web users has also increased. This has led to widening of the strength of the audience who are now exposed to terrorist ideologies over the Internet. The availability of low cost smart phones has deepened the trouble further as such phones, which run on android, support Internet features.

All this has forced the government to adopt a multi-pronged strategy to combat heavily increasing cyber- attacks.

In this regard, the concern revolving around developing successful combat mechanisms was re-iterated on May 5, 2012, by P. Chidambaram (the then Union Home Minister) who addressed a meeting at the National Counter Terrorism Centre (NCTC) whereby he highlighted the modern form of warfare- cyber terrorism.

[350]"Cyber-crimes such as hacking, financial fraud, data theft, espionage would in certain circumstances amount to terrorist acts. Hitherto, we confronted terrorist attacks only in the physical space. Now,

[350] **Cyber terrorism is bigger threat: Chidambaram on NCTC, (**May 5, 12:49 pm), available at http://www.aninews.in/newsdetail2/story49428/cyber-terrorism-is-bigger-threat-chidambaram-on-nctc.html

there are terrorist threats in the cyber-space, which is the fifth domain after land, sea, air and space. Much of our critical infrastructure lies in cyber-space."

Chidambaram, hence, emphasized on the need to enforce strict security and surveillance in cyber-space and called it the fifth domain that needs to be urgently secured from potential cyber-attacks.

IV. PREVALENT LEGISLATION

Section 66-F of the Information Technology Act, 2000 describes the following

Punishment for cyber terrorism.—(1) Whoever, —

(A) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people by—

(i) denying or cause the denial of access to any person authorized to access computer resource; or

(ii) attempting to penetrate or access a computer resource without authorization or exceeding authorized access; or

(iii) introducing or causing to introduce any computer contaminant,

and by means of such conduct causes or is likely to cause death or injuries to persons or damage to or destruction of property or disrupts or knowing that it is likely to cause damage or disruption of supplies or services essential to the life of the community or adversely affect the critical information infrastructure specified under Section 70; or

(B) knowingly or intentionally penetrates or accesses a computer resource without authorisation or exceeding authorised access, and by means of such conduct obtains access to information, data or computer database that is restricted for reasons of the security of the State or foreign relations; or any

restricted information, data or computer database, with reasons to believe that such information, data or computer database so obtained may be used to cause or likely to cause injury to the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, or to the advantage of any foreign nation, group of individuals or otherwise, commits the offence of cyber terrorism.

(2) Whoever commits or conspires to commit cyber terrorism shall be punishable with imprisonment which may extend to imprisonment for life.

This proves that the attempt to combat cyber-terrorism is the driving force behind the inclusion of this provision in the above Act. The Indian Government is not ignorant of the cyber-attacks and threats which are on a rise in the whole world, some particularly aimed at India.

The Information Technology Act, 2000 in India should be enforced strictly to deter youngsters from becoming a part of such radical organizations and acts. Since, cyber terrorism has the potential to cause large scale mass destruction and loss of innocent lives, the ambit of acts under cyber-terrorism should be increased. Also an elaborate description of the acts constituting or falling under cyber-terrorism must be made using an amendment, so that the layman is aware as to what incidents shall lead to one committing a cyber-attack, so that one can in particular refrain from engaging in any such act.

[351]**Other combat mechanisms duly adopted are as follows:-**

- A **National Critical Information Infrastructure Protection Centre (NCIIPC)** to be set up with an aim to create highly advanced upgraded security firewalls around the Internet networks so that they can prevent hacking of valuable information particularly related to the nation's economy , defence and security by terrorist organizations.
- A multi-agency **National Cyber Coordination Centre** to be set up to assess the authentication of multiple cyber threats that are received.
- A **Centre of Excellence in Cryptology**, the science of encrypting data, is being established at the Indian Institute of Statistics in Kolkata. This Centre has been set up with an aim to develop expertise in decrypting encrypted data that is the ability to decode coded information as transmitted over the web by terrorist organizations.
- As a follow-up to that, the government has set up three **cyber-forensic laboratories** in Bengaluru, Pune and Kolkata in association with software industry group NASSCOM. Nine more such laboratories are planned in partnership with state governments to be set up in near future.
- A **cyber crisis management** plan has been designed to deal with crisis situations like that of the 26/11 Mumbai attacks. As the attack can take place in any particular state, it is necessary to acquaint the state governments with the plan so devised. Hence, the state governments have also been made an integral part of the crisis management team.
- **CERT-In, or Computer Emergency Response Team (India)**, the nodal agency to deal with cyber- attack crisis is being formulated in small capacities to deal with specific sectors.

[351] NATIONAL CRITICAL INFORMATION INFRASTRUCTURE PROTECTION CENTRE (NCIIPC) (June 13, 2013) available at http://ecurrentaffairs.in/blog/national-critical-information-infrastructure-protection-centre-nciipc/

The defence sector has already set up a CERT-In for itself. Railways and the power sector are also planning to have a CERT of their own. Such an endeavor empowers these sectors with ample power to tackle a cyber-attack on itself.

V. RECOMMENDATIONS

- Strict rules on obtaining new SIM cards: The communication among terrorists in the 26/11 Mumbai attacks have taken place via mobile phones, the sim cards for which were obtained with ease. Therefore, the procedure concerning obtaining new sim cards should require severe checking of identification proof of the person wishing to buy a new sim card. The authority to sell sim cards should only be vested with authorized mobile network companies. Any irregularity perceived in the identification documents of a person should be duly complained in the Police Station, initiating a verification of that person's identity.
- The government should open helpline numbers and allow non-profit organizations to counsel youngsters who have become influenced by radical terrorist ideologies. Such counseling can return them to their original frame of mind. School teachers and professors in colleges and universities can be advised to instill nationalistic values in their pupils. Hindus and Muslims should be taught to live in fraternity and harmony. Young ISIS recruits from India who have fled back to the nation must not be looked down upon or ostracized; rather they should be inducted in the field of education. They can be provided with employment as well.
- Online sites or posts belonging or uploaded by terrorist organizations respectively should be blocked almost instantaneously. The intelligence agencies must surf through internet networks and channels and social media for such content and block it. This must be done on a regular basis and hence separate units solely for this purpose must be instituted.

- Since online social sites such as Facebook, Twitter and the Apple Company refuse to weaken their encryption strength and also do not allow governmental access to their users' records, these companies should be ordered to set up efficient units within the Company to keep a track of the kind of data that is being transmitted from one person to another. These teams should decrypt each and every data so transferred. However, all the data shall not be handed over to the government. Only that data or particular information that has terrorist links or inciting content should be reported to the security agencies.
- The government should set up more cyber-terrorism countering units that provide a strict surveillance over the web. Since, this crisis is on a rise, limited number of such units may fail to serve the purpose.
- The strength of firewall security should be upgraded from time to time. Firewalls should be regularly checked for any vulnerability. This is essential as the Web is vast in its reach and magnitude.
- Special units should be trained to decipher coding and decoding of transmitted data over the Web. Inventors should be encouraged to develop decryption mechanisms that can intercept and understand sophisticated data being communicated within terrorist organizations.

[352]Ban Ki-moon, Secretary- General of the United Nations, "The Internet is a prime example of how terrorists can behave in a truly transnational way; in response, States need to think and function in an equally transnational manner."

Emphasizing on the above factor, cyber-terrorism among other forms of terrorism takes place on a global level, transcending all state boundaries. To combat this crisis, which is not only plaguing India,

[352] Available at http://www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf

but many other countries worldwide, a global legislation that will address cyber terrorism taking place throughout the world is required. For this purpose, formulation of a legislation by the United Nations, acceptable to different nations to combat cyber-terrorism could become useful.

The lack of an internationally agreed legislation on cybercrime and terrorism is leading to a failure in fighting terrorism effectively. If this international agreement can be successfully achieved, the nations who have signed the agreement could launch collaborative efforts to manage cyber crisis. In case of a massive attack such as the 9/11USA attacks and the 26/11Mumbai attacks, the countries could aid the country so affected with resources, combat equipment and medical aid. Also, nations could help by providing each other important intelligence inputs. In this way, cyber-terrorism can be successfully beaten on a united front.

11. OPERATION IRAQI FREEDOM: LEGALITY OF THE INVASION IN RETROSPECT

Author(s): Varsha Rao[353]

ABSTRACT

The Bush administration, in its September 2002 report to the Congress on national security, placed significant emphasis on the doctrine of 'pre-emptive self-defence' to lay the foundation for its invasion of Iraq. It cited the existence of weapons of mass destruction that could be employed against the United States in the wake of Al Qaeda's September 11, 2001 attacks. President Bush described Saddam Hussein's regime as a "grave and gathering danger" and an "outlaw regime" capable of providing WMDs to terrorist cells.[354]

Yet, when justifying the legal basis for its invasion of Iraq, the United States looked to the 1990 Security Council Resolution 678 wherein a coalition of states was authorised to repel Iraq from Kuwait and to restore peace and security in the area. Reliance was also placed on Resolution 687 which outlined the terms of the UN-mandated cease fire at the end of the 1991 Gulf War, and it was argued that Iraq's violation of the cease fire had the effect of reviving the earlier Resolution 678's authorization to use force.

In light of the release of the Chilcot report or the UK's Iraq Inquiry,[355] and further instances of US military action in the Middle East such as the launch of US airstrikes into Syria without the express permission of either the Syrian

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[354] Brian Knowlton, *Saddam is 'grave and gathering danger': Bush exhorts UN to act on Iraq arms*, THE NEW YORK TIMES, Sept. 13, 2002, available at http://www.nytimes.com/2002/09/13/news/13iht-a1_19.html.

[355] *'Uproar' if Chilcot report not released within fortnight, says David Davis*, THE GUARDIAN, April 14, 2016, available at http://www.theguardian.com/uk-news/2016/apr/14/uproar-if-chilcot-report-not-released-within-fortnight-says-david-davis.

government and the UN Security Council[356] *and the deployment of troops into Iraq since late 2014 to combat ISIS insurgents, the arguments relied on by the coalition to invade Iraq ought to be re-examined. The war and occupation would go on to claim over one million Iraqi lives, decimate political institutions and infrastructure, ignite large-scale sectarian violence, and lay the groundwork for the influx of militants for the establishment of the Islamic State. The invasion of Iraq is one of the best examples of how the political milieu affects the law and the way in which legal documents are interpreted to suit the political needs of nations.*

I. LEGAL BACKGROUND OF THE CONFLICT (1990-2003)

Although the United States capitalized on the fear of the American people in the wake of the 9/11 attacks by floating the doctrine of pre-emptive self-defence to employ military force against the threat posed by rogue elements, ultimately, when it gathered the legal basis for its actions against Iraq, it chose to rely on authorizations granted by Security Council resolutions.[357]

For the coalition involved in the Iraq invasion of March 2003, the war had begun fourteen years earlier with the invasion of Kuwait by Iraqi military forces on August 2, 1990.[358] Resolution 660 adopted by the Security Council condemned the invasion, labelling it a breach of international peace and security.[359] Iraq's declaration of a 'comprehensive and eternal merger' with Kuwait by way of annexation was held to be null and void,[360] and economic and trade sanctions were implemented to prevent the commission of grave breaches of humanitarian law and arm-twist Iraq into complying

[356] Somini Sengupta, Charlie Savage, *US Invokes Iraq's Defense in Legal Justification of Syria Strikes*, THE NEW YORK TIMES, Sept. 23, 2014, available at http://www.nytimes.com/2014/09/24/us/politics/us-invokes-defense-of-iraq-in-saying-strikes-on-syria-are-legal.html?_r=0.
[357] Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92(2) GEORGETOWN L.J. 173, 175 (2003), http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1898&context=faculty_publications.
[358] Andru E. Wall, *Was the 2003 Invasion of Iraq Legal*, 86 INT'L L. STUD. SER. US NAVAL WAR COL. 69, 70 (2010), http://stockton.usnwc.edu/ils/vol86/iss1/6/.
[359] S.C. Res. 660, U.N. Doc. S/RES/660 (August 2, 1990), http://www.casi.org.uk/info/undocs/gopher/s90/14.
[360] S.C. Res. 662, U.N. Doc. S/RES/662 (August 9, 1990), http://www.casi.org.uk/info/undocs/gopher/s90/16.

with its international obligations.[361] The right of Kuwait and its coalition partners to use force in individual or collective self-defence was recognized, and the pursuit of a resolution explicitly authorizing the use of military force culminated in Resolution 678.[362]

Iraq was held to be in contempt of the Security Council due to its refusal to comply with past resolutions and was permitted one final opportunity, "as a pause of goodwill", to do so by January 15, 1991.[363] In the event that such implementation did not take place, member states cooperating with the Government of Kuwait were authorized to "use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area".[364]

Iraq's refusal to withdraw from Kuwait before the given deadline saw the commencement of Operation Desert Storm. After six weeks of bombing and ground campaigns, Kuwait was liberated from Iraq on February 27, 1991.[365] The Security Council took cognizance of the letter by the Foreign Minister of Iraq that it would fully comply with the previous resolutions by releasing prisoners of war and third country nationals, among other actions.[366]

The ceasefire agreement was codified in Resolution 687 on April 3, 1991 wherein Iraq was expected to destroy and refrain from developing chemical and biological weapons, ballistic missiles, nuclear weapons or components and agree to on-site inspections. To ensure the containment of Weapons of Mass Destruction (WMD), a United Nations Special Commission (UNSCOM) was established in

[361] S.C. Res. 661, U.N. Doc. S/RES/661 (August 6, 1990), http://www.casi.org.uk/info/undocs/gopher/s90/15; S.C. Res. 665, U.N. Doc. S/RES/665 (Aug 25, 1990), http://www.casi.org.uk/info/scriraq.html; S.C. Res. 667, U.N. Doc. S/RES/667 (Sept. 16, 1990), http://www.casi.org.uk/info/undocs/gopher/s90/21.
[362] See *supra* note 5, at 71.
[363] S.C. Res. 678, U.N. Doc. S/RES/678 (November 29, 1990), http://www.casi.org.uk/info/undocs/gopher/s90/32.
[364] *Ibid.*
[365] John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 564 (2003), http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2746&context=facpubs.
[366] S.C. Res. 686, U.N. Doc. S/RES/686 (March 2, 1991), http://www.casi.org.uk/info/undocs/gopher/s91/3.

cooperation with the International Atomic Energy Agency (IAEA).[367] Later, in December 1999, the UNSCOM was disbanded and replaced with the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC).[368]

Internal unrests in Iraq were brewing during this tumultuous period in response to the sectarian repression of Iraqi civilians, including those in Kurdish populated areas, and as a result, it led to the outflow of refugees across international borders, thus threatening "international peace and security in the region".[369] Further, Iraq was held to be in "material breach" of its obligations to cooperate with the Special Commission and the IAEA under the ceasefire provisions of Res. 687.[370] As pointed out by John Yoo, the Deputy Assistant US Attorney General during the Bush administration famous for having written the Torture Memos, Iraq had continued to behave in an adversarial manner towards UNSCOM inspectors in providing access to its inspection sites for years on end, thereby preventing them from fulfilling their mandate.[371]

In December, 1998, the inspectors were withdrawn and Operation Desert Fox was commenced to compel Iraq to cooperate with the UNSCOM inspection. On failing to do so for the next four years, the discourse at the time surrounded a paranoid idea that Iraq's obstructionist behaviours could be an indicator that the nation was developing weapons of mass destruction which it would supply to rogue elements and terrorist organisations.[372]

[367] See *supra* note 12, at 564.
[368] S.C. Res. 1284, U.N. Doc. S/RES/1284 (Dec. 17, 1999), http://www.casi.org.uk/info/undocs/scres/1999/99sc1284.htm.
[369] S.C. Res. 707, U.N. Doc. S/RES/707 (August 15, 1991), http://www.casi.org.uk/info/undocs/gopher/s91/24.
[370] *Ibid.*
[371] See *supra* note 12, at 565.
[372] Donald K. Anton, *International Law and the 2003 Iraq Invasion Revisited*, Presented at Australian National University Asia-Pacific College of Diplomacy (April 30, 2003), https://law.anu.edu.au/sites/all/files/news/ANU%20College%20of%20Law/ssrn-id2259980.pdf.

After the September 11, 2001 terrorist attacks on the World Trade Centre the Pentagon cemented this idea of suspicion and evoked military response by the United States in Afghanistan to combat fundamentalist groups such as the Al-Qaeda and the Taliban, who – under the safe haven of "rogue nations" with potential to weapons of mass destruction – could remotely train operatives and lead deadly attacks on the American homeland.[373] The sentiment was echoed by President George W. Bush in his January 2002 State of the Union Address:

"*States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic.*"[374]

In a final attempt to secure cooperation with Iraq, headlined by President Bush and the US, the Security Council passed Resolution 1441 in November 2002 requiring Iraq to allow the UN arms inspectors to resume their work, and ultimately, the demands were accepted by Iraq.[375]

Resolution 1441 recalled Resolution 678 and Resolution 687. It went on to afford Iraq "a final opportunity to comply" with its disarmament obligations state as the Council had determined that Iraq "has been and remains in material breach of its obligations under relevant resolutions, including Resolution 687".[376] Resolution 1441 provided that Security Council was to reconvene immediately upon receipt of notice of Iraq's failure to comply "in order to consider the situation and the need for full compliance with all of the relevant Security Council resolutions…."[377] The Resolution concluded

[373] See *supra* note 12, at 565.
[374] George W. Bush, President of the United States, State of the Union Address (Jan. 29, 2002), http://www.washingtonpost.com/wp-srv/onpolitics/transcripts/sou012902.htm.
[375] See *supra* note 19, at 7-8.
[376] S.C. Res. 1441, U.N. Doc. S/RES/1441 (November 8, 2002), http://www.casi.org.uk/info/undocs/scres/2002/res1441e.pdf; *See also supra* note 19.
[377] *Ibid.*

by recalling that the Council had repeatedly warned Iraq that it would face "serious consequences" as a result of its continued violations, and the failure to observe enhanced inspections procedures under the UNMOVIC and IAEA would be taken to be a further material breach.[378]

Journalist Joby Warrick, in his account on the invasion of Iraq and the political turmoil leading to the establishment of the Islamic caliphate, draws attention to the events and rancorous debates leading up to the Bush administrations' decision to invade Iraq in his Pulitzer Prize winning book *Black Flags: The Rise of ISIS*. In late 2002, a United States diplomat – Laurence Foley – had been assassinated in Jordan. From the snippets of conversation in the possession of the National Security Administration (NSA), suspicion appeared to be centred on the al-Qaeda and on a Jordanian man who hadn't drawn much American attention to himself until this point – Abu Musab al-Zarqawi, the man would go on to lay the foundations of the Islamic State in Iraq.[379] Bush appointees began exerting pressure on the CIA to demonstrate a link between Iraq and al-Qaeda's September 11 attacks. Rumours were that Zarqawi had received funding by the al-Qaeda to set up a training camp in Western Afghanistan, and that at the start of the Afghan offensive in 2001, he had fled to Iraq and was believed to have received medical aid in Baghdad.[380] Further, US officials were intent on discovering a link between the developments of chemical poisons by the al-Qaeda associated militant group – Ansar al-Islam – home to Zarqawi and several jihadis from Afghanistan and the Saddam regime, known for its proclivity for such chemical weapons.[381]

The aides of then-Vice President, Dick Cheney, were rumoured to have reacted negatively to a report submitted by the CIA all but demolishing allegations of operational ties between Saddam Hussein and

[378] *Ibid.*
[379] JOBY WARRICK, BLACK FLAGS: THE RISE OF ISIS, 60-74 (2015).
[380] *Ibid.*
[381] *Ibid.*

al-Qaeda.[382] Years later, in Cheney's written accounts, he insisted that there was, "no place more likely to be a nexus between terrorism and WMD capability than Saddam Hussein's Iraq."[383]

On February 5, 2003, Colin Powell made a presentation before the UN Security Council to make a case for the invasion of Iraq, claiming that Iraq harboured a terrorist network headed by al-Qaeda lieutenants and Abu Musab al-Zarqawi. He further suggested that by installing an agent in a senior position of Ansar al-Islam, Iraq effectively controlled the group. "What I want to bring to your attention today is the potentially much more sinister nexus between Iraq and the al-Qaeda terrorist network…. Iraqi officials deny accusations of ties with al-Qaeda. These denials are simply not credible…."[384]

The presentation was later described by Powell as one of the biggest blunders of his career attributed to weak intelligence gathering and wishful thinking by the Bush administration.[385] The speech is said to have been "an extraordinary performance, an artful rendering of a selective set of facts that favoured invasion."[386]

Such accusations in retrospect are enlightening if the conversation of the senior members of the Bush administration are recapitulated. The former President himself is guilty of making unequivocal statements to the American public, especially in his State of the Union Address on Jan 28, 2003.[387] In a speech given in Cincinnati in October 2002, Bush proclaimed that, "We've learned that Iraq has

[382] *Ibid.*
[383] *Ibid.*
[384] *Full text of Colin Powell's speech*, THE GUARDIAN, February 5, 2003, available at http://www.theguardian.com/world/2003/feb/05/iraq.usa.
[385] JOBY WARRICK, *supra* note 26.
[386] JOBY WARRICK, *supra* note 26.
[387] George W. Bush, President of the United States, State of the Union Address (Jan. 28, 2003), http://whitehouse.georgewbush.org/news/2003/012803-SOTU.asp.

trained al-Qaeda members in bomb-making and poisons and deadly gases. And we know that after September 11 Saddam Hussein's regime gleefully celebrated the terrorist attacks on America."

In a March 2003 interview on an American news channel, Donald Rumsfeld, the then Secretary of Defence, stated without qualification that, "We know where [the weapons of mass destruction] are. They're in the area around Tikrit and Baghdad and east, west, south and north somewhat."[388] An exchange with reporters after a cabinet meeting in June 9, 2003 – at a stage where there had been no discovery of WMDs in Iraq by U.S. search teams and Democrat senators were accusing the CIA of intelligence manipulation – hinted at the colossal predicament Bush had opened himself up to, "Iraq had a weapons program. Intelligence throughout the decade showed they had a weapons program. I am absolutely convinced *with time* we'll find out that they did have a weapons program [emphasis added]."[389]

II. DISCUSSION ON THE SECURITY COUNCIL RESOLUTIONS AS LEGAL JUSTIFICATIONS

Article 2(4) of the United Nations Charter ("**Charter**") creates a peremptory norm of international law[390] from which states cannot derogate:[391] "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity of political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[392] Further, Art. 2(6) authorizes the United Nations to ensure that non-members act in accordance with the Charter. The

[388] Faiz Shakir, *Rumsfield's Revisionist History: 'We Know Where the WMD Suspect Sites Are'*, THINK PROGRESS, May 26, 2006, available at http://thinkprogress.org/politics/2006/05/26/5528/rumsfelds-revisionist-history/.
[389] *Bush: 'Absolutely convinced' Iraqi WMD will be found*, CNN.COM, June 9, 2003, available at http://edition.cnn.com/2003/ALLPOLITICS/06/09/wmd.controversy/.
[390] See *supra* note 19, at 3.
[391] *Nicaragua v United States*, [1986] ICJ Reports 14, at para. 190.
[392] United Nations, *Charter of the United Nations*, 1945, Art. 2(4).

illegality of aggression under international law is a *jus cogens* norm.[393] For the use of force to be termed legal, two exceptions are provided for in the Charter under Chapter VII: Article 51 governing the right of individual or collective self-defence in the face of an actual or imminent armed attack, and Art. 42 under which a resolution passed by the UN Security Council authorizing the use of force is binding under international law. A third exception, although controversial, would be that of humanitarian intervention – the so-called Responsibility to Protect (R2P).[394] The claim of humanitarian intervention will not be taken up in the paper as at the time the case was being made for the invasion of Iraq, it was not a ground on which reliance was placed.

The paper will first deal with the arguments under Art. 42 arising out of the Security Council resolutions, followed by the doctrine of pre-emptive self-defence purported by the Bush Administration. A failure of the arguments presented by the Bush and Blair administrations to stand up against criticism would allow one to make a case for the crime of aggression against the leaders who created the blueprint and laidthe foundations for the invasion of Iraq.

There are mainly three justifications arising out of the Security Council resolutions relied on by those who were in favour of the invasion. Firstly, that Resolution 678 authorized not just the expulsion of Iraq from Kuwait, but also a broader use of force to restore international peace and security in the region. Secondly, that unilateral use of force by the United States on the material breaches of the ceasefire (Resolution 687) was permissible and the express permission of the Security Council was not required. Thirdly, that a second resolution explicitly authorizing the use of force by the coalition after

[393] *Belgium v. Spain*, [1970] ICJ Rep 3.
[394] Toby Fenwick, *In depth: Was the 2003 invasion of Iraq illegal?*, LIBERAL DEMOCRAT VOICE, Sept. 10, 2012, available at http://www.libdemvoice.org/in-depth-was-the-2003-invasion-of-iraq-illegal-30149.html.

Resolution 1441 was not necessary as the previous authorization (Resolution 678) had not been rescinded by the Council, rather it had been reaffirmed.

BROAD WORDING OF RESOLUTION 678

The coalition's first argument was grounded on the belief that Resolution 678 did not only authorize the use of force to expel Iraq from Kuwait, but also a broader use of force to restore international peace and security to the region – to which a threat was posed by Iraq's material breaches of the conditions outlined in the ceasefire Resolution 687.[395] The Security Council unanimously found Iraq to be in material breach of the earlier resolutions in Resolution 1441, thus triggering Resolution 678's authorization to resume hostilities with Iraq and respond to the breaches of the ceasefire.[396]

It is possible that initially, the United States was not under the impression that Resolution 678 authorized anything more than coming to Kuwait's aid in the face of Iraq's aggression, but the subsequent creation of no-fly zones after the sovereignty of Kuwait had been secured couched in the legal justifications grounded in 678's authority to restore peace and security in the region, adjusted that expectation.[397]

Another objection to this argument is that only those "co-operating with the Government of Kuwait" were authorized by 678 in 1990 and the coalition involved in the Iraq invasion of 2003 did not possess Kuwait's cooperation or participation.[398] To counter the argument, the same logic of operational realities with the coalition taking repeated action against Iraq from 1990 to 2002 and enforcement of no-fly zones – actions that fell out of the scope of the strict protection of and cooperation with Kuwait

[395] See *supra* note 5, at 73.
[396] See *supra* note 12, at 567.
[397] See *supra* note 5, at 74.
[398] *Ibid.*

– has been relied on as such State practice received at least a tacit acceptance from the Security Council.[399]

John Yoo attempted to counter the objections posed by France, Germany and Russia that 678's authorization was extinguished in light of the disagreement of the Security Council members to the use of force in 2003 by arguing that the Security Council has utilized only two ways to end authorizations to utilize force – either by passing a resolution to that effect expressly terminating the authorization or by setting a time-limit on the authorization. Resolution 678 is not victim to these methods, either in the resolution itself or in subsequent resolutions like 1441.[400]

The counter-arguments to the coalition's case is twofold Firstly, it has been argued that the phrase in Resolution 678 "uphold and implement resolution 660 and all subsequent relevant resolutions" appears to refer to the ten resolutions specified in the preamble and not to resolutions adopted thereafter i.e. Resolution 687.[401] The authorization to "use all necessary means" to ensure the compliance of the above resolutions would come into effect only if Iraq failed to comply with the ten resolutions – which related to Iraq's withdrawal from Kuwait, Kuwaiti property and so on, and not weapons of mass destruction.[402]

Secondly, if for the authorization of force reliance is placed on the phrase "restore international peace and security in the area", then an argument could be made to encapsulate compliance with the WMD regime under 687 under the jurisdiction of the authorization.[403] The more plausible option, however, is that 'restore' was used to permit operations such as Operation Desert Storm to compel the expulsion

[399] *Ibid.*
[400] See *supra* note 12, at 567-68.
[401] See *supra* note 4, at 181.
[402] *Ibid.*
[403] *Ibid,* at 182.

of Iraq from Kuwait and to create buffer zones for the protection of Iraq's neighbours. Once the issue to "restore peace and security in the region" was addressed in 687, the previous "restore" language can be seen to have run its course.[404] The authority to use force under 678 cannot be reasonably used to overthrow a regime that failed to adhere to a WMD regime that didn't even exist when 678 was drafted and passed.[405]

In response to John Yoo's argument that the authorization of 678 was not expressly terminated by 687, one should turn to Resolution 686 – the provisional ceasefire resolution wherein the Council addressed the continuing viability of 678 for narrow purposes, "during the period required for Iraq to comply with" the eight Security Council demands listed. 686 envisaged a "definitive end to the hostilities".[406] One cannot argue that the use of force in 2003 was to ensure the fulfilment of unmet demands as the US theory focused on non-compliance of 687 and not 686.[407]

UNILATERAL EXERCISE OF FORCE ON MATERIAL BREACHES OF CEASEFIRE RESOLUTION 687

The main argument of the coalition points out the difference between 'suspension' of hostilities and 'termination' of hostilities; unlike a peace treaty, a ceasefire or an armistice only suspends military action and did not terminate the state of war; any serious violations of the armistice gives the other party to denounce the ceasefire and resume hostilities without the express permission of the Security Council.[408] Andru Wall emphasizes the continuing nature of the conflict – though admittedly, low-intensity, between 1991 to 2003 in the form of firing of cruise missiles and bombs by coalition combat

[404] *Ibid*, at 183.
[405] *Ibid*, at 184.
[406] *Ibid*, at 189.
[407] *Ibid*, at 193.
[408] See *supra* note 12, at 569.

and reconnaissance aircrafts in response to Iraqi firing, establishment of no-fly zones, attacks by the coalition on air defence targets located in the no-fly zones, execution of Operation Desert Fox by President Clinton, and so on so forth – such unilateral use of force was not condemned by the Security Council.[409]

In counter, it has been argued that the unchallenged understanding before 687 was voted on – as announced – by India's representative to the UN was that "it does not confer authority on any country to take a unilateral action under any of the previous resolutions of the Security Council".[410] Sean D. Murphy accepts that a situation could have arisen where the Saddam regime would have had to be overthrown to contain the effect of material breaches of Iraq's obligations, however, leaving it to individual states to determine that such a situation has arisen is an abandonment of the enforcement norms created by the Security Council.[411]

Further, one cannot assign a definitive legal meaning to the term 'formal ceasefire' in Resolution 687 to mean a suspension of hostilities as opposed to a termination of the state of war. 686 and 687, seen together, form the relationship between an initial agreement for temporary cessation of hostilities and then the codification into a comprehensive final agreement for peace; there was no further expectation of a "peace agreement" following Resolution 687 – that was it.[412] Even if the word 'ceasefire' is viewed in a traditional sense, it would still not permit a unilateral exercise of force by individual nations as the agreement was "beyond the reach of the parties" and was between the United Nations – an international organization – and the defeated state.[413] In conclusion, the nature of an agreement

[409] See *supra* note 5, at 74-76.
[410] See *supra* note 4, at 195.
[411] *Ibid*, at 197.
[412] *Ibid*, at 200.
[413] *Ibid*, at 202.

imposed by the United Nations is not the same as a bilateral or multilateral treaty as unlike traditional treaties, the consent of a Member State is not required for the agreement to be legally binding on it.[414]

FURTHER AUTHORIZATION POST-RESOLUTION 1441

Kofi Annan, the former Secretary General of the United Nations, in a Sept 16, 2004 interview for *BBC World Service* stated that from the United Nations Charter point-of-view, the invasion was illegal; there ought to have been a second resolution of the Security Council.[415] Although Res. 1441 had indicated that there would be consequences if Iraq did not comply with its obligations, it was up to the Security Council to determine what those consequences should have been.[416] Resolution 1441 had found Iraq to be in material breach of the ceasefire and afforded the nation a final opportunity to comply; however, a material breach did not automatically authorize the use of force against Iraq and required additional triggering mechanisms.[417]

On the other hand, the argument from the coalition propounds that not only did the US State Legal Department note similarities in the language of Resolution 678 and 1441, 1441 was itself an example of diplomatic finesse allowing members nations to take necessary action in the void created by political differences within the Security Council, especially considering that the 678 reference to the use of force had been left intact and not been revoked.[418]

Paragraph 4 of Resolution 1441 states that the submission of false statements or omissions and the failure to comply with the implementation of this resolution shall constitute a further material breach and will be reported to the Council for assessment. In pursuance thereof, the Council would convene

[414] *Ibid,* at 203.
[415] *Iraq war illegal, says Annan,* BBC NEWS, Sept. 16, 2004, available at http://news.bbc.co.uk/2/hi/middle_east/3661134.stm.
[416] *Ibid.*
[417] See *supra* note 5, at 77.
[418] *Ibid.,* at 77; *See also supra* note 12, at 571.

immediately in order to consider the situation and the need for compliance of all relevant resolutions.[419] UK's ambassador to the UN, Sir Jeremy Greenstock, in his explanation of vote (EoV) held that "There is no automaticity in this resolution. If there is a further Iraqi breach of its disarmament obligations, the matter will return to the Council for discussion as required…. We would expect the Security Council then to meet its responsibilities."[420]

Such a view has been echoed, not only by the US representative to the UN John Negroponte, but also in a memo written by Attorney General Lord Goldsmith to the Prime Minister Tony Blair on March 7, 2003 and published by the press in April 2005.[421] Although, in his final advice to the government written on March 17, 2003, Lord Goldsmith took an unequivocal stance that the authority to use force against Iraq can be found in the combined effect of resolution 678, 687 and 1441, and that no further express decision by the Security Council would be required to authorize force, the earlier and longer memo - written ten days before the final opinion – states that Lord Goldsmith was of the view that the safest legal course would be to secure the adoption of a second resolution and that the reactivation of the authorization found in Res. 678 was predicated on whether there existed hard evidence of Iraq's failure to take the final opportunity to comply with the ceasefire; the views of the UNMOVIC and IAEA would, therefore, be significant in this regard.[422] The resignation of Elizabeth Wilmshurst, deputy legal adviser to the Foreign Office, on the ground that she did not agree with the official legal opinion provided and her assertion that an unlawful use of force on such a scale amounts to the crime

[419] S.C. Res. 1441, U.N. Doc. S/RES/1441 (November 8, 2002), http://www.casi.org.uk/info/undocs/scres/2002/res1441e.pdf.
[420] *The Situation Between Iraq and Kuwait*, S/P.V.4644 (November 8, 2002), http://www.un.org/ga/search/view_doc.asp?symbol=S/PV.4644.
[421] *Full text: Iraq legal advice*, THE GUARDIAN, April 28, 2005, available at http://www.theguardian.com/politics/2005/apr/28/election2005.uk.
[422] Simon Jeffery, *Lord Goldsmith's legal advice and the Iraq war*, THE GUARDIAN, April 27, 2005, available at http://www.theguardian.com/world/2005/apr/27/iraq.iraq2.

of aggression along with the indication that Lord Goldsmith's view had been altered to bring it in line with the official view, threw the issue into a controversial light.[423]

Multiple observations may be made regarding Resolution 1441. Most significantly, nowhere is there an express authorization of the use of force against Iraq. The discussions and explanations of vote leading up to the resolution had made it quite evident that countries like Russia, China, Germany and France were not prepared to expressly authorize force in 1441 and instead, preferred to establish a two-stage process; they would have vetoed the resolution if it had contained any immediate authorization (explicit or implicit) of military action.[424] A two-stage process would have then required the Security Council to reconvene in the event of continued Iraqi non-compliance and further material breach and pass a second resolution expressly authorizing force against Iraq.[425]

Even though the explanations of vote show the UK and US agreeing that 1441 did not contain any "automaticity", they later maintained that no second resolution - the next step in the two-stage process – was necessary.[426] The assertion appeared to contradict their persistent, but unsuccessful, attempts to obtain a second resolution explicitly authorizing the use of force.[427]

III. ANALYSING PRE-EMPTIVE SELF-DEFENCE IN LIGHT OF NEW FINDINGS

[423] *Wilmshurst resignation letter*, BBC NEWS, March 24, 2005, available at http://news.bbc.co.uk/2/hi/uk_news/politics/4377605.stm.
[424] See *supra* note 19, at 8; United Nations, Dept. of Public Information, *Return of United Nations Inspectors, Without Conditions, is Key to Solving Arms Impasse with Iraq, Security Council is Told*, SC/7534, October 16, 2002; United Nations, Dept. of Public Information, *In Security Council Debate, United States, France, Russian Federation, Others Outline Positions on Possible Resolution Concerning Iraq*, SC/7536, October 17, 2002; United Nations, Dept. of Public Information, *Security Council Holds Iraq in 'Material Breach' of Disarmament Obligations*, SC/7564, November 8, 2002.
[425] *Ibid.*
[426] See *supra* note 19, at 3.
[427] *Ibid.*

Article 51 of the UN Charter continues to generate debate in the international fora regarding the trigger required to legally exercise the inherent right of self-defence in the face of armed attack. The argument for anticipatory self-defence through the use of proportionate force to repel an imminent attack finds its footing in the 1837 dispute over Great Britain's destruction of the US merchant ship *The Caroline* for aiding Canadian rebels[428] wherein self-defence was believed to have been justified when the necessity for action was "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[429] The *Caroline* test created two principal requirements: that the use of force must be necessary because the threat is imminent and the pursuit of other peaceful alternatives is not a viable option, and that the response must be proportionate to the threat.[430]

It has been argued that the US did not explicitly characterize its military action as an exercise of the doctrine of pre-emptive self-defence against rogue nations with WMDs, and instead chose to claim legality for the invasion through Security Council authorizations.[431] However, the doctrine necessitates a deeper look as it formed a part of the justifications provided by the Bush Administration to the public as well as in its September 2002 report to the Congress on national security,[432] along with the US Congressional Resolution of October 2002 *Authorization for Use of Military Force Against Iraq Resolution 2002*[433] and in the US letter of March 2003 addressed to the Security Council.[434]

[428] *Ibid.*
[429] Letter from Daniel Webster, Secretary of State, to Lord Ashburton, August 6, 1842, *reprinted* in 2 John Bassett Moore, A Digest of International Law 409, 412 (1906); *See also* M. Ratner and Ors., *The United Nations Charter and the Use of Force Against Iraq*, LAWYERS AGAINST THE WAR, Oct. 2, 2002, available at http://www. lawyersagainstthewar. org/legalarticles/ratner. html.
[430] See *supra* note 12, at 572.
[431] See *supra* note 4, at 175.
[432] The National Security Strategy of the United States of America, The White House, Sept. 17, 2002, http://www.state.gov/documents/organization/63562.pdf.
[433] United States, Cong. Senate, *Resolution Authorization for Use of Military Force Against Iraq*, 107th Cong., H.J. Res. 114 (2002), https://www.govtrack.us/congress/bills/107/hjres114.
[434] Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351 (Mar. 21, 2003).

The restrictive school on self-defence in international law, referring to Article 51 of the UN Charter and customary international law, argues for a narrower interpretation that a right to self-defence doesn't exist without an armed attack, thus negating anticipatory self-defence. In the event of a possible attack, a state may prepare to *resist* such attacks.[435] In contrast, under the expansive theory, the customary right of anticipatory self-defence survives under Article 51 of the Charter and includes the use of force in anticipation of an attack in certain circumstances.[436] The subsequent arguments will examine only with the second school of thought and not the first as the US State Department has proceeded under the assumption that pre-emptive self-defence is a legitimate international law doctrine founded on customary law, thus basing its arguments on an expansionist idea, as indicated by John Yoo, then-deputy attorney general's paper discussing anticipatory self-defence.[437]

He chose to point out that opposition by US allies has ensured that no UN resolution has successfully been passed deeming its actions of anticipatory self-defence against Libya and Panama as violations of international law; further, the Security Council gave no formal response to missile strikes against Afghanistan and Sudan.[438] He reformulated the requirement of 'imminence' and held that the threat of WMDs after the Kuwait invasion had significantly increased with Iraq's demonstration of its capability to use it and the force used was proportionate, in that it was limited to the destruction of Iraq's WMD facilities and the removal of the head of State with hostile intentions, Saddam Hussein.[439]

As a counter, it has been argued that even though the United States may have been correct under the expansionist viewpoint of self-defence under Art. 51 – which upholds anticipatory self-defence under

[435] Leo Van den hole, *Anticipatory Self-Defence*, 19(1) AMERICAN UNIVERSITY INT'L L. REV. 69, 82-84 (2003), http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1160&context=auilr.
[436] *Ibid.*
[437] See *supra* note 12, at 571.
[438] *Ibid*, at 573.
[439] *Ibid*, at 574.

customary law – in claiming that Saddam's history of unpredictability and the devastating potential of WMDs would fulfil the legal formulation set out in *Caroline*, the grounded reality of the situation demonstrated the danger of expanding the limitations as it would leave the doctrine fraught for abuse.[440] Intelligence leaks and news sources had indicated that the case for containment of WMDs in Iraq was "weak at best and totally fabricated at worst", and the Iraq invasion had – in fact – not lead to the promised discoveries.[441] Additionally, China, France, Germany, and Russia rejected the claim that there existed an imminent threat and chose to continue UN weapons inspections as established by Resolutions 687 and 1441.[442]

In the January 27, 2003 report submitted to the Security Council, Mohamed ElBaradei – director general of the IAEA – confirmed that no prohibited nuclear activities were identified during the inspections and that no evidence has been found to show that Iraq had revived its nuclear weapons program since its elimination of the program in the 1990s.[443] Hans Blix, head of the UNMOVIC at the time, in his briefing before the Security Council on February 14, 2003, while placing doubt on certain intelligence information announced by the US Secretary of State, Colin Powell, had affirmed Iraqi compliance with weapons inspections by citing the carrying out of 400 inspections without notice across 300 sites and the prompt access provided in all instances.[444] Powell went on to claim that the progress made by Blix and Mohamed ElBaradei, director general of the IAEA, was simply process and not substance, and that Iraq's recent steps "are all tricks that are being played on us."[445]

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[440] Jorge Alberto Ramirez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilaterlism*, 34(1) CALIFORNIA WESTERN INT'L L.J. 23 (2003).
[441] *Ibid.*
[442] See *supra* note 19, at 5.
[443] Donald Nungesser, *United States' Use of the Doctrine of Anticipatory Self-Defense in Iraqi Conflicts*, 16(1) PACE INT'L L. REV. 193, 216-218 (2004).
[444] *Hans Blix's briefing to the security council*, THE GUARDIAN, Feb 14, 2003, available at http://www.theguardian.com/world/2003/feb/14/iraq.unitednations1.
[445] *UN report reinforces Security Council divisions*, CNN.COM, Feb 14, 2003, available at http://edition.cnn.com/2003/US/02/14/sprj.irq.un/.

Although Hans Blix's earlier reports criticized Iraq for not permitting UNMOVIC and IAEA to interview key government officials and rebuked Iraq's misleading declarations pursuant to 1441 on the amount of its weaponry, in his later and more conclusive reports – such as those on February 28, 2003 and March 7, 2003 – he marked out positive development by way of Iraq's commitment to comply and stressed the on-going disarmament process,[446] with a request for more time to continue inspections. ("There were eight years of inspections and four years of no inspections, and now we have had a couple of months. And it seems to me a rather short time to close the door and say, this is it.")[447] The evidence before the Security Council divided its opinion with France Russia and China determined to provide UNMOVIC and IAEA with more time to conduct inspections while the US and UK lobbied to urge the Council to pass a resolution which would authorize military attack.[448]

However, what ultimately took place was a discordant echo of the statement made by Colin Powell before the media on March 6, 2003 – that the United States was ready to lead "a coalition of willing nations, either under United Nations authority or without United Nations authority, if that turns out to be the case,"[449] and on March 20, they did.

IV. CONCLUSION

At the culmination of the invasion and the commencement of the occupation by US troops, John Yoo, in an article in the Legal Times, opined that it is not of significance whether Iraq did, in fact, possess WMDs in the end, but that at the time of the invasion, it appeared that Iraq posed a threat to

[446] See *supra* note 90.
[447] John Tagliabue, *Threats and Responses: Discord; France and Russian Ready to Use Veto Against Iraq War*, THE NEW YORK TIMES, March 6, 2003, available at http://www.nytimes.com/2003/03/06/world/threats-responses-discord-france-russia-ready-use-veto-against-iraq-war.html.
[448] See *supra* note 90.
[449] See *supra* note 94.

national and international security, especially due to its obstruction of UN arms inspectors and threats of usage of chemical weapons.[450]

When Iraq crumbled into an unstable mosaic rife with sectarian violence in the wake of political upheaval, Donald Rumsfeld, the then-Defence Secretary's unfortunate remark laid bare the problematic attitude of the Occupying Powers, the impact of which Iraq has not been able to grapple with even now: "Think what's happened in our cities when we've had riots, and problems, and looting. Stuff happens! … Freedom's untidy, and free people are free to make mistakes and commit crimes and do bad things. They're also free to live their lives and do wonderful things, and that's what's going to happen here."[451]

These remarks by the senior members of the Bush administration only goes to reiterate the deduction one can make after pitting the arguments in favour of the invasion to the much stronger counter against it – that the policymakers would rather focus on the degradation of a 'rogue nation' instead of acknowledging fault and accepting blame.

"Stuff happens" cannot begin to explain the subsequent atrocities such as the torture and inhuman treatment of detainees perpetrated by US soldiers and American intelligence forces;[452] executions without trial of 24 Iraqi civilians at Haditha in November 2005;[453] flagrant violations of the Geneva Convention by the exercise of 'sealing off' strategies in a bid to isolate insurgents by cutting off

[450] John Yoo, *Why Iraq's Weapons Don't Matter*, LEGAL TIMES, Aug. 4, 2003.
[451] Greg Mitchell, *6 Year Ago: "Stuff Happens," Rumsfeld Said, Amid Chaos in Iraq*, THE HUFFINGTON POST, May 11, 2009, available at http://www.huffingtonpost.com/entry/6-years-ago-stuff-happens_b_185691.html?section=india.
[452] Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, available at http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib.
[453] *Iraqi outrage over US Marine's plea deal in Haditha killings*, CNN, Jan 25, 2012, available at http://edition.cnn.com/2012/01/25/justice/california-iraq-trial/.

movement of food, water, medicines, electricity to the cities of Tal Afar, Samarra, Najaf and Falluja;[454] indiscriminate bombing and killing of civilians – only to name a few.

It is no wonder that current policymakers have come to realize the impact of the invasion on the creation of a hostile environment conducive for insurgent elements to build a nation of terror and destruction. In an interview, US President Barack Obama said, "ISIL is a direct outgrowth of al-Qaeda in Iraq that grew out of our invasion, which is an example of unintended consequences."[455] However, the qualifiers attached to their apologies are never-ending, case-in-point Tony Blair's statements before the publishing of the Chilcot report where he apologized for incorrect intelligence and for mistakes in planning and understanding the effects of the removal of the regime. He even admitted that there are "elements of truth" in the argument that the Iraq invasion is the "principal cause" of the Islamic State's rise. However, he still felt he made the right decision in supporting the United States' removal of Saddam Hussein by saying, "I find it hard to apologize for removing Saddam."[456] The Chilcot Inquiry or the Iraq Inquiry – a two million words long report investigating UK's involvement in the Iraq invasion – was published only in mid-2016 even though the hearings concluded in 2011, five years ago.[457] While the report did not pass judgement on the legality of the war, holding that it could be discussed only by a "properly constituted and internationally recognized court," it pointed out that the

[454] *Attacks on Cities*, in WAR AND OCCUPATION IN IRAQ, GLOBAL POLICY FORUM, available at https://www.globalpolicy.org/component/content/article/168-general/37150-war-and-occupation-in-iraq-chapter-6-english.html.
[455] Dilly Hussain, *ISIS: The "unintended consequences" of the US-led war on Iraq*, FOREIGN POLICY JOURNAL, March 23, 2015, available at http://www.foreignpolicyjournal.com/2015/03/23/isis-the-unintended-consequences-of-the-us-led-war-on-iraq/.
[456] Nicholas Watt, *Tony Blair makes qualified apology for Iraq war ahead of Chilcot report*, THE GUARDIAN, October 25, 2015, available at http://www.theguardian.com/uk-news/2015/oct/25/tony-blair-sorry-iraq-war-mistakes-admits-conflict-role-in-rise-of-isis.
[457] Matt Broomfield, *Iraq War: MPs launch investigation into legislation which delayed Chilcot Inquiry*, INDEPENDENT, April 5, 2016, available at http://www.independent.co.uk/news/uk/politics/iraq-war-chilcot-inquiry-sir-john-chilcot-a6969046.html.

way the legal basis was dealt with was unclear, far from satisfactory and perfunctory at best.[458] Not only had the UK proceeded to participate in the invasion before peaceful options for disarmament had been exhausted, but then-Prime Minister Tony Blair had also deliberately exaggerated to the public and the Members of Parliament the threat posed by Saddam Hussein, with decisions being based on the flawed information provided by the British intelligence services whose evidence-collection procedure had been tainted by misguided assumptions.[459]

The conclusions arrived at only confirm the declassified Downing Street memo's allegations made by Sir Richard Dearlove, head of MI6 at the time ("[In Washington] there was a perceptible shift in attitude. Military action was now seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD. But the intelligence and facts were being fixed around the policy")[460] and go on to remind us that in this era of political instability in the Middle East, unless the lessons of the Iraq War are kept in mind – in the words of Hans Blix – "there is nothing stopping this kind of tragedy from being repeated."[461]

[458] *Chilcot report: key points from the Iraq inquiry*, THE GUARDIAN, July 6, 2016, https://www.theguardian.com/uk-news/2016/jul/06/iraq-inquiry-key-points-from-the-chilcot-report.
[459] *Ibid.*
[460] Fred Kaplan, *Reading the Downing Street Tea Leaves*, SLATE, June 23, 2005, available at http://www.slate.com/articles/news_and_politics/war_stories/2005/06/reading_the_downing_street_tea_leaves.html.
[461] Hans Blix, *Iraq War was a terrible mistake and violation of UN charter*, CNN, March 19, 2013, available at http://edition.cnn.com/2013/03/18/opinion/iraq-war-hans-blix/.

12. DOMESTIC VIOLENCE ACT: A CRITICAL STUDY

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ABSTRACT

Domestic violence against women is a phenomenon not confined to India alone; it is endemic all over the world. According to a study, at least one out of every three women has been beaten, coerced into sex or abused in her lifetime. Domestic Violence is any form of violence inflicted on any member of the family by another in the four walls of the household. It is an established and recurring phenomenon, especially in India. What makes it so dangerous is the fact that the violence takes place within the house by one's 'near and dear ones' and hence, goes unnoticed as the woman under social, emotional and sometimes economical compulsion chooses not to file a legal complaint.

Owing to the gravity of the issue, the Indian legislature introduced certain provisions in the Indian Penal Code, about which we shall study later in the paper, but it could not achieve the desired result owing to various reasons. However, in 2005 the legislature enacted a specific legislation which regards to domestic violence called the Protection of Women from Domestic Violence Act, 2005. The researcher intends to discuss the provisions of Protection of Domestic Violence Act, 2005 and the impact of the same in the Indian social scenario. It discusses the condition of the social stigma before the enactment of the Act and how the situation has changed after the law was passed. With this aim in mind, this paper looks at the providing a critical analysis of the said Act by discussing the various shortcomings of the provisions and implementation of the Act.

The researcher, through this paper, endeavors to bring forth the various merits of the Act and, also to critically analyze the various shortcomings with regards to the effectiveness and practical applicability of the Act in the Indian society. The researcher shall also provide certain recommendations and suggestion to make the Act more effective.

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I. RESEARCH QUESTIONS

The researcher has sought to answer the following research questions:

A. What were the various enactments and criminal law provisions with regards to domestic violence before the enactment of the Protection of Women from Domestic Violence Act, 2005?

B. What was the need for a special legislation with regards to domestic violence in India?

C. What are the major provisions of the PWDVA, 2005? How has the Act proved beneficiary with regards to the protection of women from domestic violence?

D. What are the various grounds for criticism with respect to the Act?

E. How can the Act be made more effective?

II. DOMESTIC VIOLENCE IN INDIA: THE NEED FOR SPECIAL ENACTMENT

Domestic violence against women is a phenomenon not confined to India alone; it is endemic all over the world. According to a study, at least one out of every three women has been beaten, coerced into sex or abused in her lifetime.[463] However, the situation in India is much worse. According to United Nations report published in 2005, about two-thirds of married women in India are victims of domestic violence.[464] The United Nations Committee on the Conventions on Elimination of All Forms of Discrimination Against Women (CEDAW) in its general recommendation has recommended that the

[463] Dr. S.K. Mukherjee, "Protection of Women from Domestic Violence Act, 2005- Need for Amendment", Vol. 3(2), *Criminal Law Journal* at 208 (July, 2008).
[464] Anonymous, "How to make Domestic Violence Act Work for You", Vol. 22(1), *Lawyers Collective* at 20 (Jan., 2007).

State parties should Act to protect women against violence of any kind especially that occurring within the family.[465]

Although domestic violence is a stigma that is deep rooted since time immemorial especially in India, the steps taken by the Indian legislature in this regard have been rather disappointing. Prior to 1983, there was no express enactments or recognition pertaining exclusively to the issue of domestic violence in India. Though there were provisions relating to murder[466], wrongful confinement[467], abetment of suicide[468], causing hurt[469] etc., the law did not take into account specific incidents of violence faced by women by her own husband or his relatives within the home and rather construed such incidents as committed by complete strangers. It was felt that there is a need to consider a person, say a husband, on whom the woman is emotionally and mostly, financially dependent on a different plane.[470] Although the legislature passed certain legislations related to dowry like the Dowry Prohibition Act, 1961 or later, the Protection of Human Rights Act 1993, the problem of domestic violence in itself was not properly dealt with.

Considering the need to provide for separate provisions for domestic violence and a prolonged and effective campaign by women rights activists demanding amelioration of the conditions of women by criminalizing of domestic violence and dowry deaths, the Indian Penal Code (IPC) was amended twice, in 1983 and 1986, to account for offences with respect to cruelty to wives, dowry deaths and

[465] R. Raman, "The Protection of Women from Domestic Violence Act, 2005", Vol. 01(02), *Criminal Law Journal* at 17 (Feb, 2009).
[466] S. 302, Indian Penal Code, 1860.
[467] S. 342, Indian Penal Code, 1860.
[468] S. 306, Indian Penal Code, 1860.
[469] S. 321, S. 322, S. 323, Indian Penal Code, 1860.
[470] *Supra* note 3, at 17.

harassments.[471] We shall now discuss the twin amendments to the IPC with regards to domestic violence in detail here.

SECTION 498A

Section 498A was inserted in the IPC, when it was amended in 1983, with the aim of curbing cruelty by wives to the husband and/or by the relatives of the husband.[472] The section, in its explanation of the term 'cruelty', includes any 'wilful conduct', thereby broadening the scope by including mental cruelty within its ambit, as laid down in ***Pawan Kumar and Ors.* v. *State of Haryana***.[473] However, it provides that such 'wilful conduct' must be such as to be likely to drive the woman to commit suicide, or cause grave danger to life, limb or health. Here the problem lies in the fact that the definition fails to account for the most common form of domestic violence which relates to the everyday physical and/or mental abuse suffered by women, the same being observed in the decisions of ***Sushil Kumar Sharma* v. *Union of India***[474] and ***Smt. Sarla Prabhakar Wagmare* v. *State of Maharashtra***[475], where it was seen that although there were evidences of harassment, the same were not enough to drive a woman to commit suicide, thereby the same not covered under 'cruelty' as far as S. 498A is concerned.

SECTION 304B

S. 304B was introduced in the IPC by an amendment in 1986 to make offenses specifically related to dowry deaths as punishable. Though the intention of the amendment should be applauded, however, the same did not acknowledge any form of domestic violence which did not relate to dowry and dowry

[471] Madhu Kishwar, "Law Against Domestic Violence: Underused or Abused?" 120 *Manushi* 17 (2006).
[472] Jayna Kothari,"Criminal Law on Domestic Violence :Promises and Limits", Vol. 40(46) *Economic and Political Weekly* at 4843- 4849 (Nov.2005).
[473] (1998) 3 SCC 309.
[474] *Sushil Kumar Sharma* v *Union of India*, AIR 2000 SC 3100.
[475] *Smt. Sarla Prabhakar Wagmare* v *State of Maharashtra*, 1990 Cr.L.J. 407.

deaths.[476] The basic flaw in the thinking of the legislators was the fact that they associated any form of domestic to dowry related issues only and did not acknowledge domestic violence as an offense in itself. While dowry-related deaths form a serious offense in itself which needs to be dealt with sternly, a strategy which aims at only curbing such forms of offenses and completely neglecting other allied mental and physical abuses committed on women in their homes by their family is a '*narrow, short-sighted and wrongly formulated strategy*.[477]

Treating delicate issues such as domestic violence under the criminal law *per se* has its own shortcomings. Under the criminal law, the burden of proof, insofar as proving guilt on part of the accused, is that of "**beyond reasonable doubt**", a requirement which becomes very difficult to prove for the sole reason that the said violence takes place within the four walls of a household and it is hard to procure witnesses and other proofs for the said violence acts.[478]

Furthermore, there were only two remedies left for the aggrieved woman- under personal laws and under IPC. However, both might not provide adequate remedies for the woman as in the former she could get a divorce from her husband and in the latter case she can get her husband, or the relatives punished with imprisonment. She could not get any relief under the civil law where she could get an immediate remedy which would stop the violence inflicted; without inflicting punitive liabilities on the offenders.[479]

[476] *Supra* note 14, at 429.
[477] Flavia Agnes, *State, Gender and the Rhetoric of Law Reform* (Bombay: Research Centre for Women's Studies, S.N.D.T., 1995) at 110.
[478] *Arvind Singh* v. *State of Bihar*, (2001) 6 SCC 407. In the present case, the Supreme Court did not accept the testimony of the mother of the victim stating that she was an '*interested witness*' in the proceedings. The victim had told her mother that her husband and in-laws put kerosene and put her on fire. The court, due to the want of evidence and the fact that there was no outsider who was a witness to the crime, acquitted the accused of any liability under Section 498A of the IPC.
[479] Dr. S. Gupta, "Protection of Women from Domestic Violence Act, 2005: Some Concerns/Reflections/Issues", Vol. 03(09), *Criminal Law Journal* at 249 (Sept., 2008).

It is very important to keep in mind the social construct of a society especially like India where the victim of such violence would tolerate such atrocities owing to several economic and sociological reasons.[480] Breaking a marriage would be a very big step for a woman as it defines her social identity in the society. A woman is generally emotionally and economically dependent on the abuser, and also due to lack of any alternate form of subsistence.[481] Moreover, the aggrieved might have children with the abuser and due to attachment to them and also due to the fear of losing their custody; she might be compelled to endure the constant abuse.[482] Keeping the above things in mind, getting a divorce or filing a plea under the criminal law is not considered as an alternative by the aggrieved.

Therefore, the researcher is of the view that the existing criminal law provisions relating to domestic violence were not well equipped and left limited options for the aggrieved party to choose from. Also, remedies available and the high level of proof required provided as a deterrent for the women to file suits under the available provisions. Civil remedies in the form of injunctions, protection, and non-molestation orders would provide a better alternative to the aggrieved, the requirement of which was fulfilled by the coming into force of the Protection of Women from Domestic Violence Act, 2005.

III. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005: PROVISIONS AND MERITS

The Protection of Women from Domestic Violence Act, 2005, which received assent from the President on 13-09-2005 and was implemented from 26-10-2006, was an Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of

[480] Jayna Kothari, "Domestic Violence: The Need For A New Law?", Vol. 16(3), *The Lawyers Collective* at 25 (March, 2001).
[481] Madhu Kishwar, "Experiences of the Women's Movement in Dealing With Violence Against Women" in Lawyer's Collective, *Domestic Violence and Law* (New Delhi: Butterworth's, 2000) 138.
[482] Kiran Aggarwal, "Towards a Civil Law on Domestic Violence" in Lawyer's Collective, *Domestic Violence and Law* (New Delhi: Butterworth's, 2000) at 197.

violence of any kind occurring within the family and for matter connected there with or incidental there to. The law regarding domestic violence is nothing but an offshoot of Human Rights.[483]

What is important to note here is the fact that the said Act is a civil law in the first instance and only if the orders of the courts are not adhered to, then only will criminal liability be levied on the perpetrator under Section 31.[484] The Act covers women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption under Section 2(f).[485] In other words, the Act deals with domestic violence committed on not only wives and daughters-in-law but also mothers, sisters, and daughters. The Act seeks to recognize domestic violence against women as a universal problem of power relations and identifies the fact that domestic violence also includes everyday recurring acts of violence, which may not necessarily be of nature which can drive a woman to commit suicide.[486]

The term 'domestic violence' has been widened in its scope by the virtue of Section 3 of the Act where it includes physical, sexual, verbal/emotional and economic abuse; each being discussed in detail here.

i. **Physical Abuse**: It intends to cause bodily pain, or danger to health, limb or life or impair the health.

ii. **Sexual Abuse**: It is a conduct that violates, humiliates or degrades the dignity of women. For the first time, the Act gives recognition to marital rape which even the IPC fails to address.

[483] *Supra* note 3, at 18.
[484] Indira Jaising, *Law of Domestic Violence* (2nd edn., Monica Sakhrani ed., New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2007) at xxxii.
[485] *Supra* note 3, at 19.
[486] Flavia Agnes, "Domestic Violence Act: A Portal of Hope", as sourced from *http://www.combatlaw.org/information.php?issue_id=25&article_id=633* (last visited on 20/11/2010).

iii. **Verbal or Emotional Abuse**: It includes humiliation, ridicule, insults, name calling & insult with respect to not giving birth to a male child or a child, forcing her to participate in or watch pornography, repeated threats to cause physical pain to any person in whom aggrieved person is emotionally attached.

iv. **Economic Violence**: It includes not giving maintenance or money to the aggrieved person or the children, not providing necessities like food, cloth, and medical facilities, forcing them to move out of the house, preventing from carrying on one's employment, non-payment of rent. Pawning of the Stri-dhan, snatching away of the salary, demand of the dowry by abusing.[487]

While defining 'domestic relationship' under Section 2(f) of the Act, the legislators in a very progressive stance recognised the fact that the domestic household might not be only with respect to a married couple but with regards to cohabitees in live-in relationships as well, but does not acknowledge 'keeps' under the same. However, whereas the Act enables the wife or the woman in a live-in relationship to file a complaint under the Act against any relative of the husband or the male partner, it does not enable any female relative of the husband or the male partner to file a complaint against the wife or the female partner.[488] In a recent judgment of ***D. Veluswamy* v. *D. Patchaiammal***, the Supreme Court using the decision laid down in ***S. Khushboo* v. *Kanniammal & Anr.***[489], provided for the following guidelines to determine live-in relationships with regards to domestic relationship under the Domestic Violence Act:

(a) "The couple must hold themselves out to society as being akin to spouses,

[487] *Supra* note 3, at 18.
[488] The Protection of Women from Domestic Violence Bill, 2005.
[489] (2010) 5 SCC 600.

(b) They must be of legal age to marry,

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried,

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time".[490]

Furthermore, the Act acknowledges the fact that the aggrieved woman may be thrown out of the house consequently not leaving any place for her to stay in, in case she files for domestic violence under the said act. Hence, it provides for the right to the woman to reside in the 'shared household',[491] which need not be a house where the aggrieved person has a right, title or a benefit interest in. It can even be a tenanted house, where the aggrieved person lived or has lived, either jointly with the aggressor or even singly.[492] The woman cannot be removed from the said house except by due process of law. However, the said provision has been an area of scrutiny and a number of cases have come up on the same.

The Supreme Court observed in ***S.B. Batra and Another* v. *Tarana Batra***[493] observed:

"Wife is only entitled to claim a right to residence in a shared household and a shared household would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member. The property in question in the present case neither belongs to the husband nor was it taken on rent by him nor is it a joint family property of

[490] Anonymous, "SC Explanation of Live-in Relationships with Reference to Domestic Violence Act" as sourced from *http://indialawyers.wordpress.com/category/domestic-violence/* (last visited on 24/11/2010).
[491] Section 17, Protection of Women from Domestic Violence Act, 2005.
[492] Section 2(s), Protection of Women from Domestic Violence Act, 2005.
[493] AIR 2007 SC 1118.

which the husband is a member. It is the exclusive property of the husband's mother. Hence, it cannot be called a shared household."

The Act also acknowledges the fact that such violence affects women in more ways than one, in every aspect of her life - personal, economic as well as mental – and consequently, an equitable remedy should be provided considering the particular circumstances.[494] Hence, the Act provides the aggrieved various options to choose from. The various orders that can be given include a Residence Order, a Protection Order and a Compensation Order.

Under Section 18 of the Act, the Magistrate may prohibit, by issuing a Protection order, the respondent from attempting to communicate with the aggrieved person in any form[495], and alienate any accounts or bank accounts to the disadvantage of the aggrieved person[496].

The Residence Order safeguards the right of the aggrieved woman to the shared household. [497] The Residence Order can restrain the respondent from dispossessing from or disturbing the possession of the aggrieved to the shared household, irrespective of whether she has an equitable right in the house or not.[498] The Order may direct the respondent to leave the house of the shared household and may prevent him from selling off or alienating the house, except if the same being done with the leave of the Magistrate. The Magistrate may direct the respondent to provide the aggrieved person with alternative accommodation.[499]

The Act also provides for a third kind of Order called the Compensation Order where the respondent may be ordered to provide the aggrieved with financial relief in the form of monetary relief.[500]

494 *Supra* note 1, at 208.
495 Section 18(c), Protection of Women from Domestic Violence Act, 2005.
496 Section18(d), Protection of Women from Domestic Violence Act, 2005.
497 Section 19, Protection of Women from Domestic Violence Act, 2005.
498 *P. Babu Venkatesh and Ors* v. *Rani* MANU/TN/0612/2008.
499 *Id*.
500 Sections 20 and 22, Protection of Women from Domestic Violence Act, 2005.

In addition to the above reliefs, the aggrieved woman can, under the Act, file criminal complaints under the criminal law (S. 498A of the IPC) or under other special legislations seeking necessary action to be taken against the perpetrator and may amount to imprisonment as well.[501]

Hence, the researcher is of the view that the said Act aims to achieve a noble motive and some of the provisions of the Act have been enforced for the first time in India's legal history. However, as we shall study in the next chapter, there are certain gaping loopholes which need to be amended before the Act could reach its effective best.

IV. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT: GROUNDS FOR CRITICISM

We have studied in the past chapter that this piece of legislation is an extremely progressive one and seeks to safeguard the rights of the aggrieved women of domestic violence in India. However, the implementation and interpretation are where the Act and the judiciary as a whole lack. It is a known fact that implementation is the most important part of a law, however, effective it might be on paper. Owing to the present social scenario and the patriarchal mindset of the people, including women, the effectiveness of the Act gets diluted.

Certain existing lacunae in the Act still prevent women to file complaints and hence the aim cannot be fulfilled. Here are some of the shortcomings with regards to the Act and the same should be removed/ amended if the Act has to function to it effective best. Suggestions, wherever possible, have been provided by the researcher.

[501] *Supra* note 2, at 20.

Scope for Misuse- The PWDVA, 2005 provides with a lot of scope of misuse of the Act by women against innocent men. The Act appears to move on the assumption that all women are innocent, accommodating by nature and carry decent amiable disposition, whereas ill-behaviour and vices are the sole forte of the men, which might not be true in many cases.[502] Section 32(2) provides that the sole testimony of the aggrieved person serves as enough evidence for the court to conclude that the offence has been committed by the accused. This virtually empowers women to punish men at will and leaves no remedy for men against erring women who might file false complaints in case they are not happy with the marriage for whatever trivial reasons, by accusing the accused of domestic violence. [503] Furthermore, Ch.III, S. 4 of the Act says that the information regarding domestic violence can be provided by anybody who has a reason to believe that such an act has been committed or is being committed. Hence, any person might file a complaint with an intention to disturb the peaceful life of the family and disturb the family by filing such frivolous complaints before the magistrate.[504]

Ambiguity Relating to Key Definitional Terms: The terms, 'shared household', 'domestic relationship' and 'aggrieved person' although defined under Section 2 of the Act, are still concomitant on the other two terms for their meaning. This leads to certain problems while interpreting them and the ambiguity caused leads to decisions such as the case of *S.R. Batra and Anr.* v. *Taruna Batra*[505] where the decisions were taken are often at odds with the purpose of the Act. It is suggested that either the Courts come up with some judicially manageable standard while deciding such cases or the legislature clarify the same.

[502] *Supra* note 1, at 208.
[503] Dr. Minal M. Bapat, "Protection of Women from Domestic Violence Act, 2005- A Recipe for Broken Marriages & Relationship", Vol. 2(5), *All India High Court Cases* at 66 (May, 2008).
[504] *Supra* note 3, at 19.
[505] (2007) 3 SCC 169..

The Act and Children as Victims of Domestic Violence: The Act essentially aims at protecting the rights of women with regards to domestic violence. However, it needs to be noted here is the fact that children are susceptible to domestic violence too, including male children. The position of the same is unclear under the Act. Though Act defines 'child' under the definition section[506], the 'aggrieved person' has been specifically defined as a woman[507]. Simultaneously, S. 18(c) seems to suggest that a child may be an aggrieved party. Consequentially, the provisions of the Act seem to be not in harmony with each other.[508]

Inadequate Infrastructure for Implementing the Act: Protection Officers, as mentioned in the earlier chapter, play a major role as far as the protection of women from domestic violence Act is concerned as they have been allocated essential duties such as preparing the Domestic Incident Report upon receipt of a complaint, providing for a simplified legal process for the aggrieved by making applications for orders like a Protection Order for the aggrieved and ensuring access to legal aid, medical examination, and if needed, a shelter home to the aggrieved. Hence, the primary objective of providing extra-legal assistance to the victims lies on these officers. However, these officers are not provided with adequate support, both monetary and infrastructural, to discharge their duties in a satisfactory manner.[509] The researcher, therefore, recommends a more pro-active policy on the part of the State Governments to implement the Act. Furthermore, there needs to be more awareness spread about the Act so that women may avail of the relief under the same.

Flawed Existing Judicial System: Judiciary plays an imminent role in the interpretation of any statute and hence, plays a major part in its implementation. It has been noted that the judiciary still

[506] Section 2(b), Protection of Women from Domestic Violence Act, 2005.
[507] Section 2(a), Protection of Women from Domestic Violence Act, 2005.
[508] Srijoni Sen, Sanhita Ambast, "The Domestic Violence Act, 2005: A new direction", sourced from *http://news.indlaw.com/guest/columns/default.asp?domesticviolence* (Visited on 11th November, 2010).
[509] *Id*.

works on a predominant patriarchal mind-set. This is specially illustrated in the famous case of Batra v. Batra[510], where the Supreme Court interpreted the provision of the Act in a way which the researcher respectfully views as being against the aim and goals the Act wishes to achieve. The judgment provided that the aggrieved woman has no right of 'shared household' if the same does not belong to the husband. This, therefore, provides the perpetrators to throw the victim out of the house in which they inhabit on the grounds that the same does not belong to the husband but to say, his parents. This works in complete contradiction to the aim S. 2(s) of the Act aims to achieve.

Hence, the aforementioned loopholes in the Act and the present sociological setup of India prove to be hindrances for the effective implementation of the Act. Some serious work needs to be put in to ensure that justice is provided to all the aggrieved women of domestic violence in India.

V. CONCLUSION

The Protection of Women from Domestic Violence Act is a legislation which is well intended and aims at eliminating the social stigma of domestic violence. Though the attempt to break many stereotypes and social shackles was indeed a brave one, certain shortcomings have made the Act wanting for grounds to thrive.

However, it has to be acknowledged that it is not easy to make such a legislature work more so because of the fact that inherent nature of the crime sets it distinct from other crimes. The relationship between the abused and the abuser makes it very difficult for the abused to file a complaint as the abuser might be a wife beater at one moment and a caring husband the next.

[510] *S.R. Batra and Anr.* v *Taruna Batra and Anr.*, (2007) 3 SCC 169.

It is rightly said that a law is only as good as its implementation, however, laudable and noble be its intentions and aspirations. The success of any legislation requires the creation of a conducive social climate. Legal reforms are pointless unless they are preceded by social reforms. The Indian society continues to be patriarchal in nature where the people still consider wife beating as 'normal' and women are told to 'adjust'. The mindset of the judges is very disturbing as domestic violence is still not considered to be a 'crime'.

The researcher is of the view that the emancipation of women requires, more than laws, breaking free from social taboos, education, and economic development. The malaise of domestic violence needs to be recognized, resisted and reported to the respective authorities,[511] like the recent campaign of "Bell *Bajao*" where the campaign asks people to ring the bell of the house where they hear domestic violence taking place.[512] The researcher shall conclude the paper by stating that an Act, however perfect, cannot operate in vacuum, separate from existing societal conditions. The PWDVA, 2005 is a legislation which aspires to achieve noble goals but is itself ridden by certain flaws. It has often been accused of being biased and subject to misuse, hence no interim relief should be provided to the complainant unless *prima facie* signs of torture are not established.[513] Also, certain provisions, as mentioned in the previous chapter, should be revisited and required amendments should be made.

[511] *Supra* note 20.
[512] As sourced from *http://bellbajao.org/about/campaign/* (last visited on 24/11/2010).
[513] Legal Fighter, "Fight for Justice", as sourced from *http://legalfighter.wordpress.com/2010/03/01/how-to-stop-misuse-of-domestic-violence-act/* (last visited on 25/11/2010).

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