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PUNISHMENT: A DRIVE FOR JUSTICE WRITTEN BY GODWIN GOODHEAD AKPAN

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ABSTRACT

This paper provides an overview about punishment as a drive towards justice in India. It compartmentalizes the chronological explanation of various theories of punishment with concrete examples. However, it highlights and expatiates the impacts of punishment on reducing the crime rate in India, the question of separating criminals from society, granting of parole, the effects of punishing offenders, along with attempting to resolve the arrival on the issue of giving alternatives to the criminal justice system. Moreso, the aspect of justice, evidence law, rarest or rare doctrine, collective conscience, factors influencing the commission of crime, and changing the narratives of sentencing, etc. have been dealt with concretely.

Works of literature were drawn from both primary sources through observations of various court proceedings, activities of advocates, and visitation of some jails in India as well as secondary sources of data collection, such as Books, Journals, Case Laws, Reports, and other internet materials. To get a tentative outcome, the author has adopted a strategic research methodology; doctrinal, analytical as well as a comparative study. Except where due recognition of any author has been referenced, the credit and originality of the work lies with its maker.

This paper, therefore, concludes that more concerted efforts should be geared towards the aspect of the criminal justice system, it provides some possible suggestions, and it also answers the question as to whether punishment should be reformed or maintained as a valid criterion for the effective administration of the criminal justice system in India.

Keywords: Punishment, Crime, Justice, Evidence, Rarest of Rare, Collective Conscience.

I. INTRODUCTION

Human society evolves each day with unique things going laterally by it, along with it, crime has become more or less a routine to some individuals or groups of people ranging from children to adults, as well as those directly or indirectly contributing to its execution. The legal system of various countries has put various mechanisms in place to ensure that these unspeakable actions are completely eradicated, but the achievement of it completely becomes almost vague or impossible.

Punishment is the outcome of both commission or omission of any act which is prescribed as an offence in any particular law. Heinous crimes such as murder, rape, terrorism, kidnapping, and robbery as well as others like fraud, forgery, grievous hurt, kidnapping, abduction, and trafficking have brought questions as to what should be done, whether to kill, imprison, fine, or solitarily confine culprits. New ages have come up with more advanced nature of crimes like serial killing, psychological impairment, cybercrime, etc., concerns have been raised retrospectively to the traditional and medieval periods as to whether punishments should be very detrimental, or if the culprits are to be removed from society, tortured with electric shocks, or burnt at the stake.

Moreso, the drive for justice is somehow misunderstood, it is an absolute truism that there can be fairness and impartiality in restoring what has been caused as an offence against the state, but looking at it from the judiciary perspective of the interpreters, the goal of lawmakers, and the enforcing agencies, it is imperative that the drive towards attending a complete justice is inevitable, hence, the punishment is required. Nevertheless, viewing from paraphernalia associated with punishment which is sometimes simple, rigorous, or either leads to isolation from society, psychological trauma, and even exposing fewer offenders to learning from more hardened criminals, it is always doubtful to comprehend if imprisonment is a good kind of punishment and others, hence, being subjected to more jurisprudential and substantive questions of law dealt here.

To preserve law and order in society, certain things have to be put in place especially, to stop criminals from causing threat to it. The people's criteria or demand for justice is at all cost, the law provides the procedure of attending that height especially the aspect of collection of evidence, the judiciary becomes proactive to keep the Constitution in check and do away with arbitrariness, and the executive strives towards the avoidance of abusing its authority, therefore, the aspect of collective conscience, evidence, and doctrine of rarest of rare cases have been looked into in a simple manner. The level of punishment weighed on convicts are also seeming to be proper to some extent, but the need to rethink the Difference's principles of treating people as not completely equal gives more demand to understand punishment as a drive to justice.

The paper attempts to develop an overview of the role of punishment as a drive for justice in India. It first expatiates on the dogma of the drive towards justice, what is required to be done to ensure that the aggrieved party gets remedy and the interest of the accused is being protected accordingly. It progresses to highlight all the various theories of punishment including the utilitarian, incapacitation, and multiple approach theories, etc. This covers a general contemporary aspect with a historical background of some theories. The analysis reveals that though there may be a claim of following the reformatory theory in form, in practical reality, multiple approaches are being adopted to some extent in India. It also postulates that almost all the various theories of punishment are in support of society than criminals in terms of gruelling the offenders. Part four of the paper also examines the impacts and contributions of punishment in reducing crime in society as a drive to justice, it divulges to touch some critical aspects of it in detail and challenges to maintain that punishment has been a major factor fascinating the reduction of the crime rate in India.

The key part of this paper is contained in section five, which deliberates on the modern-day problem of why criminals should not be part of society or be isolated. The topics covered in this part are associated with the reasons why people think of committing crimes, and why all offenders should not be considered useless to society. The argument on this expanse assesses the pattern adopted to tackle these issues and how far they have succeeded in putting the issues in the right standpoint. It also tackles the aspect of granting parole to convicts, nonetheless, it upholds that criminals are to be separated and incarcerated according to the level of crime committed. Part six divulge the integral aspect of the doctrine of rarest of rare cases, it establishes the procedure of condemning an accused along with the limitations of the doctrine. It narrowed down its ending part to such assertion that the parameters that are outlined in the doctrine are not uniformly followed by the Courts. The seventh part handles the overview of evidential rule, types of evidence that are admissible as well as the aspect entailing the burden of proof.

In addition to that, part eight discusses about the societal, political, and economic effects of punishment, and the technique that the law has taken to expeditiously deliver substantive justice. It goes without the saying that the effect of punishment is better than the injury that criminals would have caused to society if given the upper

hand. The ninth segment substantiates the stratum related to the factors influencing the commission of offences, while part ten points out the challenges faced in the criminal justice system.

We are in a time when the world is expecting everyone to change with it, and the activities of voluntary or non-governmental organizations, human rights activists, etc. have greatly influenced the outcome of the criminal justice system. The last part penultimately looks into the paradigm of this point and does not hesitate to argue the debating need for alternatives to punishment. It is argued that there cannot be any best way to replace the criminal justice system in India, hence, alternatives to punishment can only best serve the purpose of less grievous crimes than odious ones. The concluding part summarizes the key points of analysis in this paper with references.

II. THE DRIVE OF JUSTICE

The question on how punishment is a drive for justice leaves several minds with the contemplation of what indeed is “Justice”? Justice to simply put is ‘fairness and impartiality’. Cambridge Dictionary defines Justice as “fairness in the way people are dealt with”. Also, it defines it as the behaviour or treatment that is fair and morally correct” (Cambridge, 2023). Several jurisprudential efforts have been made to narrow down this vast and cumbersome concept, but attaining uniformity in the definition is something next to impossible. John Rawls, Immanuel Kant, Robert Nozick, Ronald Dworkin, Justice Hillel Steiner, and Peter Vallentyne have given considerable approaches towards propounding theories that are suitable for the achievement of justice. It may not be wrong to ascertain that they are *per se pari materia* as they dance towards to tune of utilitarianism, libertarianism, and egalitarianism, etc. which is not going to be treated in detail here. However, what one may derive from all these could simply be the categorical imperative about how justice works (Duignan, 2023; Nardin, 2017, Ricciardi, 2007, Vujadinovic, 2018).

Justice can be Distributive which means taking into consideration the consequentiality, rule of law, and wealth to ensure that the resources of the state are equitably distributed to all citizens. It goes in line with Contributive justice wherein there is granting of equal opportunities to everyone to acquire their earnings, just as the Constitution of India enshrines. With the outbreak of concerns towards the ecosystem, environmental justice has sprouted out to give aide to the protection of the environment as a shared but differentiated responsibility (United Nations Office on Drugs and Crime, 2019).

In the aspect of the Criminal Justice System, it goes in *pari passu* with the nature of pattern or rather a theory of punishment that is being followed. Restorative theory of Justice by its very nature focuses on making efforts to ensure that the offender takes responsibility for his actions, comprehend the harm inflicted as well as being deterred from committing such again. A more enhanced kind of justice in this aspect will be the Retributive theory, it is here that the term ‘proportionality’ holds great value. This theory balances justice from

the dimensions of the victim, accused, and society at large, it encompasses that the punishment received for committing a crime should be in coreferential or equal footing with the crime committed. It allows the application of law to the circumstances of the case, the nature of the offence, the rights of the parties and their entitled relief in law, among others. Furthermore, the criminal justice system is interactive in nature, while focusing on the possibility of reforming a culprit, it also maintains the status quo of people involved as agents in it, vis-à-vis, the Police and the prison system, Prosecution, Defence, the Court, etc. (Beccaria, 1986)

Having understood the concept of justice in a broad manner, it will be important to narrow it to a very specific aspect of how justice is met. The concept of fair trial from the moment a person has been accused for committing a crime to the time of conviction, the nature of evidence admissible before the Court, the protection given to the witnesses, the relief given to the aggrieved party, and the independence of the judges in giving an impartial judgment are all what forms part of justice in criminal law. Keeping in mind the adversarial system of trial in India, it is visible that the scope of independence, impartiality, and competence of the judges are being expounded as they play a referee role by sitting to hear the matter for the first time in Court and deciding without emotions (Tiwari, 2023).

Justice goes down to the presumption of innocence of the accused person until the contrary is proven beyond reasonable doubt. When the various stages of crime such as intention, preparation, attempt, and commission has been actualised, it is still unjust to criminalize a person without being heard, hence, true justice is accompanied with the right of the accused to be informed about the accusation labelled against him, to choose his legal representative or given a legal aid when none is afforded, and to be informed about his rights. It is not a proper justice if the trial, examination of witness, or collection of evidence are done in the absence of the accused, here two things happen, it is either there is a bail (sometimes anticipatory) with the surety that the accused person will comply with the concerned authority during investigations and trial process, or where the offence is non-bailable in nature, the judicial custody of the accused will be taken (National Human Rights Commission, 2021).

Moreover, the ideal practice of transparency has been conducting trial in an open court, however, in some cases, this can be done in closed doors (cameras) due to certain factors like security reasons, the personality of the accused person or witness(es), etc. as seen in practice, needless to give instances, especially when it comes to matters involving high ranking politicians; whether this is discriminatory or reasonable in nature is another subject matter altogether, though convenient to the Court. In line with this, section 327 of the Code of Criminal Procedure (1973) has provided for an open court trial with justifiable exceptions to matters of rape cases, other grounds such as the increased stress for the accused, invasion of his privacy, and damage to his reputation does not seem reasonable. (*Smt. Ujjam Bai v. State of Uttar Pradesh*, 1962), *Unlawful activities (Prevention) Act 1967 S 44*). The test of reasonableness has to be seen in the light of the golden triangle test (*Meenak Ghandhi v. Union of India*, 1978), nevertheless, it may be a deviation from the present

work to delve into the aspect of constitutional validity of punishment. However, justice is best given along with punishment if it is within the premise of the Preamble as well as the Articles of the Constitution of India (1950) read harmoniously along with the various exceptions in the proviso, precedents, or any other law to that effect for the time being in force. Citizen's transparency is required, there is no reasonable differentia or rational nexus in not allowing open justice to certain category of people, the same income they make is similar to that of other citizens in general notwithstanding the savings, they acquire equal rights, and a crime is crime irrespective of the weightage of it, be it fraud allegation, defamation, theft, or rape cases, there is no point of hiding. In fact, adding reputation to plaintiffs should be restricted by the Court, apart from the occupation of what a person does for a living, the famousness of the person should be set aside as it may likely affect the judicial independence. Section 44 of the Unlawful Activities (Prevention) Act (1967) emphasises that terrorism cases are heard in an open court, however, with prior application, the court can allow non-print media during the trial as well as limit the use of photographic and visual or audio equipment to that which does not produce distracting sound, or light. The general public may either criticize that the law has been misapplied or that the law itself requires amendment, however, this aspect has been properly handled to ensure that cross-examination and chief-examination are taken on the same day in an open Court (*Mukesh Singh v. State of Uttar Pradesh* (2022) Livelaw (SC) 826).

On the other hand, the aim of the prosecutor since crime is committed against the state is to get justice from law, the nature of justice that needs to be given is for the Court to give due consideration to the prosecution story and shreds of evidence being adduced. Since the aggrieved party has suffered harm, as per the findings of the Court, it is a matter of justice to pronounce judgment on the nature provided by law, and to protect the interest of the victim without any interest on the side of the judges or investigating agents. It is a settled principle of justice that a person cannot be punished twice for the same offence (double jeopardy), he cannot be compelled to give witness against himself (self-incrimination), and also has the rights of pre-sentence hearing as provided in section 235(2) of the Code of Criminal Procedure 1973 (See; the Constitution of India 1950 Art. 20). Consequently, keeping in mind the various principles of natural justice, first a person cannot be a judge in his own case (*Nemo iudex in causa sua*), the trial court must give hearing to both parties (*Audi alteram partem*), and last but not the least, the Judge must as a matter of obligation state proper and special reasons for arriving at his judgment otherwise referred as the rule of speaking orders and seeing that the justice is not only done but seen to be done without delay or denial (Mishra, 2022). Section 354(3) of the Code of Criminal Procedure 1973 also provides for mentioning special reasons as to why the sentence of death, imprisonment for life, etc. has been awarded without resorting to alternate punishment.

Undue delay may result in the defeat of justice, especially an impairment of ability of the accused to defend himself due to suffering for long in the prison, yet, sometimes even not having the sufficient time to interact with his advocate. In many situations, it has been seen that the judgment is given when the victim is death, or case withdrawn due to death of the accused, also, by observing cogently, it is seen that cases involving

politicians or top-ranking people in the nation are set for special, expeditious and immediate hearing without delay, whether this dances to the tone of equality that the Constitution provides is purely a question of law, considering a case to be more important than another (The Economic Times, 2022).

The legal framework should also ensure that Judges have the authority to compel witnesses to appear at hearings or trial, and otherwise have a principled discretion to manage the progress of a case, this is because people's life is at stake. Challenges arise that the prosecution representatives are not ready with their arguments, witness did not show up, medical or other excuses for adjournment, etc., these contribute to the prolongation of cases which is not palatable, there should be strict guidelines regarding the length that every court should take to dispose of pending cases and the process should be strictly followed. For example, the role and effect of the National Investigation Act (2008) does not only establish the national agency at the central level to investigate and prosecute offences affecting the sovereignty and integrity of India, but also provides under section 19 of the Act that its trial shall be held on a day-to-day basis of all working days. This gives strength to the right to Speedy Trial as derived under Article 21 (*Hussainara Khatoon & Ors. V. Home Secretary, State of Bihar, 1979*). This particular right has only been a mitigating factor in various stages of investigation, inquiry, trial, appeal, revision and retrial because if the accused should approach the Supreme Court under Article 36 (Constitution of India, 1950), it may take another decade to give direction for speedy trial. This is not an issue with the Court alone, but also the parties involved, especially advocates who are after money and not ready to deliver their client's case brief thereby giving irrelevant excuses to appraise them.

Having seen that adjournment has contributed immensely to the delay of justice, another thing that has also served as a lacuna in the criminal justice system is the rejection of Ex-parte trial. It has been seen that trial cannot be done in the absence of the defending party even if it is a summary trial. This has contributed not only to the accumulation of cases, but the delay of justice especially when the accused has absconded. Although it makes no much difference with that of civil law suits because sometimes even when a decree is passed ex-parte, the respondent can still approach the Court to present that there was no proper service of legal notice, that several factors led to impossibility of appearing before the Court, or that the judgment has suppressed certain unavoidable facts which may cause irreparable loss to the appellant if the suit is not reopened. Nevertheless, it gives a little hope of progress than not taking cognisance at all. Cases related to section 138 read with section 142 Negotiable Instruments Act (1881), for example, have reached the outcry demand for ex-parte trial even by the Court (*G. H. Abdul Kadri v. Mohammed Iqbal, 2022*), even at that, it is seen that the Court's hand is still folded to keep trial on hold until the whereabouts of the accused is known (*Mac Charles (I) Ltd. V. Chandrashekar and Ors. 2005*), and this incur not only a great loss to the Complainant but also contributes to the delay of justice. Therefore, there is need to punish not only the accused for non-appearance, but to extend some punishment to the prosecution like fine if they contribute to the delay of their case, otherwise the matter be disposed and accused set free. It is strongly emphasized here that this can best be ensured statutorily more than leaving it open at the pleasure and whims of judges.

III. THE THEORIES OF PUNISHMENT: A COMPARATIVE ANALYSIS

There can be no legal punishment without a crime. Punishment has always been in the position to adjust and keep society in check against the crime being done contrary to it. According to Thomas J. Bernard, Anthony Nicolas Allot, and David A. Thomas (2023), Punishment is “the infliction of some kind of pain or loss upon a person for a misdeed (i.e., the transgression of a law). Crime is said to be committed when there is an external (physical), mental, or psychological consequence in the form of harm or injury which is done in an unjustifiable or outlawed manner either by an act or omission with the guilty mind (*mens rea*) that such prohibited act is wrong and may result to a consequential effect and punishment. In most cases, crime has been claimed to be committed without *mens rea*, however, the viewpoint of law relaxes on the burden of proof in which its shifts to the owners who claim that the guilty mind was not present. In this paper, ‘society’ is used to describe a large mass of people, it may be a country in general or a particular state or region of it. Also, ‘individual or singular words’ as often used does not suggest that it applies to only one person but rather can include a collective number of people who may jointly or severally bear the consequence of their offence or related topic. Lastly, the use of ‘he’ is gender neutral for the purpose of this article except the contrary is expressly provided.

The application of punishment can be best understood if a crime is committed. In India, crimes and punishment are defined in the Indian Penal Code (1860), although there are considerable substantiations in the procedure under the Code of Criminal Procedure (1973), and other specific laws. The code though does not mention any theory of punishment directly, has implied versions of it in some of its provisions. The various approaches to punishment vary from one case to another. The punishment given to a person committing murder cannot be the same as a person defaming a human being. To justify this, Cesare Beccaria recognised that punishing offenders is the primary function of the state in the interest of public security (Beccaria, 1986).

In India, punishment (Danda and Prāyaścitta) evolved from its ancient practices ranging from its Dharma in the ancient legal literatures of Dharmashastra and Qisas, religious punishment in Hindu and Muslim, and other forms of monarchical systems which were used by Manu, Kautilya, and the Quran. They promoted punishment in different modes such as admonition (Vakdanda), Remonstrance (Prauascitta), Fines (Arthadanda), Imprisonment (Bandigraha), death or mutilation (Mratudanda or Aung – Vichheda), etc. (Ranjan, 2021).

Nevertheless, the various theories of punishment which will be focused upon are Deterrent, Retributive, Reformative, and Expiatory, as well as the Utilitarian, Incapacitation, and Multiple Approach Theories respectively.

1. Deterrent Theory of Punishment

This is a social defence theory that does not seem to recognise the existence of reforming a criminal. Deterrent theory as the name suggests includes the punishment given to criminals in consonance with making an impact or creating an example to people living in society. Deterrence can be of different types, it can be specific deterrence which deals with attempts to remove crime by influencing a particular person with punishment, it can also be general by frightening the public or a large group of people with reprimand (United Nations Office on Drugs and Crime, 2019). It is believed here that when an individual is punished cruelly, he is likely not to commit the crime again, and on the other hand, when a person is killed by hanging, or theft is punished openly in a shameful manner, for example, it deters people from committing a similar crime with the fear that if they should do it, a severe punishment will be followed.

The various components of the Deterrent theory as propounded by Jeremy Bentham (*Ibid*) are that the punishment must be very swift after the crime is done, it must be certain that it will be the payback for the crime, and it must be severe in such a manner that individuals living in that society will receive the message that doing a similar thing will end them in no better situation than that. Examples of the deterrent theory of punishment include upright jerking by rope, trap door, elephant crushing (South Asia), boiling (either in water, oil, or tar), etc.

2. Retributive Theory of Punishment

This theory also goes with the notion of “an eye for an eye, and “a tooth for a tooth” or the proverbial saying “tit for tat”. It tries to explain a harsh sense of justice based on revenge, nemesis, or retaliation. It is that kind of concept that explains, for example, if A should kill B by cutting his head, then A must be killed in the same manner as well. Tracing to the ancient Mesopotamian culture long before the writing of the Bible and the evolution of Greek Civilisation, this concept associated with the retributive theory and related phrases were written in Hammurabi’s Code as discovered by a French archaeologist Jean-Vincent Scheil in 1901 (US History, 2022). The primary aim of this theory was to protect widows, orphans, and other sets of society from harm or exploitation, however, there were the existence of discrimination which will not be apportioned here. This type of punishment was in support of the fact that if a wrong is being committed, the punishment should be equivalent.

This type of punishment was very crucial in nature, and more or less made up of torturing and it can be sustained that the essence of it was for the emotional satisfaction of the person that has been wronged, for example, cutting the body of a human being called ‘slow slicing or death by a thousand cuts’. However, it is very hard to maintain that this was very good because sometimes, determining whether the punishment was equivalent to the offence committed was very difficult. Although in the latter sense, the supporters of this theory explained it to include the fact that the punishment has to be even greater than the offence being

committed. These includes the cutting off of hands for stealing, permanently enervating someone for raping, and removing of teethes for biting someone, etc. (Eldridge, 2022).

3. Preventive Theory of Punishment

The preventive theory of punishment is that form of punishment that establishes that, for a crime not to be done again, the removal of such opportunities that can likely facilitate it should be the nature of punishment given to the doer. For instance, the fact that A has stolen the property of B, or that A has been kidnapping people, therefore, A should be imprisoned to disable him from having access to cause such social unrest or nuisance to society anymore. In another illustration, if a medical practitioner fails to observe his medical ethics, or if someone should drive recklessly on the road, then their punishment should be the ceasing of their licences in both cases which will prevent them from doing such acts again in future without caution. Instances of preventive detention when riots are going on (to suppress it), constraining someone from running away after killing another, restraining someone from escaping the authorities after committing a crime, etc. all hold its appreciation to this theory (Bernard, 2021). It deals with making one inept of executing new crimes, and it also supports isolation, solitary confinement, imprisonment, lawful restraint, preventive detention, and some other means of criminal law punishments.

This theory has been generally accepted by many states and is mostly upheld to date. The period of this detention varies from one crime to another, and it is believed that when a person is being separated from society, then it may be said to afford peace to the people, thus, physical restraint sets in. Other than revenge, the preventive theory looks at the criminal and not more of the crime itself, it tries to remove the possibility of the crime reoccurring again by the criminal (recidivism), it emancipates to put all possible barriers to carrying out of such an offence. Most importantly, this theory also contemplates the state of the criminal, it is obvious that due to the nature of some offence, the society may not only rely on marginalization of the convict, and in some crucial cases, may want to eliminate the person in an extra-judicial manner, hence, to safe the right to life of such person, the preventive theory serves a high purpose (*Asfaq v. State of Rajasthan*, 2017, pp. 27-28).

4. Reformative Theory of Punishment

The reformative theory of punishment is holistic and somewhat barbaric in its full form. It is that theory of punishment that looks at the factors that can lead to the commission of a crime other than the crime itself and it believes that if these factors are treated as a disease, then the criminals will have no reason of going back to them. This theory is based upon the principle of "Hate the Sin, Not the Sinner" (Priya, 2014). Incurably corrupt

persons, serial killers, juveniles, crime syndicates, habitual offenders, terrorists, hardcore and hired criminals, etc. very well fall under these categories of people that are to be reformed.

The ideology here remains the reasoning that certain corresponding factors like economy, sudden provocation, unsoundness of mind, frustration, anger, unemployment, illiteracy, etc. may compel a person to commit a crime. In frames the connotation that it does not necessarily mean an offender cannot be usable to society or that the person has ceased to possess the characteristics of human being, hence, it seeks to transform people to become more loyal to law and respecting the right of others as well (Bhatt, 2022). Craftmanship is an example of this rehabilitative process, application of treatment and recreational training to enable the criminals to return productively, contribute to society, and remain law abiding as opposed to the deterrent and reformatory theories is what the modality of reformatory theory entails. This reduces recidivism to a very large extent; cases of release on parole, grant of probation, commutation, and the juvenile justice system, among others, are examples of the reformatory theory. India has upheld this process to a certain height before and after conviction, hence, the accused in most cases are no longer arrested and kept in jail or judicial custodies, but rather they allowed to provide surety pledging to be available before the court of law as at any time required by the law (court); anticipatory bail being a pivotal to this as well.

5. Expiatory Theory of Punishment

This theory of punishment is somewhat supportive and on the other hand problematic, hence, chances of surviving the substratum advancement of crime committed in present era become minimal. In Hindu and other personal Laws, it was regarded that when a person has been offended and restoration or compensation has been done, the doing of it will be regarded as cleansing or non-prodigious to the one who committed the offence, and hence, the forgiveness of sin (Maithraye, 2021). How true it may be will not be treated here. Reparation for crimes committed, amends, compensation, compunction, and atonement, for example, returning stolen property to the owner, paying heavily for causing hurt to a person, etc. lies within the category of this theory, hence, the central focus of the Expiation Theory is the compensation awarded to the victim by the wrongdoer. It's conscience-oriented cleansing of hearts, but at the same time, it is too simple in terms of the people's safety as those who may not repent wholeheartedly may still have to uphold recidivism. At times, the criminal is exemplarily punished with punitive compensation and he is obliged to cease from doing such offences in his remaining life; this becomes an example for others to refrain from committing such crimes.

In a true sense, this theory is more moralistic in nature, it believes in making a criminal realise that he has committed an offence against society and is expected to reprimand, thus, the notion that every person deserves to be forgiven when he realised his/her mistake. It should be added here that this is not in the aspect of civil nature, for example, a rapist may plea to marry the victim and prays for forgiveness which may be accepted in thin circumstances with cost (*quid pro quo*) or not. On the other hand, when a matter is of civil

nature but seems to be criminal in nature, it is mostly advised that the civil remedy be availed first, but this is subject to the prayer of the aggrieved party and the findings of the Court to uphold or decline the same, but then, it is not very related to this theory in most occurrences (*Usha Chakraborty v. State of West Bengal*, 2023).

6. Incapacitation Theory of Punishment

Incapacitation is often conflicting as it slightly relates to other theories of punishment, however, it defers a little as it principally pacts with those with habitual offenders' status. This means that where there are multiple offences, criminal records, reoccurrence of crime, or recidivism intrinsically by a person or group of persons, then there is the need to reduce such strength from the person and make him incompetent of committing them time and again (Binder and Notterman, 2017). Using the example of rape, the idea of chemical castration to eliminate the sex drive of rapists in California since 1996 is a good promotion of this theory (Harness, 2020). On the other hand, banishing a criminal from society will not just bring about peace, but disengage the opportunity for the criminal to bring up such crime again in society (Norwood, 2021), though sending such person with criminal record to another kismet is the risk to others if the person continues executing *malafide* intentions. It is germane to mention that this theory recognises the execution of an offender through capital punishment in heinous crimes such that the tendency of the person committing the crime is completely removed, hence, incapacitation sets in. This aspect will be treated subsequently under the doctrine of rarest of rare cases.

Furthermore, this theory fosters to create fear in the mind of the present as well as the upcoming generation, it also deals with the isolation of offenders from society either temporarily, or permanently, but the aim is to treat a lawbreaker differently.

7. Utilitarian Theory of Punishment

The Utilitarian theory of the justification of punishment stands in opposition to the “retributive” theory, because punishment here is intended to make the criminal “pay” for his crime. The idea at this juncture is the concept of consequential punishment for the benefit of a greater number. This theory perceives punishment to be a necessary evil imposed in society, and the consequence or fear of it creates good in the world. Jeremy Bentham is associated with the utilitarian theory of punishment, according to him, punishment is evil and should be done only to the extent necessary that it can produce benefits in the world (Maithraye, 2022).

According to the utilitarian theory, the rationale of punishment is entirely to prevent further crime by either reforming the criminal or protecting society from him and to deter others from crime through fear of punishment. Since crime and punishment are inconsistent with happiness, there should be a maximum amount of punishment for the benefit and happiness of the maximum number of people (*Ibid*). The idea of this theory is not specific as that of deterrent theory, but rather, it tries to lay down punishment for future actions because

of the reason that criminal offences upset the tranquillity and stability of society, hence, the punishment should be severe as a yardstick to control it and uphold peace. Nonetheless, the utilitarian theory centres on the consequence for both the offenders and society and then tries to maintain that the total good for the greater number produced for punishing a criminal should not exceed the total evil, thus, punishment should not be unlimited but optimal (*Ibid*). The penultimate of this theory will be dispensed in a later stage in terms of the concept of collective conscience, whether it entails the wellbeing of the entire populace, what Aristotle will not hesitate to call Eudaimonia, or the happiness of appreciating only the law in the delivery of justice.

8. Multiple Approach Theory of Punishment

It will not be wrong to say that this is one of the best discretionary theories of punishment as adopted by the present-day legislative and judicial system. It tries to look at the plurality of punishment as it is presumed that in certain cases, upholding only one theory will not be enough to achieve the ends of justice. Occasionally, multiple approach is that theory that deals with the situation of imprisoning a criminal, at the same time imposing a fine along with training the convict during the period of imprisonment (Garg, 2020). Another example may be granting imprisonment, at the same time making it rigorous for a certain time, simple in matters of solitary confinement and others as the case may be. Confiscation or the forfeiture of property of an accused person for the crime of theft or recovery of funds for embezzlement or money laundry while at the same time sentencing the person to imprisonment are all examples of the multiple approach theory. It deals with punishment in such a manner that they are not very arbitrary in nature, hence, creating a perfect balance as varied according to crimes being committed.

The Indian legal system has clearly recognised this theory. Section 53 of the Indian Penal Code (1860) states the various kinds of punishment to which the offenders are liable under its provisions: A death sentence, life imprisonment, imprisonment for a lesser period which may be rigorous or simple, or a fine or a combination of imprisonment with a fine.

The Court has to consider mitigating factors such as offences committed unintentionally in the heat of passion, sudden provocation, age of the accused, and general exceptions (Indian Penal Code 1860, s 76 – 106) or as are applicable under sections 299, 300, etc. of the Indian Penal Code (1860). Overtly, the multiple approach theory of punishment is the type of punishment that varies according to the state of affairs, it considers the question of law and facts, and keeps in mind other factors that may have influenced the commission of such offence while awarding the punishment.

IV. THE IMPACTS OF PUNISHMENT ON CRIME RATE

Punishment has facilitated the scope of criminal law, the law evolves according to changes in society, and sometimes following utilitarian principles and the arguments related to the sociology of law, it evolves before society, though in a very narrow way (Katz, Coupette & Hartung, 2020). The question arises as to whether when these people called 'criminals' are being punished, whether it stops or increases the crime rate become a question of facts. Since time immemorial, people have been greatly punished for the crime of murder, rape, theft, terrorism, cybercrime, etc., whether it has been put on a standstill or continues to grow is something very difficult to answer without concrete justification.

It is no doubt that criminals are more prone to issues involving economic benefits, offences like theft, fraud, murder of a person to take over properties, etc. Others due to political, social, religious, or individual interests like jealousy and unhealthy competitions are compelled to do what they may not have done under normal circumstances. It is visible that this amounts to the law punishing the defaulters accordingly, but the level at which others deter or learn from it remains more or less very indifferent (Kelly, 2018). It is very difficult to ensure crime reduction when the possibility of recidivism is very high. In India, due to the overpopulation of prisons, the preventive measures have turned out to be the opposite. Gone are the days when men and women were put together in the same prison which increased sexual immorality and was tackled by separating them through the reform brought about by the Prison Act (1870), presently, the merging of both hardened criminals with the ones without criminal records or who have committed offences of lesser nature suffices. Consequently, it has brought about recruitment of more gang groups or unlawful assemblies which corrupt the minds of one another and strategies the execution of a more unspeakable offences when released under any circumstance. Deducing from this angle, rather than reducing the crime rate, it turns out to increase the number of it along with the production of more trained criminals.

Furthermore, the exceptions provided by law are now becoming literally more than the punishments themselves. Punishment aims to correct the wrong of a person and to set him as an example that will discourage others from committing a similar offense. In such situations whereby, people are already apprised of the nature of crimes and their protection under the law, there exists the tendency of committing more crimes. In India, the legal reforms realized that including children between the ages of 16 and 18 from punishment has increased the number of rape cases under the Prevention of Children from Sexual Offences Act (2012), hence, the need to expand the scope of such exceptions and reconsider the age limit of minors under the Act, especially when it comes to minors in romantic relationships (Hakim, 2023). In society today, for instance, it is very possible to train a child under the age of seven on how to handle rifles as well as how to lie if caught. The child is taught at that stage to know that what he is doing is not supposed to be known to anyone, and also assured that no liability will be imposed due to either family background or other prominence of influence. This is not to say that all exemptions are improper, but they should not be given such weightage to cover up lapses as things ought to be understood without the stipulated patterns (Pavithra, 2022). It is a known fact that the execution of official functions is justified by law, but at the same time, when a police officer at the cost of discharging his

official function uses that influence to satisfy his personal interests, then the law should make such punishment more stringent. Even when the Indian Penal Code has provided specific offences for people under the service of government, there should be modalities to bring to light the grey areas such as delays in filing a complaint before the Court, inconvenient protocol facilities before concerned office can address petty crimes, among others. Many instances today have shown the autonomies and assumption of excess powers by different authorities, and not tenable actions has been brought to reform them, however, the roadmap ahead promises to bring transformation against such abuse of privilege which sets them apart from society or serve as a manifestation of power or authority.

However, the reason why punishment has not fostered an absolute reduction in the crime rate is because of the multiple approach system of punishment. Although it is not mentioned that punishment reduces crime very much, however, where there is a uniform nature of string laws as in the case of some Countries, then there will be the comprehension in the minds of people about the deterring nature of punishment involved in any crime that they may commit. This means that the prevalent idea of bringing alternatives to punishment is more or less reducing such fear or respect of crime by the people. A person who may not have a house to live in or good food to eat may tend to kill a fellow human being so as to be imprisoned and get the benefit of good meals. These kinds of pleasures are being proposed by highly-spirited human beings in the country, particularly the non-governmental organizations (NGOs) as well as human right activists, who foresee the extension of more constitutional and enjoyable rights to prisoners. Supporting pleasure in prisons, though not very bad, and providing good conditions of living standard is one way of not only appreciating the crime committed, but also the shifting of life's burden from people who are lazy to work for themselves, to the hands of the government who will feed them and leave greater evil to the members of society, specifically the tax payers.

V. CONCERNS REGARDING THE ISOLATION OF CRIMINALS

a) Isolation of Criminals

Crime starts in society, then the results of it amount to a punishment of different nature. The context here is focused on the nature of those punishments that emphasise whether the offenders should be allowed to stay or are to be isolated from society. Isolation can be in different forms, it can be through the banishment of the person or group of people concerned (extradition), it can be through transportation to life (life imprisonment), it can be solitary confinement or preventive detention, or it can also be the awarding of death sentence. The Supreme Court of India has in the celebrated cases of *Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka* (2007) tried to put an end to such convictions that include the taking away of the life of a person for major crimes committed. However, most cases support special imprisonment up to twenty years

without parole, imprisonment up to the rest of their natural life of the convict (Nirbhaya Case), deportation of criminals (if foreign nationals), etc. (*Mukesh & Anr. v. State NCT of Delhi & Ors.* 2017, Criminal Law Report, 2013).

Imprisonment has been a major multi-dimensional approach to crime and punishment that deals with incapacitation, retribution, deterrence, rehabilitation, and correction of criminals. Nonetheless, society always blame the wrongdoer of crimes rather than treating the crime as a disease in its very own nature. It is often thought that those crimes which may happen as a result of poverty, unemployment, illiteracy, poor standard of living, etc. can be handled by the government before it gets out of hand, but this has always remained in between, spending on people, and spending on criminals as well. Certain studies have it that the environment of a child influences his outcome in society. Suppose a child who grew up keen-sighted with his father molesting the mother, it will be beyond presumption that such child will be susceptible to do the same in his own time. It is in situations like this that arise the questions as to whether some people are more likely to commit crimes than others, whether punishment should vary according to the environment, nature of birth, and whether the offenders should be removed from the general society.

Isolation of criminals from society is not always the solution in all matters. Just as underaged children are treated as people who conflict with the law, certain people who are mature should as well be treated according to the hatred for the crime and not hatred for the person. To simplify this, for example, a child that has been deserted from birth and have no opportunity to experience love, care, etc. may develop an emotionless feeling toward other human beings, especially when treated in isolation and this may lead to finding other improper means like robbery. This anxiety of refusal may press him to the extent that he may want to eliminate any objects of his disaffection or emotional vulnerability, he can think of avoiding the possibility of being looked down upon, hurt, or humiliated by others, hence, indulging in any nature of suitable crime presumed to be fit to gain undeserved respect. In such circumstances, a wide number of people may want to support the fact that the criminal should be removed from society, but the best way of maintaining the human nature of a such person can superlatively be by dealing with the crime such that the emotions of feeling loved and cared for is being restored. Psychopathy studies on antisocial personality should include those individuals who are unsocialised and whose behavioural pattern bring them into conflict with law and society, the effect being incapability of actual loyalty to individuals, groups, or social values.

Crimes committed out of selfishness like the killing of someone due to jealousy, arrogance or self-pride, irresponsibility or abuse of bestowed powers, peer pressure, comparison with unhealthy competition, the feeling of guilt being left out or incompetence to learn from experience, etc. all require proper separation of such people from society either for a long or short period. Individuals who fail at aligning their ideology with that of the society in which they are a part of are more likely to cause havoc, social unrest, join terrorism or form unlawful assemblies. Poor parenting skills and other problems like the intention to revenge on people

or just commit a crime *per se* are more likely to bring about antisocial behaviour which people of adolescence and beyond mostly exhibit (Sivakumar, 2021). It is not wrong to settle now that criminals are people who fail to adjust and become normal members of conventional society. Criminals are not compulsorily antisocial or psychopaths that need to be eliminated from society, but they are just a result of the circumstances they face and difficulties they fail to overcome, thus isolating such criminals who have consciously carried out their offence for unreasonable reasons of emotional satisfaction should be removed from society to reform them and daunt others. More about factors influencing the commission of offences will be ironed in the long run of this article.

b) Temporary Release of Criminals on Parole

A parole is nothing but a conditional release or suspension of sentence of a convicted person with restrictive guidelines and expectations of emulating good conduct, reporting to the supervising prison officer or concerned authority over a particular time frame, usually after serving part of the sentence and before the expiration of the fixed and actual jail term. It has been seen in most cases that the concept of parole is sometimes misconceived in comparison to that of furlough. While the former is mostly given even within short term of imprisonment (up to one-month), the latter can become possible in a long-term sentence for a grace period up to fourteen days (*Asfaq v. State of Rajasthan*, 2017, para. 18 - 23). The power under the aspect of granting parole can be exercised by the divisional commission who mentions specific reason(s) for allowing it, nonetheless, the time frame does not disturb the actual sentence period. Meanwhile, the power of granting furlough lies with the Deputy Inspector General of Prison; although parole is allowed with the intention of retaining family and social ties, furlough goes a little deeper in breaking the monotony of imprisonment by enhancing the maintenance of link between the offender, his family, and society. If this is proven to be unhealthy to the social or family interest, it can be reversed especially for the avoidance of fear, discrimination, along with reserving the safety of the culprit against being harmed by the community in the form of jungle justice and even for the safety of those who exposed or deposed him. It can also be terminated if the wrongdoer falls short of the expected behaviour, especially if he commits a new offence. The essence of this is because some of those who leave the prison without strong networks of support, employment prospects, fundamental knowledge of the communities to which they will return, or reliable resources, stand on a significantly higher chance of failure. Consequently, offenders revert to criminal activity upon release due to the lack of hope, marginalization from being merged back into society, etc., thus, parole and furlough can sometimes help to prepare convicts for success after their release as purported in the reformatory theory of punishment (*Ibid*, 2017).

c) Reasons for Granting Parole

Parole can be bifurcated into regular and custody parole. A custody parole can be granted when there is emergent situation like death or sombre illness of the prisoner or his family member, wife's delivery without any family member to assist her, during marriage of a family member, or other exigencies. A regular parole is granted based on foreseen circumstances like period of cultivation, grazing, harvest in his possessed or family farmland, and sometimes, when there is destruction of his property including such damage caused by natural catastrophes, pursue of special leave petition before the Supreme Court against the judgment delivered by the High Court, maintenance of family and social ties, etc. (*Asfaq v. State of Rajasthan*, 2017, para. 22).

It is more or less a correctional therapy to ensure reconciliation and readjustment to convicts. From a critically standpoint, imprisonment is done to render society immune from criminals for a specific time period, even with that, a convicted person does not cease to be a human, and at the same time, it will not be reasonable to deny them a dignified life solely on the ground of being a hardened criminal, hence, the grant of parole. Contrarily, just like a hardened criminal cannot solely complete a task without drawing the attention of the book of law (police), it cannot be an assurance that one having a less criminal record cannot choose to do otherwise by relapsing into crime even while going to the society on parole, although the possibility of such repetition is outrightly noticed to be less (*Ibid*, para 25 – 26).

To summarise this, one of the paramount justices granted to people that are being punished under the law is the provision of parole while in the prison. Merely the fact that a person has been convicted of serious and heinous crime should not be a capitalising factor of denying him parole since anybody can regret their past and amend their future, nonetheless, parole cannot be claimed as a matter of right. Also, the fact that the conviction was being confirmed by the Supreme Court does not mean that the convicted person cannot claim other relief like parole from the High Court (*Ibid*). This is different from law making process wherein the laws made under the Union List or by the parliament via resolution to two or more states cannot be amended by the State government, the judiciary provides for flexibility and convenience in its drive for justice.

VI. ELIMINATING CRIMINALS: DOCTRINE OF RAREST OF RARE

a) The Doctrine of “Rarest of Rare Cases”

The Doctrine of ‘Rarest of Rare Cases’ is one of the most prominent and controversial criminal law principles in India. Its origin is old, but the spirit remains active due to endless number of crimes committed in every seven days of a week. Before discerning into the doctrine as it is, it will be pertinent to understand what the concept is all about. The challenge arises out of the leniency to eliminate a criminal by the Indian Courts; however, some stringent cases hold the hands of the Court so tight to the extent that they may betray the whole nation if such conviction is not hold.

The questions that one needs to ponder upon may be as to what should be considered as rare cases. It is indeed rare cases in several instances such as eating cremated body of a person, women being parading naked as an instrument of communal strife, disguising oneself to a country with one excuse but having a hidden intention, planting banned bombs during an election, urinating on a poor labourer, joint burning of a minor by husband and wife, extraction of tooth along with removing his flesh from stomach by militants, shooting gun in an open court premises, beating a toll officer without apology, collectively fighting in a train, causing such actions leading to train accident, killing of people by stray dogs, hiring muscled men to secure a little shop thereby influencing customers from either leaving or pricing, etc. Rare cases would also be an authority taking law into the hands by extending hands (slap) on the face of a degree holder for professional negligent rather than resorting to legal remedies, carrying of a mother on vehicle bonnet for resisting the arrest of her child, non-stoppage of vehicle by government servant even when his security has fatally caused an accident, receiving of bribe on the first day in office, among others.

On the other hand, there are rare cases which happen with less human interventions or naturally by acts of God such as electric shocks during rain, carrying away of people by flood, industrial negligence even with due care, environmental pollution, volcanic eruptions, etc. All these are rare cases trending on everyday news, what is common in them is the fact that the hands of law are folded, askance, and considered helpless by the people carrying out these unspeakable acts, however, when the law takes its position to do complete justice, whether these could be considered to fall under the category of rarest of rare cases or ordinary criminal offences? The subject matter here is solely criminal, though may have some civil spirit, civil in the sense that the curtain can be lifted from getting damages or compensation in exchange of human lives, to the aspect of prosecution, absolute liability, and putting the perpetrators behind the bars. Thus, this doctrine of rarest of rare cases must be looked from the angle of actions that results to loss of life, fatal or vegetative state of a person, or any such offences that are punishable with death. Examples of this may be murder (burying a person alive), war against the state (terrorism), gang rape of old people and children below the age of twelve even to death, etc., more examples will be given later.

The Doctrine of “Rarest of Rare Cases” was first propounded as a legal principle in the reputable case of *Bachan Singh vs State of Punjab (1980)* after detailed consideration of Indian laws as well as the jurisprudence of such sentence in the international community and the consideration of other doctrines like ‘form and object test, pith and substance rule, and test of direct and inevitable effect’, etc. The doctrine provided that the principle of rarest of rare cases can be adopted to award death sentence to a criminal **“when the alternative option is unquestionably foreclosed”** (*Ibid*)

Reiterating the same after three years in the case of *Macchi Singh and Others vs State of Punjab (1983)*, Justice M. Thakkar expanded the practical application of the earlier proposition to avoid vagueness of law and pointed out five essentials under which this doctrine can work properly. These include:

1. **The Manner of Commission:** What has to be seen here by the Court is that the way in which the murder has been committed is extremely brutal, grotesque, diabolical, repulsive or immoral to the extent of triggering the collective conscience of the society. Examples of this essential factor include the burning of a living person, inhumane act, or cutting the body into pieces in a monstrous manner which all amounts to death.
2. **Intention:** In addition to the above parameter, the motive for exhibiting the murder has to be seen, especially when it is with total depravity and meanness. Examples include hired assassin committing murder for the sake of ransom, cold-blooded death to inherit or take over property, and causing terrorism or such actions like waging war against the state.
3. **Anti-Social Nature of Crime:** The offence committed must be socially abhorrent in nature. This aspect has been treated separately as to whether the collective conscience should be considered in awarding punishment. Some instances of this nature consist of killing a member of a scheduled caste, minority or marginalized community to create social disturbance like causing them to run away from a certain area, or taking over their rights and properties. Another illustration given on this aspect involve such murder of women in terms of Sati practice, Dowry death, or death as a result of the quest to marry another woman.
4. **Magnitude of Crime:** The fourth essential is inter-related to the aforementioned, it involves the degree of committing a crime, mostly mammoth in nature. Examples contain the elimination of almost or all family lineage especially the caste, community, or locality. It has to be uncommon and of gravest culpability even after considering the circumstances of the offender and the crime thereby making imprisonment to be inadequate.
5. **Personality of the Victim:** This is one of the most aggravating factors that triggers the society. The personality as used here is not only in terms of a person's charisma, public figure or political leader, inter alia, but rather, they include the killing of an innocent child who cannot possibly provoke anybody, murder of a helpless woman, or high and dry person who is of old age or with infirmity, killing of person under the domination or trust of the murderer, etc. (*Ibid*).

Nonetheless, having considered the above criteria, it will be ideal to say that they are not exhaustive in nature, since no two cases can be held alike in absurdity, the guidelines laid above cannot be taken as rigid, unchangeable, or immutable in imposition of death penalty. It may not be an irony to say that offences such as gang rape of a minor, dowry death, etc. are no longer rare as they occur very rampantly nowadays, nevertheless, there are heinous crimes that happened after the judgment such as the Sikh Carnage Case, Attack on Parliament, returning to kill one's master in a firm with machet, burning of victim's body to eliminate evidence, killing of social activists, whistle blowers, and even people attempting to keep such recording that may review the evidence of crime scene, these are all rarest of rare cases (Uma, 1994; State v. Mohd. Afzal and Ors. 2003).

In the parameters crystallized above, it has been seen that the result of death (murder) is common in all, the doctrine failed to look into such factors which the victim is left in a persistent vegetative state in cases like in the aspect of rape, much regard to appreciation of this under section 376 of the Indian Penal Code (1860). Murder as used above is within the competent definition under section 300 of the Indian penal Code (1860), that is, culpable homicide amounting to murder, however, a more unique understanding of murder could be the *actus reus* (effect) resulting from the act of maladjusted individuals which lead to the inability to cope with the person(s) that are alive, thereby resorting to delete them. That could be a good point to say, but not a standard definition of the same.

b) Procedure of Condemning an Accused Person

When it comes to sentencing and condemning of an offender, the executive plays a very crucial role. In criminal law, when once a person has been sentenced to death by the Trial Court, the confirmation of such sentence has to be made before the High Court (Code of Criminal Procedure 1973 s 368). In most cases, the convict can appeal in the High Court, and if the same is confirmed, he has an option to file another appeal before a higher bench of the High Court or to directly move to the Supreme Court under Article 136 (Constitution of India, 1950) which is a Special Leave Petition, if the same sentence is upheld, the offender can approach the Court to reconsider its Judgment under Review Petition (*Ibid*, Art. 137). Further, the choice is still open for the accuser to file a Curative Petition; this concept was developed to achieve the objective of complete justice by the Supreme Court under Article 142 as developed in 2002 (*Rupan Ashok Hurra v. Ashok Hurra*, 2002). This can be attended upon fulfilment of certain criteria, and what the petitioner has to prove before the Court is whether there was any abuse of process, violation of the principle of natural justice, apprehension of bias on part of a judge, or any such act or omission that may lead to gross miscarriage of justice, etc. It is at this stage where there can be no other judicial remedy to the person if the case is still considered as rarest of rare and the sentence to death maintained.

The last remedy that is available for the Criminal is to file for a Mercy Petition. This is another cumbersome process that can only be entertained by a competent authority. The President of India or the Governor of States can exercise their clemency power to grant certain relief to the petitioner after conducting a proper investigation in the matter. Sections 54 and 55 of the Indian Penal Code (1860) as well as Section 432 of the Code of Criminal Procedure (1973) deals with the power to suspend or remit sentences. On the other hand, Section 433 of CrPC (*Ibid*) deals with the power to commute sentences by an appropriate government, whereas, Section 433A of the same Code limits the fractions of death sentence commuted to life imprisonment to be reckoned as 14 years. Note that, since the executive powers are co-extensive to the subject matters upon which the parliament in the case of central government or the state legislature can make laws, the Governor therefore has the authority to exercise this clemency power in cases of death sentence as criminal law is a matter of List II

(Concurrent List) of the Indian Constitution (1950). Once this is done, it is either the mercy is granted to reduce the sentence, or the judgment of the Supreme Court is left undisturbed. In either way, such decision is subject to judicial review on the grounds of *malafide* intention, improper investigation, or abuse of process, etc. If there is no mercy that is shown on the Criminal, then a Death warrant or what is sometimes referred as a 'Black warrant' will be issued along with the specification of the date for executing the criminal.

c) Limitations of the Doctrine of Rarest of Rare Cases

After considering the grounds under which a person can be sentenced to death for committing a crime as well as other instances that were not considered while expounding the doctrine, it will be more finetuning to look into certain kind of limitations that affects the smoothness of it:

1. **Limitation by Act of Parliament:** The Constitution of India has empowered the Parliament, except for colourable legislations, to make laws for the whole or any part of the territories of India. To some reasonable extent, this power is unlimited under List I of the Constitution, in List II it overrides the objectionable laws of the State through Doctrine of Repugnancy, and in other cases like where resolutions are passed by states, or efforts to integrate international treaties, etc. it still has upper hands. Hence, the derivative here as a limitation to this doctrine is that Parliament may be law figure out such cases that may be awarded capital punishment, either in addition to or curtailing the powers of the rarest of rare cases.
2. **Limitation by Act of Foreign State:** Several circumstances have made it possible that a sovereign nation can be indirectly influenced by some external factors. By entering into treaties, the concerned parties are obliged not to take certain steps that may frustrate the purpose of such agreement, and as such, it plays a vital role as a limitation to the rarest of rare cases. This can be possible for example in terms of Extradition Treaties, several countries can enter into such treaty with India agreeing that they will extradite a fugitive(s) only on the ground that he will be punished for the offence mentioned in the application sent to their embassy. The limitation to this doctrine here will be when they may agree to send back such person only on the ground that no death sentence will be awarded to him irrespective of the crime committed, hence, even when the crime is very rare, the doctrine bends its wings.
3. **Limitation by Act of Executives:** The Constitution of India (1950) has through Articles 72 and 161 bestowed clemency powers on the President of India and Governor of any respective States to grant pardons, reprieves, respites, or remissions of punishment, or to suspend, remit, or commute the sentence of a person convicted of any offence. All these words have different meanings and also, there are some differences between the clemency power of the President extends up to the judgment of a Court Martial, and that of the Governor of a State, however, that aspect is not relevant to be substantiated here. The factor that has to be brought home here is that even when the Court sentences a person to death under the rarest

of rare cases, a competent authority can still interfere by changing the sentence terms, or making such changes that does not amount to capital punishment, and this is a major challenge to the doctrine itself.

4. **Limitation by Acts of the Judiciary:** It may look strange to say that the judiciary also serves as a limitation to its doctrine. This is possible in two ways, first being the exercise of its powers under Article 13 of the Constitution (*Ibid*). Even when a matter may appear to be rare in nature, when it seems that the punishment or law made on the award of death sentence is arbitrary, inconsistent with the basic structure, or against the Fundamental Rights under Part III of the Constitution, it can through judicial review declare such law to the extent of its inconsistency to be null and void, ultra vires. Secondly, the limitation can be derived from Article 141 of the Constitution (*Ibid*) which makes it that any law or judgment declared by the Supreme Court shall be binding on all Courts in India. The restriction from deviation or the integration of precedents curtail the wild powers of Court to sentence a person to death. For example, if the Court refused to grant capital punishment with certain reasons, in a similar fact, the Court below cannot deviate from the binding nature of such judgment to do otherwise. However, since no two facts can be completely alike, the precedence can be overruled by a larger bench of judges (*Justice K. S. Puttaswamy (Retd) v. Union of India, 2018*).

VII. COLLECTION AND ADMISSION OF EVIDENCE

a) An Overview of Evidence in Criminal Law

The rule of evidence under the criminal justice system can be best appreciated based on the overall facts of the case and here, we will limit ourselves to the general overview of evidence related to crimes of heinous nature. Real evidence, Direct evidence, Primary source evidence, Documentary evidence, Oral evidence, and Testimonial evidence (UpGrad, 2023) are objective shreds of evidence that are to be given clear and proper attention while determining the guilt of a person, this is because, in shaping the mitigating circumstances along with balancing the aggravating factors, the Court considers the issues that may conceivably influence the possibility of the crime occurring in such manner, hence, these pieces evidence are of great value. These includes but not limited to the factual matrix of the crime, the place of occurrence, CCTV footage, prosecution or victim's story, existing police, medical, and expert reports respectively, etc. In some cases where the culprit has been apprehended during trial without an anticipatory bail, certain shreds of evidence are taken to decide the amount of punishment such as the jail administration or probation officer report as to the nature of work done by the perpetrator while in jail, medical reports like psychological and psychiatric evaluation, or psychometric to determine if there are any clinical signs or symptoms of psychopathology problems, social investigation reports like education background, interview of family and society members, etc. If these reports are proven to be obtained in a manner contrary to procedure stipulated in the Evidence Act (1872) or any other

law for the time being in force, the Doctrine of fruit of poisonous tree is applied to invalidate it. The presumption of innocence as a drive for justice remains the same that unless and until a competent court declares a person to be guilty of a particular offence, he can only remain a suspect or an accused person.

Hearsay evidence under section 60 of the Indian Evidence Act (1872) by its very nature cannot be admitted in the court of law although the doctrine of Res gestae is an exception; testimonial evidence must be given by such person who saw, heard, or perceived the matter directly, still, the exemption aforementioned is as a result of the fact that in most cases, words or actions already brought to light cannot be undone just like a news once broken cannot be repaired, hence, things speak for itself (*res ipsa loquitur*) and so, certain words said by people who are incapable of giving witness by themselves can be considered. One of the best forms of direct evidence is when the presence of the witness was natural in the crime scene, it holds a great value as it is believed that a conscientious witness will not wish to implicate someone else but the actual person, especially in such instance where the witness has been aggrieved and demands justice.

Demonstrative evidence can come into play if it is relevant or admissible, but then, it cannot be a pivotal to convict a person to death because if any contradiction is later found, either there was a flaw in the demonstration, or sufficiency to materially mislead the Court as such, the death sentence will become irreversible once done. The same inference can be made in Anecdotal evidence as well Scientific evidence which requires proof beyond reasonable doubt. Digital evidence has been sprouted with the advancement in technology and smartness in executing crimes, even at that, such situations whereby a person has been sentenced to death merely on the grounds of digital evidence has not been seen gaudily. *Prima facie* evidence is crystal clear and undisputed even before any investigations take place, for example, in matters of murder, it is seen on the first impression that someone has been denied the breath which other human beings are enjoying (murdered), and until it is proved otherwise, such evidence remains undisputed.

Moreover, when it comes to Circumstantial evidence or what is easily inferred as indirect evidence, the query arises whether a person can be convicted based on the circumstances found in a particular case. This type of evidence was being challenged in *Aloke Nath Dutta v. State of West Bengal* (2006) whereby Justice Katju rejected the contention of making it an extinguished factor for such conviction in odious crimes. Nonetheless, many other cases have been found to defer in its findings by making it a strong corroborative factor that can be added to arrive at the rarest of rare cases. These includes but not limited to the physical and connecting evidence, human behaviour, indirect witness testimony, scientific evidence as against direct witness of a crime, and other events that took place before, during, or after the time that the actual crime took place. In admitting the circumstantial evidence, the Court gives heed to the Exculpatory evidence of the accused which the burden rests on him to excuse, justify, and absolve his alleged guilt and proof of innocence.

b) Burden of Proof:

The standard of proof in criminal matters is not limited to the preponderance of probabilities as it is in civil matters, what is required here is the burden that lies on the party claiming a trial to prove the guilt of the accused beyond reasonable doubt. The doctrine of benefit of doubt arises when there is an infirmity or possibility of circumstance that may tend to create doubt in the evidence of the Prosecutor even when other evidence is deemed to be admitted. In any instances, section 4 of the Indian Evidence Act (1872) empowers that the Court may, shall, or conclusively presume certain facts in a case. In some cases where there are presumptions like under section 113A of the Indian Evidence Act (1872) and section 43E of the Unlawful Activities (Prevention) Act (1967), the concept of Reverse Burden arises. In Reverse Burden, the onus of proof will be shifted to the owners which implies that, it will be left for the accused party to prove that the charges labelled against him are not true. This happens mostly when there is the presence of the concomitant facts or when probable cause is proven or brought on record by the prosecution, at this time, the presumption of innocence as discussed earlier will be replaced by an assumption of guilt of the accused, thus, the burden shifts to the accused to show cause or adduce evidence to extricate his guilt beyond reasonable doubt (*Sher Singh @Partapa v. State of Haryana*, 2015; *Rangammal v. Kuppaswami*, 2011).

VIII. THE EFFECTS OF PUNISHMENT

Punishment considers several factors, sometimes the immunities on certain group raises some doubts to think whether the law, through some reasonable classifications, can give the justice that it anticipates. It is undeniable to say that sometimes the innocent is wrongly convicted, also there are situations whereby people of less serious crimes are being merged and treated in the same manner as hardened criminals. After one juxtaposes all these, it is evident that the consequence of it can produce different effects on the people involved in crime ranging from psychological or mental, economic, political, as well as social factors. In some cases, these effects develop before one is sentenced, issues of overcrowding in prison yards, delay in the cause of a trial, and restraint or miscommunication from family are enough, to begin with. Also, the effect of being severely tortured and ill-treated, neglected of a balanced diet, proper clothing, health, and hygiene, as well as the growing practices of streamlining jail visits by people and management of open-air prisons are other effects of punishment, especially in the multidisciplinary approach of punishment (National Academies of Sciences, Engineering, and Medicine, 2017, pp. 15 – 24).

Under the deterrence, retributive, and utilitarian punishments, it is true that to enable the reduction of these crimes and discourage people from indulging in them, the effects of it bring about several impacts as mentioned earlier and reinstated in different categories below:

1. **Psychological Impact:** Psychological impact begins with the criminal in person, what he thinks of himself, and what others will think about him. The gregarious instinct of a man that he is only what he is among men changes from the dichotomy of the looking-glass self, this implies that the criminal may develop

mental problems of thinking about the reason why the crime was committed and tries to correlate if he deserves the nature of punishment that is given to him. Disengagement from work, friends, families, and society at large all sum up under this category of a psychological effect.

2. **Economical Effect:** Looking from the angle of economics, the impact is both on the state and the criminal. While the offender will fail to contribute meaningfully to his family during the time of punishment (or exist no more in terms of the death penalty), the economic value of the said person begins to deteriorate, hence, no income will be generated. On the flip side, incarceration of criminals demands a lot from the state, the prisoners do not contribute meaningfully to the overall GDP of the country, but at the same time become a burden upon the state, especially in circumstances where the reformatory theory is adopted like in India, thus, the State spends on feeding, maintaining, training and ensuring the well-being of people who are not making any contribution to it in return. It has been established here that even though convicted for certain crimes, an offender may be confined and curtailed of his rights, yet, few rights remain inalienable; these include the basic right to safety, reasonable standard of living, or basic amenities such as adequate food, water, accommodation, ventilation, clothing, sanitation, bedding, and opportunities for exercise, though it is not completely achieved in a practical sense. The upkeep of such numbers of people is resource-intensive and the limited number of resources will lead to a violation of the human rights of prisoners, hence, the state is to bear the cost of making available all the needful (Mishra, 2021).
3. **Political Standpoint:** Politically, the effect of punishment leaves a scar on the face of potential people who, if did not commit the crime, would have been capable of leading different positions with distinguished capacities. It is doubtful that when the mark of punishment has been branded on a person, especially degrading in nature, they lost their legitimacy. It is an absolute truism that people do not promote the voting of criminals into seats as it may amount to kakistocracy. In line with that, recent reforms have made it mandatory in India that political parties must publish the criminal records of their candidates, this is because the people will not be happy to vote into power someone who is already outlawed, which indeed may set in anarchy. This does not mean to say that every one that is convicted cannot contest for election, but the chances of being voted become less, and the chances of effectively handling the position differently become inevitable. Notwithstanding that, this point has been manipulated in a grey line as there are still politicians progressing even with criminal records (Jindal, 2022).
4. **Sociological Perspective:** The social impact of crime is the inclusion of psychological, economic, and political factors. It is a known fact that crimes are often committed against society at large and the social order is the main component that makes the punishment to be more or less stringent for the security of peace and safety for all. The marginalization of criminals has brought about the need to consider them as vulnerable groups as well. The people in society who get to witness how others are being punished for the crime sometimes, turn to make mockery of them, isolate, and at some point, do not believe that they can

remove that cloth or character of crime in the long run. These impacts run from the offenders to their family members. Suppose a father commits the offence of theft, society sometimes refers to the child by such name describing or representing the crime like, 'the child of a thief', 'son of a murderer', etc. hence, a child may be forced to rethink the condition that he is being forced into, and as a consequence may want to run away from the society or commit a more heinous crime by harming or killing the person(s) that addresses him in such manner, thereby promoting recidivism.

IX. FACTORS INFLUENCING THE COMMISSION OF OFFENCES

There are several factors which influence the commission of offences by people. It may be said that the crime committed by a child under the age of seven is no offence (*doli incapax*), however, such early introduction to activities that would have been punishable if done by a major person contributes in a long run to the tendency of carrying out an offence in future. Childhood exposure to potentially traumatic events, the age of the offender, past and present background of the parents, siblings, family relations and friends, experience of violence or marginalization, pressure of being ostracized from delinquent groups, prognosis and hardcore criminal peers within society, academic backdrop like failure, misuse of opportunities, association or nature of work done, reprisal motive, alcoholism, and the list goes on (Exner, pp. 115-120). Moreover, the criminal history, income (low rate), behaviour (sudden provocation), health well-being like extreme mental defect or emotional disturbance and similar factors which impaired a person's capacity to appreciate the criminality of his conduct has to be seen in the light of the test severity. Sometimes, the accused may believe to be morally justified by his actions but this can be misused in fighting for such movements like for the sake religion, although, there is no religion that explicitly promotes or supports such unspeakable claims.

Clearly speaking, while considering the above factors, the Court mostly bifurcate them into mitigating and aggravating factors to see if they are extenuating, or whether the possibility of providing an alternative sentence is unquestionably foreclosed. Mitigating factors include the probability of reformation, rehabilitation, and reintegration, or as the case may be, the less possibility of recidivism as well as under-trial behaviour in jail (*Bachan Singh vs State of Punjab*, 1982). However, since the Court cannot prejudice any man to suffer injustice (*actus curiae neminem gravabit*), it has to be seen whether the accused acted under the duress or domination of another person, made to believe what is not true, among others; involuntary intoxication also forms a part of this. Though, the balance of vindicating offences has to be made in line with the aggravating circumstances. The aggravating factors have been treated under the rarest of rare doctrine like nature of the offence, intentions of the accused, the dying declaration of victim, etc., some of these factors have also been dealt with under the definitions, explanations as well as exceptions provided under Sections 299 and 300 of the Indian Penal Code (1860) in terms of culpable homicide amounting and not amounting to murder, inter alia (*Ibid*).

Other factors include the expectations of the offender; it is not everybody that have self-control, quest for acquisition or taking over of (family) property, and relationships with people who are the victim. Also, in many plain cases, the offenders sometime confine their thinking faculty into a box of considering that they have no hope left and as such, since the commission of suicide will not be a good option, resting in the prison can give an alternative. Meanwhile, although the criminal justice puts forward intention as a considerable factor, but it may not be wrong to say that the manifested ones are being looked into, that is to say that the latent (hidden) intentions of a hardened criminal can possibly be either to execute a crime and feel a little relieved of getting away with it, or paving way to revenge, then go and settle in a somewhat comfortable manner in the prison yard. This is not to say that the prison yard is not *per se* a good correction mechanism as it has been maintained since time immemorial, however, the increasing recognition of unusual rights, especially the nature of human rights accredited to convicts, such that they make no much difference from a common man who labours hard before having a platter of bread on the table, have made the prison yards more or less to be seen by the culprits as a refuge centre of regretting their miserable lifestyle or staying without remorse.

X. CHANGING THE NARRATIVES WHILE AWARDING SENTENCE

a) Reconsideration of Certain Cases

The narrative of death sentence or imprisonment for life should be changed in some nature of offences which at recent is considered very heinous and grievous in nature. A man who is obsessed with infatuations can go to any length to the extent of killing another fellow due to jealousy, insecurity, or sometimes betrayal of trust of cheating by a partner in a matrimonial home. It has come to the era where the Court has to take several things into consideration while deciding any matter, especially seditious and rape cases which the latter will be explored in detail here. Much obliged to the High Court of Madras that which have rejected the contention of consensual sex by a child falling a little short of eighteen years to be considered as rape (*Supra*), other courts have held that the caprice that rape cannot be invoked on the grounds of failed promise to marriage, these show how much the provisions of rape laws have been abused and the awakenings of judiciary. Specifically talking about rape cases, the court should be proactive in looking at such factors like the nature of relationship existing between the accused and the victim, the conversation history of the parties to the case (both physical, telephonic, or private social media without prejudice to the right of privacy when the evidence is needed), the nature of play that they were into, and the level at which the refusal was being made, whether the “no” was a mean one or unserious. The same is related to the claim of outraging a woman’s modesty which several claims have been brought to put people behind the bars, most people may be unhappy in the ruling of the Kerala High Court that the ‘grabbing of woman’s hand without lustful intention does not outrage her modesty’, however, it deserves appreciation for recognising the need to protect the interest of innocent men (Mitra, 2023). These points are actually open for criticism, but let’s consider a little critical illustration as thus: A girl who is found

to have sex with a man may be kicked off and considered loosed by the family or society when caught, what happens here is that she may bear the humiliation or resort to protect herself by alleging that it was without her consent, hence, since any level of penetration or manipulation is required, if it is confirmed that such incident took place, then the offence of rape is made out. When this occurs and the matter is brought before the Hon'ble Court, at this point two things happen, it is either the man proves himself innocent beyond reasonable doubt that it was done with her consent and gets acquitted, or he is convicted for an innocent offence. Even if the Girl confesses the truth to the family after seeing the pain the man will undergo, no one will take the shame or want to bear the cost of malicious prosecution, hence the pressure of ensuring that the accused is kept behind the bars. Recall that, this is only a contention of what should also be addressed in the administration of criminal justice, it is by no means supporting uncontrollable emotions that lead to committing such actions against the will of a woman, it does not also entail that all relationships or communications must amount to the commission of copulation, but rather, it is attempting to reduce the suffering that has been shifted to the male counterpart for doing such things which were clandestinely or mutually agreed either expressly if not impliedly to be done. Sometimes it is seen that even the man may not have been interested in doing such act, but fall prey of being seduced, or even lured towards the angle that they both could not control the outcome, nonetheless, the rape law still become misused like a weapon in modern society (*Manoj Kumar Arya v. State of Uttarakhand*, 2023).

On the other hand, talking about extreme cases like the raping of a minor child, old woman, married woman, manipulating a person without historical existence of probable relationship or such voluptuous communication, and even gang rape, which may all lead to the condition of vegetative state or death which are no longer rare cases, it has been seen from a normal point of view that imprisonment is no longer influencing people to refrain from committing crime, sometimes they end up victimizing and molesting several people before they are being caught. The mindset of the current generation has been influenced by several factors which has been dealt under the reasons why people commit crime in this article, moreover, to add on to that, social media, peer pressure, and even exposure to contents like pornography and other mischievous movies have contributed to the increase in the uncontrollable amount of rape and related offences. Therefore, it is strongly suggested that other than killing, or imposing life imprisonment to even resourceful people which does not still deter others, the rapist should be castrated. Emasculation of rapist after during the service of jail term, or before returning back to society does not kill them, it does not make the law retributive, especially if the chemical process is followed, it only enhances the protection of women and human dignity at large. This suggestion has been applied in many Countries like Nigeria (O'Neill, 2020) and Australia (Maggie, 2014) and major decline have been recorded, thus, if it is also incorporated in the criminal justice system in India, it will not only prevent the perpetrators from doing or repeating the offence, it will correspondingly thwart others from engaging in such activities, and still make the convict to remain resourceful, reformed, and law abiding in society.

Overtly, sterner sentence is required where the gruesomeness of the offence, let's say cold-blooded murder, gang or brutal rape, etc. are very horrendous, of atrocious propensity, and committed in such a manner that the victim become helpless and undefended. These are aggravating factors that has to be considered, the reformative idea should not be a devise to promote crime of exceptionally depraved, premeditated, and heinous character even to the extent that it is carried out in an extremely cruel and inhumane manner. It is not a matter of criticising one another's tribe, state, or religion, it is not enough protesting, setting fire on people's abode, and speaking ill about the government; if rape has not considerably reduced to a minimum since 2012 (Nirbhaya's Case; Justice Verma Committee Report, 2013), then there is nothing that can be done very stringently to curb it, not even constituting bodies to produce reports upon reports. As evident in most cases, the matter is being brought to the notice of everyone after the crime has been committed, maybe after lodging First Information Report (FIR) or reading media publications. The police cannot live with everyone, and the government are not the ones promoting these actions, therefore, to reshape the nation, the law must take its stand (as it always has) to imprison a culprit if the need is required, and to sentence to death without delay where it is necessary, deterrence in such matter will not make the legal system to be non-reformative.

b) The Ideal of Collective Conscience

Collective conscience comes through the Reverence for Life Principle by the society in adopting the humanistic edifice towards securing its members. This lasts until the tendency of incompatibility comes in to trigger a death sentence in no case doctrine wherewith the trust of one's life in the hands of another is gone as well as such extension to the properties. This can be induced as a result of people trying to avoid the eyes of law as well as the ambition towards protecting their lives and properties, nonetheless, when the action of an individual or group of people fall short of the societal merits by taking away the life of a living being in a manner that is intermittent and unbelievable, the expectation of deterrence by the community as a drive to justice becomes inevitable. Notwithstanding that, the judiciary has proven ununiformly itself to be counter-majoritarian in such a manner that it deals specifically with individuals and not factors such as public opinion, shock to the collective conscience, and social necessity for awarding the sentence of death, nevertheless, some cases reiterate the contrary (*Santhosh Kumar Satishbhusan Bariyar v. State of Maharashtra*, 2009; *Shanker Kisanrao Khade v. State of Maharashtra*, 2013).

On this regard, it will be rather pertinent to understand certain factors that may have been taken for granted, needless to call it a debate since it may look heated but without any sweat or much energy being loosed. The legal system of India is so vast that transplantation or importation of foreign laws will serve a contrary, except in such laws where the Constitution expressly permits under the Common law system and international laws which are incorporated in the form of Environmental Laws, for example (*Anmol Kumar v. State of Bihar*, 2023). However, there seem to be a categorical imbalance in the aspect of "collective conscience", whether the law should be as it is, or as it ought to be? This aspect is devoid of the jurisprudential

assertions of Hart and Fullers Debates, or that of Hans Kelsen, what necessarily should be considered here are the questions as to who makes the law, to whom, and for what purpose? The Preamble of the Indian Constitution along with the Basic Structure Doctrine strongly affirms India, of which it has proven itself, to be one of the largest democracies in the world. The substratum of the preamble begins with “We the People” (The Constitution of India, 1950). One may wonder why we have to come this far, but then, Democracy is government of the People, such a system where the majority rules and the interest of the minority are being protected. Now when it comes to law making process, it is firmly believed that the law is made by the people and for their own safety, orderliness, wellbeing, and social control, this is possible through both direct and indirect Elections where the people vote their representatives to step into their shoes in the progression of making the law, these are the legislative organs. Sequel to that, when these laws are made, say criminal laws, there are foreseen to protect the organic solidarity of the people by reforming them. Since the shift will be arbitrary for judges to apply their emotions while deciding complaints, the reasonability of applying their minds on a case-to-case basis arises. Since it has been visible that crime is always committed against the society, it should be a settled principle that the Community should demand death sentence for the offender with great care and thoughtfulness. What is considered as collective conscience is something that the judgment leaves in a manner not necessarily considered as vague but rather vast, thus, even when socio-economic factors are looked into in some cases, the baseline that steps into the picture rests on the common law principle of justice, equity, and good conscience. At this point, rule-based reasoning versus analogical reasoning come in, whether the judges while interpreting should construe it in the light of law, application of mind and public opinion of the people or should strictly stand on what they feel is right? It is in this situation that the collective conscience of the people being represented comes in to strike a balance, thus, since the law is made by the people, interpreting and implementing it also calls for the same line of attention without prejudice to the actual law (Arsenal, 2020; Shuifa and Jinglei, 2008; Bandyapadhyaya, 2010).

XI. CHALLENGES FACED IN THE CRIMINAL JUSTICE SYSTEM

- One of the major challenges faced by the Criminal Justice System in India is the inability to change the mindset of people from committing crime. Even with the security and provisions made by government to ameliorate the citizens towards a better standard of living, they still tend to betray the motherland by doing actions that are not legally or morally upright.
- Another challenge will be the diversity of people, this ranges from caste, religion, gender, race, place of birth, and even education. The upbringing disparity and level of understanding among the people differs, and this brings about chaos, conflict, disagreements and commission of crime even within members of a family. The standard of morality varies from one person to another, and this is highly affected by the heterogeneous nature of the Bharat.

- Considering the increasing rate of crimes and criminals unfluctuating more than the number of Judges and Courts across the Country, getting justice in a swift and easy manner becomes a little difficult. Consequently, there are challenges of unforeseen delays ranging from the aspect of registration of complaint, investigation, the role of legal practitioners, and the ability of Judges to dispose of case within a stipulated period of time.
- Peer pressure, advancement in digital world, poor parental care, outgrowth of excessive human right claims, and the numerous exceptions to law have also contributed to the pre-planned and self-executed crime rate in India. People tend to mastermind how they can get away with crime, murder for example, they carefully study the defences available in law and also the ways in which they can eliminate or manoeuvre evidence. All these form part of the many uncountable problems faced in the criminal justice system.
- In addition to that, another problem lies with the actual execution of sentence. The court can award imprisonment till the end of the convict's natural life, it can give special sentence of not less than twenty, twenty-five, or even up to thirty years. However, when the judgment has been signed and pronounced, the responsibility shifts to those who implements' the law, which is the executive who is bound by different provisions of law. Then, the fear that arises becomes the assurance of whether the sentence given to the prisoner after scrupulous and apprehensive debates would be executed accordingly. For example, it has been a misconception of taking imprisonment for life which is substituted for death sentence in most cases, as fourteen years of imprisonment even without remission as though it was the sentence of first choice. Delay in executing a person who is sentenced to death, and the afterward plea to commute the sentence due to such postponement is also a significant challenge.
- Moreso, another issue is the lack of consistency in the sentencing process. There is lack of uniformity and consistency, especially in awarding death sentence, exclusively in cases that falls within the rarest of rare doctrine, like cutting of one's body into pieces, the Court still commutes such death sentences to imprisonment for life.
- Last but not the least challenges in the aspect of factual parameters. This is as a result of the reality that no two cases can be completely the same on different occasions, therefore, there cannot be a straight-jacket formula of specific subject matters whereby death sentencing is being awarded, as a matter of fact, it is mostly followed that life imprisonment is the rule while death sentence is an exception.

XII. ALTERNATIVES TO PUNISHMENT IN THE CRIMINAL JUSTICE SYSTEM

The option for an alternative to punishment in the criminal justice system is something that requires several considerations. It may not be completely wrong to ascertain that there cannot be a perfect alternative to the criminal justice system itself, vis-à-vis, punishment. Although certain suggestive methods like

decriminalization of certain crimes have been made very much beneficial in tackling this like the decriminalization of homosexuality and adultery, it has, however, not been sufficient to apply to a general rule (Hasija, 2020; *Suresh Kumar v. Naz Foundation*, 2014).

This is not to assert that all police and law enforcement agencies are corrupt or are not capable of deciding matters outside the court, but there are many rational jurisprudences insofar as the criminal justice system is required. The contribution of alternative dispute resolution systems is not discarded overtly in criminal law, but then, such alternatives as arbitration, counselling, mediation, etc. cannot perform their best in criminal law cases. The necessity for the court is sometimes overemphasized especially when matters decided in the aforementioned are being brought like in civil suits; bringing an Award under Execution Petitions that has been decided by an Arbitrator before the court creates the reimposition of burden which it earlier claimed to have lightened for the court especially, when parties are not satisfied with the award. This is all because, even if the police, arbitrators, mediators, etc. are given the privilege to decide on criminal cases, it will be very difficult to ascertain if they decided it in accordance with the law, if they took a biased stance, if they followed the procedural standard of deciding the case, if they admitted proper facts or evidence, and if they applied the basic principles of justice equity and good conscience, etc. This particular aspect has been a problem even within the independent and integrated legal system, on several cases, it has been seen that the higher courts mostly reverse, set aside, or overrule the order of Courts below, and on the other hand, they offer kind interference, find discrepancies even between Judges on the same dais, or coordinate benches (*Supra*).

Furthermore, the alternatives like the help of community elders or community service organizations seem to move the fast-evolving legal system back to the traditional period which the nation is obviously trying to do away with. There will be a high number or prevalence of jungle justice, bias, and over-representation of people belonging to certain classes, castes, creeds, religions, or economic status, and even undue influences because of non-independence by such people as compared to the judicial institution, hence, delegating such power to decide criminal cases will not just be threatening to human lives, but the entire country at large.

People often suggest alternatives to punishment mostly because they are not victims to it. The way people become so sure about their actions has brought the need to revisit justice in a higher form and proper manner. The author has through some findings discovered the “**Theory of Claim**” to mean that “men can only claim that something is right or wrong when he is directly involved in it”. In a criminal offence *per se*, due to the action of one, the right to claim that he is right arises to justify what may have been considered wrong if it was done to him. Some, after being punished for an offence, maybe sentenced to five years imprisonment for example, will tend to call on human rights activists to determine their fundamental rights that have been infringed upon by the State. The same goes to the criminal justice system which will now tend to consider those contentions as mitigating factors that should be considered as being capable of reducing the Court’s sentence.

In addition to that, alternatives suggested such as verbal sanctioning of criminals, conditional discharge, status penalties, economic sanctions, confiscation orders, community service orders, etc. will not harm certain kinds of criminals. Sanctioning a person verbally may do no difference if such person does not listen to advise, on the other hand, economic sanctioning will only harm the poor and not the rich, and those with political or academic influence will do nothing than justifying their self-acts as compensation for painful feelings of inferiority received from those that they consider substandard to them. The imposition of a fines as an alternative to criminal justice is widely criticised here; supposing that the fine imposed upon a person for consuming alcohol is minimal, people with more money will be compelled to drink more, and those who consumed and are not able to pay the fine for it are being imprisoned, thus, there is need for a strict review of fines and balance the sum of compensations imposed from case to case (Kumar, 2021).

Absolute or conditional discharge from prison on parole, furlough, probation as seen in section 360 of the Code of Criminal Procedure (1973) are comparable to granting of opportunities to blood-streamed criminals to do even better. Keeping in mind certain grounds or parameters which includes the age, character, antecedents or mental condition of the offender and to the trivialness of the offence, etc., it will not be inappropriate to maintain that there is reasonable discrimination here as it allows for certain offenders, especially when the extenuating circumstances of their offence is such that the punishment is less than seven years. Irrespective of that, committing a theft into community service, for example, is more or less an exposure to doing away with public properties, or destroying them as in the case of a terrorists. In the same illustration, even with proven medical reports, one can show good character or behaviour in prison only to be released on probation, and after achievement of this, they can still become who they intended to be, commit more crime, escape the reprimand of law if attempt to arrest again is made, and thereby compelling the Court to take into custody any such person that stood in as surety in the stead of the reoffender. In some cases, the release of convicts serve good purposes as the main aim of this provision is to promote reformation, and also prevent young offenders from being mixed in with hardened criminals in prisons where they may be exposed to illicit activities. Notwithstanding other any unforeseen behaviour or circumstances, probation is enshrined to curtail imprisonment in the Indian criminal justice system. It anticipates the release of a person on admonition from punishment in convictions below two years with the aim that they can be reformed if allowed the latitude to express themselves with society, keeping in mind a close monitor, advice, and training to completely transform as well as reform them (The Probation of Offenders Act 1958 s 3 & 4).

Moreso, alternatives like restitution or restoration of property to the victim, suspended or deferred sentences, judicial supervision, and referral to an attendance centre are helpful in some specific, and not all cases. This is evident in compoundable offences (Code of Criminal Procedure 1973 s 320) wherein parties can with or without the permission of the court as the case may be, gratify or settle their differences and maintain friendly relations like in cases of Negotiable Instruments where compromise is allowed.

To curtail the harshness of deterrent and retributive theory, section 265A to 265L of the Code of Criminal Procedure (Amendment) Act, 2005 has adopted the concept of “*Nolo Contendere*” (Plea Bargaining). This alternative though not complete in nature gives a little relief to the accused in offences below seven years (not against women or children), and can be granted in situations whereby the accused presents no contention in exchange for a lesser sentence, this means that, other than ‘an eye for an eye’ when an accused pleads guilty without claims or objections, his punishment may be pleaded by the public prosecutor to be reduced (Prakash, 2023).

Therefore, several instances have shown that there can be some additional features to make the criminal justice system ease and reformable to the best adjustment of criminals and society. Other than certain factors that have to be kept in mind, it has been seen that devising other means can be possible in civil related disputes, however, there cannot be a perfect alternative to the judicial monopoly, specifically in arriving at punishment as a drive for justice under the criminal justice system.

XIII. CONCLUSION

Punishment is the best way to explain the level of an offence to a wrongdoer. There doesn't need to be an emotional satisfaction on the part of the victim, but it should be imposed in such a manner that recidivism will be curtailed and the majority of people will see, learn, and uphold a social contract of peace and obedience to the law.

Meanwhile, the concept of justice has been considerably deliberated, along with that, the various theories of punishment have been expatiated, and its impacts seem not to cause great changes as the crime rate increases every day. The growing concern of isolating criminals has turned out to be a two-edged sword as it somewhat causes a psychological effect on the mind of the culprit and his relatives, and then at the same time reduces the efficiency of the state's productivity due to high budget and provisions toward providing food, shelter, medicine, and clothing to juveniles in correctional homes along with male and female criminals in jail.

Moreover, the hybrid adoption of multiple approach theory of punishment by the Indian legal system seems to prove a better turnaround in the aspect of law, temporary release of criminals as well as the elimination of criminals have been tested in line with the doctrine of rarest of rare cases which of course is not proven to be uniformly applied. Further, the rule of evidence is seen to ensure the giving of opportunities to all parties to prove their cases and at the same time bringing the dispute to an end, however, the challenges as pointed out showcases the aspect of delayed trials. Since the idea of bringing up of alternatives to the criminal justice system is more or less another way of causing more harm than good due to the tendency of unsatisfactory judgments by non-judicial officers, therefore, the maintenance of ‘judicial monopoly’ is taken on affirmative.

Nonetheless, it has been seen that people commit crimes for some reasons and the time has reached where the narrative of sentences has to be changed, thus, it is suggested that the quantum of punishment in the Indian legal system should be more stringent to deter crime rate, the idea of fines should be tackled as it causes imbalance to those who could not afford them, consequently, others commit crimes because they have the fine to pay, thereby bringing bias to the justice system.

In addition to that, it has been suggested that the consideration of listed cases should not be influenced in any way by the personality of a person. A reform should be made such that each case is given a specific duration to come to an end, and in case of any delays, be it on the part of the prosecution or defendant, a fine of heavy cost be imposed, otherwise the matter be disposed of. This aspect should be extended to the guidelines on Judges' ability to bring cases to an end within the stipulated period, keeping in mind their recess time and the number of holidays observed by the Court.

Also, there is a strong recommendation regarding the aspect of rape cases and sentencing in this regard. Along with putting certain factors like prior relationships and conversations of people into consideration, if the nature of committing the offence appears to be of rarest nature; castration of rapist will be a possible way of reducing rape and is highly proposed in these recommendations.

Nevertheless, there should be uniformity in the approach towards rarest of rare cases, and also, collective conscience should be put into consideration in determining the sentence of heinous crimes. Finally, it has been observed that one of the causes of recidivism is as a result of merging both convicts with fewer records of offences with hardened criminals, therefore, in the light of that; it is recommended that some provisions be made to strictly separate criminals in an appropriate modality, keeping in mind factors that are likely to influence the commission of crime, and the motive of the reformatory theory of punishment in India.

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