THE ART OF CALCULATING SENTENCING SEVERITY: THE CONUNDRUM OF SUBJECTIVE EXPERIENCE AND SOCIAL REALITY

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Abstract

Thisarticle examines the punishment and, more vividly, the sentencing of the penal subject. It explores the unattended social life of punishment, particularly the subjective experience and its distinctness. The article scrutinises the objectivity incalculating sentencing severity and advances the subjective challenges from the existing literature. By advancing the subjective challenges to objectivity, the authorportrays pain as a pertinent factor in calculating sentencing severity. The article elaborateson how the modern prison system is painful in its unique ways and how the penal state ignores many of these pains. The author argues that pain is a sufficiently broad concept that could facilitate understanding the fluidity in the experience of penal subjects and would also help in reducing the objective and subjective divide. It also exemplifiesthe proximity model and argues thatit stands as an illustration of how pain could be brought into the penal practice. If we fail to consider the pain and its allied factors, the authorbelieves that the penal state commits a methodological error in understanding the punishment itself in consonance with social reality.The authoruses India as a reference point to elaborate on the arguments.

Keywords: Sentencing Severity, Objectivity, Subjectivity, Subjective Experience, Social Reality

I Introduction

CRIMINALISATION INTERMINGLES with different sets of processes, ranging fromoffence determination, trial, andpunishment, while various other aspects come in between these three dominant elements of the system. The State is the primordial litigant in the system, occupying the space of the victim and, in some sense,grabbing the sufferings of the victims into a criminal case and claims to facilitate the court in the pursuit of justice.[1] The outcome of this process is a judgment determining the punishment if found guilty in the so-called designed process of the criminal justice system. The accused is therein inflicted with

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[1]Andrew Ashworth, *Sentencing and Criminal Justice*, (Cambridge University Press, Cambridge, 5th edn.,2010); H.L.A Hart, *Punishment and Responsbility*, (Oxford University Press, Oxford, 2nd edn., 2008); Andrew von Hirsch, "Proportionality in the Philosophy of Punishment", 16 *The University of Chicago Press* 55–98 (1992).

certain forms of punishment, ranging from imprisonment, capital punishment, forfeiture of property, solitary confinement, fine, etc. The process often has a pernicious effect on the parties of the system, which is why Robert Cover famously remarked that the legal interpretation is closely tied to pain, violence, and death; in his own words, " Legal interpretation takes place in the field, of pain and death."[2] Cover cautioned the legal community to be aware of the law's violence and how violence is readily reflected in legal practice. He says legal interpretation is not a neutral or objective exercise but rather one that has serious consequences for the individual and communities. Hence, he advocated to minimize the violence as much as possible. The law's violence is majorly reflected in the criminal justice system in different forms. It may be the violence of the police, the interpretative violence of judges, or the violence of executioners of the interpretative judgment, etc.[3]

The process of deciding punishment is one of the subtle tasks performed by the judges. The judges calibrate various aspects of the case in hand and accordingly come up with an appropriate punishment. But the process is not as simple as it appears. It has various nitty gritty aspects, each of which is complex. For instance, the principled criminalization exercise purports for a proportionate punishment or just punishment for the offense identified by the criminal law; how the same is performed by courts is a question of deep inquiry.[4]Similarly, the modern punishment system largely bases its decision on objectivity.It presupposes that the State canjustly calculate sentencing severity through this exercise in objectivity.The judges perform this task by considering various aspects of the punishment.However, the larger question is how the State can calculate the appropriate punishment in a largely unjust world.Tonry famously statedthat it is indeed difficult to achieve just deserts in a highly unjust world. Still, law and the State ignore this circumspection and claim to do justice, irrespective of thehighly unjust world. The law claims to be objective and neutral and purports to do justice.[5]

[2]Robert Cover, "Violence and the world", 95 *The Yale Law Journal* 1601-1629 (1986).
[3]*Ibid.See also* Christoph Menke, "Law and Violence", 22 *Law and Literature* 1–17 (2010).
[4]*Supra* note 1.
[5]Michael Tonry, "Proportionality, Parsimony, and Interchangeability of punishments",in Michael Tonry (ed.) 217–37 *Why Punish? How Much? A Reader on Punishment*, 226–8 (Oxford University Press, Oxford, 2011).

This article takes these questions seriously, taking India as a reference for study (but not intending to restrict the scope to India alone).[6]It questions the very objectivist exercise of the penal state and raises the huge unexplored issue of subjectivity in punishment.

The initial part of the article briefly discusses the philosophical understanding of punishment and concretise what is lacking in such understanding. It then puts forth the concept of objectivity in calculating sentencing severity and further explores the subjective challenges for calculating the appropriate sentence. Byanalysing these subjective challenges, the authorlays downthe pain as a determining factor in calculating sentencing severity. The articleanalyses the pains of punishment from the existing literature and advances the proximity model to calibrate pain in punishment. By doing this, the author claims that the State has anobligation to consider the pains of punishment in the era of the advanced possibility of social science research. The author argues that addressing the subjectivity challenges would be rudimentary to understand the true nature of punishment, to define and even to theorise the punishment. Otherwise, the law commits a methodological error in understanding the sentence and punishment itself. The author bases the arguments in the context of the Indian penal regime and uses the Indian scenario to explain the pivotal role of understanding subjectivity in punishment.

The article adopts a doctrinal-descriptive study by analysing various existing literature.

II The Philosophical Underpinning of punishment and its parochialism

The institution of punishment is structured by certain definite aims and values; the legal arena justifies the imposition of punishment by referring to those aims and values, which legitimise the act of punishment. The aims and values are essentially derived from normative philosophical theories, which justify the system of punishment.[7]Hence in legal practice, these normative philosophies have a direct impact on the criminal justice system, and for understanding the penal practice, the normative rationale plays a crucial role. The philosophical ideas of punishment tell us the aims and values of punishment and therein justify it unqualifiedly. The crucial function of such a normative framework is to establish a

[6] India as a reference point helps to view the varied type of culture that intensifies the intersectionality in understanding the punishment and the subjective experience.

[7]R.A Duff and David Garland, "Intrdouction: Thinking about Punishment", in Antony Duff and David Garlands (eds.), *A Reader on Punishment*12–13 (Oxford University Press, Oxford, 1994); A Flew, "The justification of punishment," 29 *Cambridge University Press journal of Philosophy* 291–307 (1954).

standard outline within which the punishment should be worked and measured. The philosophy of punishment, to that extent, performs two tasks: on the one hand, it provides normative legitimacy to the institution, and on the other hand, it ensures the extensive power of the penal state is subjected to recurrent normative scrutiny.[8]

The judges, while deciding punishment, must navigate through various theories, which form the base of punishment in any country. The theories determine the purpose of the punishment. The classical theoriesof punishment arecaptured by the common dealings with the people. Suppose we ask a person, why do you think we punish someone who commits a crime against you? The probable replies are: the person certainly deserves to be punished or to teach them a lesson/message by inflicting the punishment or to prevent the person from committing a similar crime. The classical theories are rooted in the above answers from a common man. While the first answer constitutes retributive justification to punishment, the second one incorporates consequentialist justification.[9] These two philosophical traditions cover the primal way of looking at punishment, though different approaches could be observed within these two traditions. For philosophers, the debate centers on why punishment is justified, even if they disagree on how it is justified.[10]

The retributionist says there is a direct relation between the crime and the punishment. This relation determines the appropriate punishment, its nature, and its extent. Kant says, the punishment can only be inflicted when a person commits a crime. The offender ought to suffer for the act they have done,[11] the offender should get what they deserve.[12]For Mackenzie, the punishment aims to make the offender suffer like a victim. The offender has forfeited their rights of equal value when they commit a crime, and consequently, they must suffer like the victim.[13] The act and the punishment are interlinked, the punishment should fit the crime or be proportionate to the crime. Hence, the retributionists have a backward-looking approach, wherein they punish the offenders for an already committed crime as a

[8]Guyora Binder, "Punishment Theory: Moral or Political?" 5 *Buffalo Criminal Law Review* 321–72 (2002). *See also*H.L.A Hart, *Punishment and Responsbility*, (Oxford University Press, Oxford, 2nd edn.,2008); R.A Duff and David Garland, "Intrdouction: Thinking about Punishment", in Antony Duff and David Garlands (eds.), *A Reader on Punishment*(Oxford University Press, Oxford, 1994).
[9]Ezazul Karim, "The Critical Evaluation of the Different Theories of Punishment" 29 (C) The Jahangirnagar Review 471-489 (2020); Ted Honderich, *Punishment the Supposed Justification*(Pluto Press, London, 2006).
[10]*Ibid*. *See also* H.L.A Hart, *Punishment and Responsbility*,(Oxford University Press, Oxford,2nd edn., 2008).
[11]Immanuel Kant, *The Metaphysics of Morals, Trans. Mary McGregor* 141 (Cambridge University Press, Cambridge, 1996).
[12]*Ibid*. *See also*Ted Honderich, *Punishment the Supposed Justification*(Pluto Press, London, 2006).
[13]J.S.Mackenzie, *A Manual of Ethics*(University Tutorial Press Ltd., London, 1929).

deserts for their guilty act. It says the punishment should be proportionate to the crime committed, in other words, it reflects the idea of just deserts[14]. Rawls says a person who does a wrongful act should suffer for the wrong in proportion to the wrongdoing.[15]The following three features summarise the idea of the retributionist theory of punishment: i) the person must be guilty of committing an offence (breaking the law); ii) the person must deserved to be punished (forfeiting their rights of equal value); and iii) the punishment must fit the crime or be proportional towhat they deserve.

The second important tradition in the philosophical justification of punishment is the consequentialist justification.The proponents of utilitarian and deterrent theories are the adherents of consequentialist theory. The theory propounds thatthe punishment is justifiable to an extent of the good consequences resulting from it. It mandates that any justification of punishment should depend on its actual expected consequences and when it is shown to promote social interest. In other words, the punishment should produce general welfare by promoting good consequences. They treat persons as a means to benefit others.[16]Hence, the consequentialist approach is forward-looking; they aspire for the future benefit deriving from punishing a person, and there is no necessary connection between the crime and the punishment.Bentham says the punishment can only be justified if it produces sufficient pleasures or hinders sufficient pains, to outweigh the evil.[17]The theory pins to create an example to prevent other people from committing similar offences; it postulatesthat the fear or actual imposition of punishment leads to conformity. It is preventive and exemplary in nature; it is preventive by deterring the offenders from committing the same offense again, and it is exemplary by deterring other people from committing similar offences.[18]

The reformative theory of punishment embodies humanistic principles and endeavors to rehabilitate offenders. The reformative theory of punishment posits that the main objective of penalization is to reform the offenders' character, guiding them toward rehabilitation and

[14]*Supra* note 5. *See also* John Bronsteen, Christopher Buccafusco*et.al.*,, "Retribution and the experience of punishment," 98 *California Law Review* 1463–96 (2010).
[15]John Rawls, *Political Liberalism* (Columbia University Press, Columbia, 1996); John Rawls, *The Law of Peoples* (Harvard University Press, Harvard, 1999).
[16]*Supra* note 9.*See* alsoR.A Duff and David Garland, "Intrdouction: Thinking about Punishment", in Antony Duff and David Garlands (eds.), *A Reader on Punishment*12–13 (Oxford University Press, Oxford, 1994).
[17]Janet Semple, *Bentham's Prison: A Study of the Panopticon Penitentiary* (Oxford University Press, Oxford, 1993).
[18]Guyora Binder, "Punishment Theory: Moral or Political?," 5 *Buffalo Criminal Law Review* 335-340 (2002); Ted Honderich, *Punishment the Supposed Justification*(Pluto Press, London, 2006).

integration as productive members of society. It stresses the importance of therapy, education, and instruction to help offenders reintegrate into society. This theory is primarily grounded in humanistic principles and seeks to reform criminals by imparting an understanding of the 'wrongfulness in their behaviors.[19]Many criminologists support this theoryviewing criminals as individuals affected by social, political, and economic factors, often accompanied by mental disorders.

Another important tradition which assumed a great role in recent times is mixed justifications. As the word indicates, the mixed justification is a mixture of one or more theories and the unified justification to be reflected in the penal practice. Perhaps Nietzsche has a great role in formulating such an approach to punishment. He by critiquing the dominant discourse on punishment said, that punishment has manifold purposes and meaning in different historical periods.[20]Hart says any morally tolerable account of punishment must be a compromise between distinct and partly conflicting principles.[21]A single explanatory or justificatory framework is inadequate to explain the intricacies of punishment. The view that there is one single meta value or objective, within which all questions of justification need to be pigeonholed, is somehow wrong. There isa plurality of values that carry different theories, principles, and justifications, providing a conjunctive answer to the question of the justifiability of punishment. Hence, the punishment imposed by the penal regime may carry the attribute of consequentialism (utilitarianism (preventive, and exemplary)) retributivism, or rehabilitatory theories of punishment.

All the above-mentioned justificatory theories of punishment, in turn, reflect the punishment system that exists today, and all the theories have an objectivist approach in their respective dealing with punishment. The retributive theory calculates sentencing severity through an objective metric of proportionality; the consequentialists objectively determine the pain and pleasure and try to outweigh the pain, and the rehabilitationistsview the punishment objectively within their specified categories, like the criminological matrix. David Garland says the way the institution of punishment is picturised in the current penal regime obfuscates the problematic and unstable view from its purview. The punishment system has a certain inevitability, which the system itself takes for granted, which leads the institution of

[19]Christopher Bennett, "Punishment and Rehabilitation", in Jesper Ryberg (ed.)*Punishment and Ethics New Perspectives* 52–71 (Palgrave Macmilan, New York, 2010);Ezazul Karim, "The Critical Evaluation of the Different Theories of Punishment" 29 (C) The Jahangirnagar Review 471-489 (2020).
[20]*Supra* note 7.
[21]H.L.A Hart, *Punishment and Responsbility*(Oxford University Press, Oxford, 2nd edn. 2008).

punishment constricted into certain narrowly formulated channels.[22]The framework is restricted to narrowly tailored penal questions such as, what is a crime, what it looks like, what are the principles to determine criminality (i.e the idea of mensrea, actus reus, causation, etc.), what is the appropriate sanction, what is the appropriate punishment, who is the authority to decide the punishment and so on.[23] By calibrating punishment in such a restrictive manner, the modern penal regime has safely circumvented the social life attached to the punishment, in other words, the institution has buried the social questions under the garb of certain penal logic. The social questions are arbitrarily settled with inadequate details, more like an administrative task. The punishment turned out to be an institutional process, a technical task of judges and penologists sanctioned by the institutional structure.

The philosophical discussion of punishment tackles the legitimacy and the justification of the institution of punishment. But, when you critically engage with the normative framework, it is found that, there have been various questions, which the philosophical foundation failed to answer. Let us pose such extracted questions: how does the criminal justice system determine the appropriate mode of punishment? Or, how is the penal severity calculated by the penal regime, particularly in an unjust plural world, where just deserts is merely impossible to achieve? Or how the punishment system appeases the community at large? How does penal logic work like a technology of power which penetrates into the human soul? How is the penal system regulated by an ideology or by economic principles? These pertinent questions are rarely tackled in a philosophical framework. To understand and answer these questions, we need to attend to the social, political, and economic determinants of punishmentand these questions debunk the parochialism of the normative philosophical theories of punishment.

In essence there is a complete lack of serious appreciation of the nature of punishment. Particularly, its social character and role in social life. The philosophical framework of punishment is an idealized, one-dimensional picturisation of punishment.Such a one-dimensional image presents the conundrum of punishment merely as a variant of the classical liberal debate of the relation between State and individual. What warrants here is a

[22]David Garland, "Sociological Perspectives on Punishment", 14 *Crime and Justice* 121 (1991); David Garland, *Punishment and Modern Society: A Study in Social Theory*(University of Chicago Press, Chicago, 1990).
[23]*Ibid. See also* David Garland, "Frameworks of Inquiry in the Sociology of Punishment" 41 *The British Journal of Sociology* 1–15 (1990).

holistic understanding of punishment, a social foundation of the punishment, and its deeper social significance.[24]

In this context, the author discusses the idea of objectivity and subjectivity in punishment. The article questions the dominant penological narrative to create a counter-narrative.

III Objective Determination of Sentencing Severity and Subjective Challenges

The major concern in this article is the imprisonment executed by the prison system. When the offender is sent to the established prison to undergo the sentencing period, the judge objectively determines the sentencing period by applying judicial mind to the facts of the case. Objectivity is the standard here. The judgesobjectively weigh certain subjective factorsin deciding the appropriate sentence.[25]

The general understanding of criminal punishment begins with the orthodox definition afflicted to it.Criminal punishment for objectivists is an intentionally imposed phenomenon by the State on an individual subject responsible for criminal conduct. The characteristics of the imposed punishment arei) intentionality by the State; ii) imposed on an individual subject; iii) for a violation of legal rules; and finally,iv) its unpleasant nature.[26] The objectivity standard observes a clear-cut pre-determination of unpleasantness thatthe penal subject may experience. They do the same with certain principles and standards fixed by the law in calculating sentencing severity. The most common wouldbe the Proportionality Principle, which established the severity scale for offences and punishments and determines sentencing severity based on these predefined scales.[27] Hence, if a subject commits an offence, the judges first place the offence with offence severity scale and subsequently connect the

[24]*Supra* note 22.
[25]Andrew Ashworth, *Sentencing and Criminal Justice*, (Cambridge University Press, Cambridge, 5th edn. 2010); Lori Sexton, "Penal subjectivities: Developing a theoretical framework for penal consciousness", 17 *Punishment & Society* 114–36 (2015); Esther FJC van Ginneken and David Hayes, "'Just' punishment? Offenders' views on the meaning and severity of punishment", 17 *Criminology & Criminal Justice* 62–78 (2017).
[26]A Flew, "The justification of punishment," 29 *Cambridge University Press journal of Philosophy*319 (1954); SI Benn, "An approach to the problems of punishment," 33 *Cambridge University Press, Journal of Philisopshy* 325–421 (1958); H.L.A Hart, *Punishment and Responsbility*,(Oxford University Press, Oxford, 2nd edn.,2008).
[27]Andrew von Hirsch, "Proportionality in the Philosophy of Punishment" 16 *The University of Chicago Press* 55–98 (1992); Davis Hayes, "Penal Impact: Towards a More Intersubjective Measurement of Penal Severity" 36 *Oxford Journal of Legal Studies* 724–50 (2016).

offence with the severity scale of punishment by proportionally deciding the appropriatesentence. Objectivists may also emphasise aggravating and mitigating factors formulated by the law or the judges themselves in determining the final sentence.[28]

The objectivity standard in calculating sentencing severity works within a strict framework. We shouldnote that proportionality stands as the basis for the objectivity standard. Standardised deprivation is the most common and predominant objective standard in calculating sentencing severity. Here, the punishment is decided based on certain qualities of punishment that the subjects may experience. Hence, for some, certain basic socio-political freedoms such asliberty, freedom of choice, and freedom of movement are the determining factors in calculating the severity.[29]Mara Schiff constructed a quantitative severity scale to calculate the relative severity of the punishment based on these socio-political freedoms.[30]Similarly, some authorsput forth a percentile scale to measure the harm caused by the negative impact on the victim's socioeconomic living standard.[31]Both of these metrics perform the function of quantifying the unpleasantness of the sentence with specific socio-political indicators. In sentencing practice,the judges rely on a similar exercise to calculate the appropriate punishment. What happens here is that the judges calibrate the severity with certain objectively determined categories.In practice, these categories are certain deprivations on the human body, like deprivation of property, liberty, freedom of movement or locomotion, etc.

The question is, how would the judges objectively determine the sentencing severity with certain categories, which is a relatively subjective matter? In other words, penal consciousness differs from individual to individual; prisoners perceive different meanings for their punishment, irrespective of whether the judge intends a certain punishment to be inflicted or not.[32]

The term law is used here in a wider sense, the law may cover the decision of judges and the sentencing authority. The terms like sentencing severity and punishment severity are used interchangeably .

[29]Davis Hayes, "Penal Impact: Towards a More Intersubjective Measurement of Penal Severity", 36 *Oxford Journal of Legal Studies* 728-729 (2016); Esther FJC van Ginneken and David Hayes, "'Just' punishment? Offenders' views on the meaning and severity of punishment," 17 *Criminology & Criminal Justice* 62–78 (2017).

[30]Mara Schiff, "Gauging the Severity of Criminal Sanctions: Developing the Criminal Punishment Severity Scale (CPSS)", 22 *Criminal Justice Review* 203(1997).

[31]Andrew von Hirsch and Nils Jareborg, "Gauging Criminal Harm: A Living-Standard Analysis" 11 *Oxford Journal of Legal Studies* 1–38 (1991).

[32]Lori Sexton, "Penal subjectivities: Developing a theoretical framework for penal consciousness", 17 *Punishment & Society*120–125 (2015).

The question mentioned above demands an explanation. Sexton arguesthat objectivelycalculating sentencing severity misses the innate subjectivity in punishment. She says punishment is something done to the people and experienced by the people. The penal consciousness varies with individuals;it draws a gap between the objective nature of punishment and the subjectively experienced punishment, and she termed it a punishment gap(salience),which is nothing but the difference between the individual expectation of punishment or the intended punishment (by the State) with the actual experience of punishment or the subjectively experienced punishment. For Sexton, this creates a considerable problem in calculating sentencing severity.[33]Kolber says that when two people commit the same offense with the same severity, the judges generally sentence them with the same form of punishment or with the same sentencing severity. But the fact is that they do not experience incarceration in the same manner. When one feels tolerable, the other might be devastated and completely tormented by the sentence. He says our sentencing system has safely ignored this aspect. The identical punishment in name produces invariable differences in the severity of the punishment.[34]

The penal system supposes that the severity of the punishment can be measured and compared. The common way of calculating sentencing severity is through the proportionality principle. The proportionality constructs a scale of gravity of different crimes and concomitantly creates a scale of severity of punishment. The offence is then linked with the scale of gravity of crime with the scale of severity of punishment and thereby objectively determines the appropriate sentence.[35]Thejudges(who are the objectivists)determine the gravity of punishment with the length of the sentenceand the rigorous nature of the punishment. Objectivists then base the gravity of punishment on categories like curtailing liberty, locomotion etc. and finalise the sentencing severity within the predetermined objective categories. They conceive these categoriesas the determining factor in deciding the severity of punishment.

But conceiving severity simply in terms of sentence length or liberty deprivation or locomotion is a complete misrepresentation of punishment. The prisoners conceive their

[33]*Id.* at 118-124.
[34]Adam J. Kolber, "The Subjective Experience of Punishment", 109 *Columbia Law Review*196-97 (2009).
[35]Jesper Ryberg, "Punishment and the Measurement of Severity" in J.Ryberg and J.A. Corlett (eds.) *Punishment and Ethics New Perspectives* (Palgrave Macmillan, London, 2010).

punishment in their own unique ways. In that context,rankingand conceiving severity merely in terms of specific deprivation misrepresents the actual sentencing severity.[36]

Ryberg saysthat the proportionality and objectivity in calculating sentencing severityat least attractstwo distinct challenges namely the challenge of differencein impact and delimitation. The punishment of one year in prison for the same objectively determined severity for A and B may affect them differently. He says the difference may be found objectively if the prison conditions differ. Even when the prison conditions are similar the difference in impact would be found in the subjective experience of the punishment. The difference may also be found in direct and indirect effects. The direct effects in prison terms include suffering, unpleasantness, pain, frustrations, etc., undergone by the prisoner due to the fact of being put behind bars. The indirect effects include things like depriving sexual relations, spending time with family and friends, deprivation of the experience of life outside the prison, etc. Ryberg argues this challenge of difference in impact is a profound and largely undiscussed matter in the criminal justice system.[37]

Similarly, the challenge of delimitation is another major challenge in calculating sentencing severity. The delimitation challenge asks whatall such effects would be considered in calculating sentencing severity. If we take suffering, what would be the limit of such suffering? If we take direct and indirect effects, how do we delimit the boundaries of such effects? He questions the punitive and non-punitive boundaries created by the criminal justice system. Heargues that such criteria would fail to understand the severity of punishment and that the possibility of exceeding the severity is always present in punishment.[38]

Joel Goh argues that proportionality in criminal sentencing is poorly defined despite its dominant role in the criminal justice system. He says its application is problematic, mired in complexity, and judges have little expertise or guidance in applying the same. He put forth four difficulties posed by proportionality. Firstly,the definition of proportionality in law is blurred, and various theories exist regarding its application. Secondly,there is an inherent conflict between different sentencing goals and the principle of proportionality itself. Thirdly, the basic understanding of crime and punishment itself, its nature and differences, and

[36]*Supra* note 29.
[37]*Supra* note35, at73-75.
[38]*Id*.at 75–87.

finally,the proportionality displays itself as mere sentiments and emotions. He says the only practical proportionality is the manifestation of opinions and moral assumptions of society. Hence, for him, proportionality is not an objective ideal.[39]

The above discussion forces us to ponder the subjectivity debate deeply. The subjective experience of punishment isa key challenge to the proportionality-based calculation of sentencing severity and objectivity at large. It challenges the predetermined categories in measuring the sentencing severity. Davis Hayes observes the proportionality principle, and the aggravating and mitigating factors fail in the inter-subjective gauging of penal severity. For him, personal mitigation and ranking of sentencing severity are not enough;instead, he advocates for a holistic perspective on sentencing, wherein we need to look into the conduct compared to the pains that the sentence is likely to inflict on specific individuals in her unique context. For him, pain should also be a determining factor for calculating sentencing severity.[40]

In essence, the subjective and objective divide is critical for punishment.It is impossible to dodge the subjectivist's criticisms easily.

IV Indian criminal justice system and objectivity

The Indian approach to punishment swings between the legislative framework and the judicial discretion given to judges. On the one hand, the legislature generally prescribes a minimum and maximum sentence to be inflicted, and on the other hand, the judges are entrusted with the task of calibrating the appropriate punishment from the given legislative framework. Hence, we have substantive laws like the Bhartiya Nyaya Sanhita, the Unlawful Activities Prevention Act, etc. Criminalising and prescribing minimum and maximum punishment for specific acts and the BharityaNagrik Suraksha Sanhita and BharityaSakshyaAdhiniyam for facilitating the process of criminal administration. Different theories of punishment are also reflected in the criminal justice framework. However, it has to be accepted that there has been no single consistent theory applied to the Indian context. This is why Mrinal Satish says the Supreme Court has failed to advise a prompt theory in

[39]Joel Goh, "Proportionality - An Unattainable Ideal in the Criminal Justice System" 2 *Manchester Student Law Review* 42-44 (2013).
[40]*Supra* note 29.

determining criminal sentencing.[41]The different judges view the punishment with their own sensibilities and it has become a common trend that the judges' approach to punishment becomes the norm in a particular case in their hand. Nevertheless, the Court acknowledged the fact that various theories(reformative, retributive, deterrent, etc..) hold their importance in working on an appropriate punishment.[42]

In *Sushil Murmu*v. *State of Jharkhand*,[43] the court emphasized the importance of proportionality in criminal punishment:

> Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. Anything less than a penalty of the greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise.

The Court also observed the importance of various theories, that may come into the picture while deciding the punishment:

> The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the traffic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

[41]Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (Oxford University Press, Oxford, 2016).
[42]Anju Vali Tikoo, "Individualisation of Punishment, Just Desert and Indian Supreme Court Decisions: Some Reflection" 2 *Indian Law Institute Law Review* 20–46 (2017).
[43]*Sushil Murmu*v. *State of Jharkhand*, 2003 AIR SCW 6782.

Similarly, in various judgments, we could see the weightage being given to societal opinion or public conscience and victims'rights. Hence, in *Dhananjay Chatterjee* v. *State of West Bengal,*[44]the Supreme Court observed:

> In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

The very basic understanding of imprisonment as deprivation of liberty, more particularly the freedom of locomotion, is prominent in the Indian approach to punishment as well. Many judgments could be found quoting Black Stone to concretize the importance of freedom of liberty and locomotion and why the curtailment of such rights should be used sparingly. The courts treat the restriction of locomotion as the chief purpose of imprisonment. *Sunil Batra*v. *Delhi Administration,*[45] *Maneka Gandhi* v. *Union of India,*[46] *Francis Manjooran*v. *Union of India,*[47] *Dinesh Sankhla* v. *State of Rajasthan,*[48] etc. are a few judgments that explain this point. The courts have staunchly upheld various legal and fundamental rights and described the rationale behind upholding these rights. These are indeed landmark judgments in the context of extending the scope of fundamental rights, but the aspect to be considered here is that the legal debate on imprisonment surrounds certain legal categories, like personal liberty, more particularly locomotion. These and many other judgments prove that point.

A detailed survey of judgments is not attempted here.Rather, the aim is to understand the nature of justifications the Supreme Court tends to take while inflicting a punishment. The objectivity standard in punishment is prominent in the Indian criminal justice system. The

[44]*Dhananjay Chatterjee* v. *State of West Bengal*, (1994)2 SCC 220.
[45]*Sunil Batra* v.*Delhi Administration*, 1980 AIR 1579.
[46]*Maneka Gandhi* v.*Union of India*, 1978 AIR 597.
[47]*Francis Manjooran*v. *Union of India*, AIR1966KER20.
[48]*Dinesh Sankhla*v. *State of Rajasthan,* 2024:RJJD:14649.

courts assume the punishment can be calculated justly through the proportionality principle. In other words, the individual just deserts is possible, irrespective of the deep social division in India. The courts also consider various theories when deciding on appropriate punishment.

VWhy should we criticise pure Objectivism?

Punishment is one of the constituent elements of the criminal justice system, and the State is responsible for justifying the punishment it imposes. This is why many theorists argue that any attempt to justify punishment entails the penal state inflicting the apt or correct amount of punishment.[49]For some scholars, understanding subjective factors and variations is primordial even to define and theorise criminal punishment.[50]The pure objectivist tendency in calculating sentencing severity should be viewed from the recent highly sophisticated developmentof social science research.Why should we hesitate to do so if we can address the challenge of subjectivity in a cost-effective and administrable manner? And the law has anobligation to consider the actual or anticipated experience of punishment.[51]In an era where social science research is making the lived experience of the social phenomenon even more accessible, why should the law frown upon considering the subjectivity in punishment?If it is possible to perceive the impacts of punishment as a subjectively experienced reality, a purely objective description of punishment alone is unsatisfactory.[52]

Social science research in the modern era effectively draws empirical patterns. If an empirical pattern is possible with modern social research tools, why does the law hesitate to use the same to draw a pattern in the experience of the penal subject?It is a fact that accurately predicting the future experience of the penal subject is impossible. However, if we can identify patterns of subjectivity through past empirical research and apply them with a certain degree of specificity in calculating sentencing severity, why does the law hesitate to do so?Why should objectivity be the only standard?If punishment can be understood as a social

[49]Andrew Ashworth, *Sentencing and Criminal Justice*, (Cambridge University Press, Cambridge, 5th edn., 2010); Michael Tonry, "Proportionality, Parsimony, and Interchangeability of punishments'," Michael Tonry (ed) *Why Punish? How Much? A Reader on Punishment* 217–37 (Oxford University Press, Oxford, 2011).
[50]John Bronsteen, Christopher Buccafusco*et.al.*, "Retribution and the experience of punishment," 98 *California Law Review* 1463–96 (2010); Davis Hayes, "Penal Impact: Towards a More Intersubjective Measurement of Penal Severity," 36 *Oxford Journal of Legal Studies* 724–50 (2016).
[51]*Supra* note 34.
[52]Nils Christie, *Limits to Pain: The Role of Punishment in Penal Policy* (Oxford: Martin Robinson and Company Ltd., 1982); Davis Hayes, "Penal Impact: Towards a More Intersubjective Measurement of Penal Severity", 36 *Oxford Journal of Legal Studies* 724–50 (2016); Esther FJC van Ginneken and David Hayes, "'Just' punishment? Offenders' views on the meaning and severity of punishment", 17 *Criminology & Criminal Justice* 62–78 (2017).

reality that better reflects experienced reality, why should the penal state turn a blind eye to it?These, in fact, raise the serious issue ofignoring the innate subjective experience of the criminal subjects.

The Pain of Imprisonment, the Legal Discussion

In his historical essay 'Violence and the World', Robert Cover argues that legal interpretation is closely tiedto violence and death. The law rests in pain and death,[53]which means legal interpretations have wider implications thanwe imagine. Violence is inherent in interpretative acts. It has severe consequences for individuals and communities. Imprisonment is one such justified violence inflicted by the law, essentially to quell the violence of the subjects. The law takes the responsibility to keep the order of the State and performs this act through legally justified violence. In the modern context,imprisonment is the prime example of such violence.[54]

We have done away with the archaic model of punishment, wherein the punishment has more to do with the physical infliction of pain to the body. The punishment was primarily a pain-inflicting exercise to the physical body.[55]From there, we have come to the new model of the prison system. As Michel Foucaultclaims, the punishment and the body relation have become reticent, which means the body now serves as an intermediary to deprive certain aspects like liberty, property, and certain other rights. The body is now ensnared in a system of disciplinarian processes attached to certain constraints, privations, and obligations. Physical pain is no longer the determining factor in punishment for Foucault.[56]Even if we accept the proposition of Foucault, denying that the modern prison system is devoid of pain is myopic.The fact is that it creates a unique pain of its own, and to understand the punishment as an institution; we have to move away from Foucaultand accept the fact that the modern prison system is indeed painful in its unique ways. This is why the author is saying that, by ignoring pain and merely mapping the punishment with specific legal tools of rights and deprivations, we are committing a methodological error in understanding the punishment itself. A first step in this direction would be to accept pain as a matter of legal fact, and once

[53]Robert Cover, "Violence and the world", 95 *The Yale law journal*1601–1602 (1986).
[54]*Ibid.*
[55]David Garland, *Punishment and Modern Society: A Study in Social Theory.* (University of Chicago Press, Chicago, 1990).
[56]Michel Foucault, *Discipline and Punish -The Birth of the Prison,* 75-78 (Random House, New York, 1979).

we accept the same, research must be done to understand the nature of legally inflicted pain and suffering.

If we see the trajectory of the criticisms attached to calculating the severity of the punishment, one factor that stands out is that the punishment is painful. Both subjectivists and objectivists have acknowledged the same. Pain depicted here is not physical suffering alone. Pain, in modern terms, has wider connotations. Pain may depict an individual experience of physical, emotional, and mental suffering of a penal subject arising from the sentence imposed by the criminal justice system. Or it may be a somatosensory conception conceived in the brain of the penal subject and reflects the trauma or agony and cannot be restricted to these aspects alone.[57]Scarry famously said that pain destroys the capacity to communicate, and it destroys language. Pain has a deeper meaning that is innately subjective and may be difficult to communicate.[58]Undoubtedly, the imprisonment imposed by the criminal justice system produces unique and innumerable pain of its own. If we need to truly understand the nature of imprisonment, it is difficult to avoid the pains of incarceration. The prison system exerts control over the body and soul of the individual and produces innumerable pains, both seen and unseen, which are often unaddressed by the criminal justice system under the vague category of punitive and non-punitive consequences of imprisonment.

On this pretext,let us examine some of the literature on pain of imprisonment, which would help us to understand, why pain should also be a determining factor in calculating penal severity. One of the primordial literature on the pains of imprisonment (about the modern prison system) is Syke's"The Society of Captives." Sykes presents certain definite pains of imprisonment, such as; *deprivation of liberty*(wherein the prisoner experiences restrictions in movements and loses contact with the outside world), *deprivation of goods and services*(it forces the prisoners to poverty or, in other words, forced poverty)*, deprivation of heterosexual relationship* (the prisoners are forced to maintain celibacy), *the deprivation of* autonomy (the prisoners are robed of their choices and decisions) and *the deprivation of security* (the prisoners live in constant threat of fellow prisoners).[59]For Sykes, the pains of imprisonment are certain deprivations deliberately inflicted by the criminal justice system.

[57]Nils Christie, *Limits to Pain: The Role of Punishment in Penal Policy* (Oxford: Martin Robinson and Company Ltd., 1982).
[58]Elaine Scarry, *The Body in Pain,the Making and Unmaking of the World* (Oxford University Press, New York, 1985).
[59]Greesham M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison,*63-84 (Princeton University Press, Princeton, 1971).

Sykes never really elaborated or even attempted to explain the expansive nature of the pains of imprisonment. He deliberately restricted his empirical project to these five different pains of imprisonment.

Many authors have extended the Sykes project to understand pain in more depth and detail. In the modern prison system, pain includesi)Containment (which is an extension of deprivation of liberty to cover things like a prisoner's treatment as an object in a warehouse depriving basic human necessities, including food, health care, etc. commonly named as secondary incapacitation);ii)Exploitation (extension of deprivation of goods and services, it talks about utilising prisoners for cheap and forced labour - a commodification of prisoners);iii)Coercion (extension of deprivation of heterosexual relationship- here it talks about the plight of female prisoners, the exploitation of them by prison guards and officials;iv)Isolation(extension of deprivation of autonomy- here it talks about deprivation of human contact and touch, the common use of solitary confinement through the arbitrary decision of prison officials); and finally v)Brutality (an extension of deprivation of security, here it talks about the violence of prison officials if we try to expose the violence inside the prison).[60]

The above description cannot explain the pain in its entirety.In one sense, it is impossible to understand the pain of others, which is largely a subject phenomenon. However,theendeavor would be to have a solid understanding of pain and its varied elements. The pain may also include certain additional pains, such as mortification or embarrassment of the self, an affront to the self itself, and existential crisis the prisoners undergo concerning their identity and survival,[61]losing ties with their family and friends, essentially restricting the communication itself.[62]The pain may also include loneliness, suicidal thoughts, feeling that their life is being wasted in thefourwalls of the prison, deep missing of social life, the fear of copingwith the new world, how to deal with life after the release,etc. These are specifically

[60]Benjamin Fleury-Steiner and Jamie Longazel, *The Pains of Mass Imprisonment,* 8-9 (Routledge, New York, 2014).
[61]Stanely Cohen and Laurie Taylor, *Escape Attempts: The Theory and Practice of Resistance in Everyday Life* (Routeldge, Abingdon, 2003).
[62]Victor Lund Shammas, "Pains of imprisonment", in Kerley KR (ed.), *The Encyclopedia of Corrections* 1–5 (John Wiley & Sons, New York, 2017).

connected to long-term imprisonment.[63]These additional painsrequire careful consideration if we need to understand the nature of incarceration, but again, this is not an exhaustive list.

The pain may also be extended to include certain disaggregated pains.Itis nothing but pain that arises out of the differences. Wide extensive research has been conducted in western countries regarding female prisoners and their unique challenges. The pains, such as the strained relationship with their children,[64]the pain of pregnancy and the trauma associated with it,[65]The vulnerability to sexual abuse and unreported abuses in prisons[66]etc., are a few examples.[67] The disaggregated painsare not restricted to female prisoners alone;they may cover the distinct pains of ethnic minorities, whose sensibilities might differ from other common majority and elite people, and that might impact their experience of incarceration.[68]The young prisoners were found to have their own distinctive pains attached to their age and emotional capacity.[69]The pain could also be found differently in transgender people and other sexual minorities, which is exclusively a new area of research. In precise Sykes, conceptions have been expanded to cover many pains that may be experienced in imprisonment.

The pain cannot be restricted to prison walls alone.It has implications beyond the prison walls, and we can name it as *pains beyond prison walls*. This may include fear of receptivity in society, having committed an offence, and undergoing the required punishment.[70]The pain after incarceration in modern society may also include certain specific pains such as coping with the changed society, the issue of re-establishing ties and bonds with families and

[63]TJ Flanagan, "The Pains of Long-Term Imprisonment: AComparison of British and American Perspectives", 20 *The British Journal of Criminology* 148–56 (1980); S Walker and A Worrall, "Life as a Woman: The Gendered Pains of Indeterminate Imprisonment", 132 *Prison Service Journal* 27–37 (2000).
[64]H Foster, "The Strains of Maternal Imprisonment: Importation and Deprivation Stressors for Women and Children", 40 *Journal of Criminal Justice* 221–9 (2012).
[65]PA Ocen, "Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners.," 100 *California Law Review* 1239–1311 (2012).
[66]A George and J McCulloch, "Naked Power: Strip Searching in Women's Prisons" *The Violence of Incarceration* 117–133 (Routeldge, London, 2008).
[67]S Walker and A Worrall, "Life as a Woman: The Gendered Pains of Indeterminate Imprisonment", 132 *Prison Service Journal* 27–37 (2000).
[68]Y Jewkes, "Men Behind Bars: 'Doing' Masculinity as an Adaptation to Imprisonment", 8 *Sage Publication Men and Masculinities* 44–63 (2005).
[69]A Cox, "Doing the Programme or Doing Me? The Pains of Youth Imprisonment", 13 *Punishment & Society* 592–610 (2011).
[70]J Warr, "The Prisoner: Inside and Out",in Y. Jewkes,J. Bennett and B. Crewe (eds.) *Handbook on Prisons.* 586–604 (Routledge, Abingdon, 2016).

beloved ones, the pains of desistance and isolation due to non-receptivity in the community, etc.,[71] which may lead to secondary prisonisation.

The discussion of pain does not really stop here. There is anextensive research conducted, particularly in the western context, to spot the pains and to include those sufferings and consequences in understanding the punishment and to reduce the social impact it possesses. In that context, ignoring the pain in calculating sentencing severity ends up in the inimical trouble of the punishment gap introduced by Sexton and the challenge of difference in impact propounded by Ryberg.[72]The issue will not stop there, the failure of mapping pain would ultimately result in losing the subjectivity in its entirety, which the law never aims. If the law commits a methodological error[73]in ignoring the pains of punishment by restricting the punishment to certain deprivations, the result would be a massive issue of societal ignorance of the law, which the author doubts the law can accept or afford in any democratic country.

Pains of imprisonment in the Indian context and its varied fluidity in experience

Prison writing in India is a useful tool to understand the nature of the prisoner's experience of pain and suffering. There have been many autobiographies focusing on the subjective experience of a prisoner from pre-independence to the date to the post-independence period. The pre-independence political prisoners' writings like Aurobindo Ghose's Tales from Prison (1909), Bhagat Singhs Jail Diary (1929), Prison Days by Vijay Lakshmi Pandit (1945), etc. are some important writings on their experience of prison days in their own language. In the post-independence, Books like A Prisoner's Scrap by L.K. Advani (2016), Prison diary by Jayaprakash Narayan; Comrade Ramachandra Singh's 13 Years: A Naxalite's Prison Diary (2018); Fractured freedom- A prison Memoir by KobadGhandy (2021), etc. are some writings, expressing their own subjective experience as a prisoner and their narration of others pain and suffering inside the prison.

A peculiar narration of the prison experience is found in Arun Ferreira's Colours of the Cage- A Prison Memoir. The author had been in Nagpur jail for nearly 5 yearson charges of being a

[71]B. Nugent and M. Schinkel, "The Pains of Desistance", 16 *Criminology & Criminal Justice* 568–584 (2016).
[72]Lori Sexton, "Penal subjectivities: Developing a Theoretical Framework for Penal Consciousness", 17 *Punishment & Society* 114–136 (2015);Jesper Ryberg, "Punishment and the Measurement of Severity" in J.Ryberg and J.A. Corlett (eds.) *Punishment and Ethics New Perspectives* (Palgrave Macmillan, London, 2010).
[73]The term methodological error is discusssedsepertely in coming sections.

Naxalite. He projects a mirror image and beautifully narrates the experience in prison through a first-person narrative style. Ferreria recollects the memory of his experience of being a prisoner from the forty-four letters that were sent to his family during the period of his imprisonment. He bases the letter as the reference point and states how the prison administration censors the letters posted by the inmates. The author narrates various realities of prison life, like the terror of the police, the isolation of a prison cell, the structure of the prison compound, the widespread surveillance in the prisoneven in the most private times, threats from the other inmates, the psychological issue of loneliness and missing the every minute aspects of the family, etc.[74]

These prison autobiographies are some important documents that form a general understanding of prisoners' experiences in India. However, in reality, the trial courts that decide the punishment for an offense rarely look at the subjectivity of the criminal subjects; they hardly scrutinize the social condition and reality of the offender. Hence, what we need to understand here is that there is no concrete study of the institution of prison as a social institution or as a part of social life. In other words, the study is largely concentrated on the penological objective matrix by treating prison as a space of confinement and restricted locomotion. The debate surrounds the constitutional right of liberty, and there is no space for subjectivity and social reality in this matrix of understanding the experience of imprisonment. Further there is no critical engagement with the distinctness or fluidity in the experience of prisoners. More particularly, how the women prisoners experience their imprisonment, how the transgenders experience their incarceration, and how the sexual minorities experience their imprisonment are some serious questions of inquiry. But they have never really found their voice in India's penal regime. Even in these general categories, a person belonging to a religious or caste minority, like a transgender lower caste person or a transgender religious minority person, which would further impact their subjective experience as a prisoner, entails serious consideration in research. This type of research looking at intersectionality is completely lacking in the Indian context.

Fluidity or distinctness in the experience of pain and suffering is a fact to be acknowledged in any society. The subjective human pain and suffering are unique to individuals, and the question raised in this article is how the legal system restricts them to certain legal categories without considering the individual and social reality. In an empirical

[74]Arun Ferreira, *Colours Of The Cage: A Prison Memoir* (Aleph Book Company: Rupa Publications, New Delhi, 2014).

study on the mental health perspective of the death row prisoners conducted by Project 39 A, National Law University, Delhi, presents the painful and distressful experience of death row prisoners and brings forward the contradiction that exists in the Indian penal system. The report says that out of the 88 prisoners interviewed, 64 had been abused or neglected as children, 46 were school drop out, and 73 were grown up in a disturbed family environment. Among most prisoners, 73 of them had faced three or more adverse childhood traumatic experiences.[75]But when it comes to the determination of punishment, they say these factors were not considered. These prisoners face multiple social and physical exclusion, stigma, and psychological and physical violence. The law's promise of dignity inside the prison is merely a distant aspirational word. The law dismisses the psychological suffering or the pains of death row as either unintended consequences or, at times, as deserved outcomes. Be it intended or unintended, the human cost of the death penalty for the family and for themselves is irreparable.

The National Crime Record Bureau documents that nearly 66 percent of the prison population belongs to schedule castes, scheduled tribes, and other backward classes. Journalist Sukanya Shantha says the caste dictates the nature of labor that you perform inside the prison. By describing the stories of different prisoners, she elaborates on the discrimination faced by the prisoners based on the caste hierarchies. How the social division, class, and caste hierarchies determine the consequence and nature of imprisonment is a serious inquiry.[76]However, there are no such concrete studies detailing the fluidity of the experience of this discrimination and how it affects the subjectivity of the prisoners.

Methodological error

We need to accept the impact of different factors in the subjective experience of imprisonment, but the penal state often ignores these factors as unintended consequences or parallel consequences, and the law claims it cannot take such external things into consideration. In some sense, the law says, they don't have the expertise to deal with such social reality. Law is an objective instrument, and taking such subjectivity is beyond the law's imagination. This article questions this very imagination of law and argues that social reality is something that law cannot ignore, and if the law needs to claim authority, the law

[75]NLU Delhi, "Death Penalty India Report",(2016)*available at*https://www.project39a.com/dpir#:~:text=The%20Death%20Penalty%20India%20Report,is%20divided%20in%20two%20volumes (last visited on March 20, 2025).

[76]Sukanya Shantha, "From Segregation to Labour, Manu's Caste Law Governs the Indian Prison System" *The Wire* (December 10, 2020), *available* athttps://thewire.in/caste/india-prisons-caste-labour-segregation (last visted on March 20, 2025).

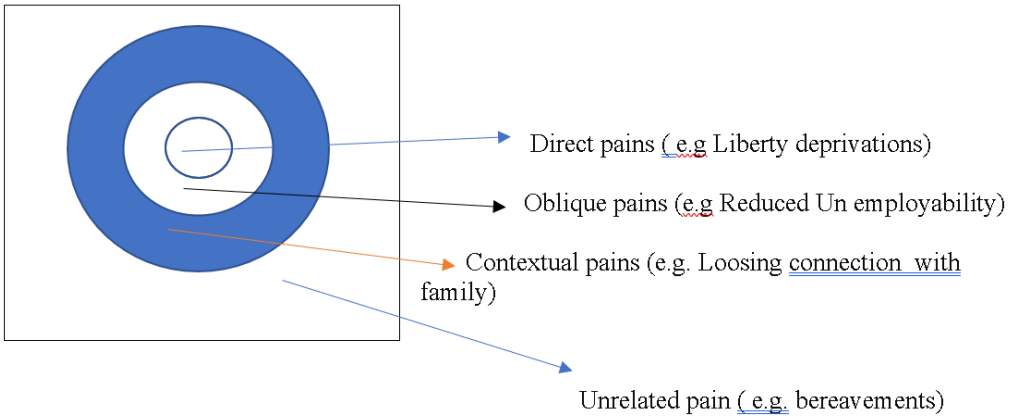
should have a close nexus with social reality. In other words, the law should adequately express the social life attached to the law. The prison system is a social institution with social implications; hence, it should also reflect the social reality. Ifthe penal state dodges its responsibility to consider the fluidity in the experience of different criminal subjects, the State commits a methodological error in understanding the very nature of punishment itself.

The methodological error is related to the claim of law to objectively determine the appropriate sentence and the claim to do justice in a criminal case. If the penal state ignores the pain and its allied experiences, it automatically ends up misunderstanding the nature of imprisonment and, therefore, commits a methodological error by omitting an important component of the punishment, i.e., subjectivity and social reality. This, in turn, results in the rebuttal of the very claim of law to do justice and the larger claim of law being neutral and objective. The objectivity that the law earns here is objectivity at the cost of social reality and individual subjectivity. The author believes this is a methodological error in understanding the nature of imprisonment and, in a larger context, the punishment as a whole.

VI Davis Hayes ProximityModel of Pain

Hayes formulated a proximity model to map pain into the calculation of sentencing severity. The proximity model focuses on the proximity or closeness of pain to the penal state. In that context, he draws four specific categories of pains: direct, oblique, contextual, and unrelated pains. This model and the taxonomy for Hayes perform the function of association of pain with the penal state, irrespective of whether the State directly intends it or not.[77]

The modelis picturised below for better visualisation.



[77]David Hayes, "Proximity, pain, and State punishment", 20 *Punishment & Society*240-241 (2018).

Direct pains

Direct painsrefer to those pains directly intended by the penal state, or in other words,these pains arestraightforwardpainsinflicted by the penal state while punishing an individual. The common example would be the deprivation of liberty.When the penal state inflicts the sentence, it supposesdeprivation of certain freedoms such as freedom of choice, movement etc. These deprivations are explicitly intended by the penal state hence easily traceable in any form of punishment.[78]

Unrelated pains

Unrelated painsare unintended by the penal state but are equally straightforward. They do not have proximity to penal state action, which means they are not caused or exacerbated by the penal punishment. The best example would be bereavement, i.e., suppose one of the prisoner's close family members or friends died during the sentencing period, preventing the prisoner from attending his last rites or spending time with the person during his last days. The question would be whether the pain of such nature forms part of the calculation of penal severity.For Hayes, the remaining two groups aim to resolve this particular issue.[79]

Oblique pains

Oblique painsreveal a category of pains indirectly intended by the penal state. For Hayes, this category works out a compromise between objectivism and subjectivism, essentially because this category engages with empirical experiences. Hayes illustrates fromPedain, the perpetrator of cargo destruction fixed a bombto exploit the lucrative insurance policy. The perpetrator argues, "My only aim was to destroy the cargo. I never intended to kill the crew members".The position of law observes that the person may have intended the death of the crew members obliquely, or he has sufficient knowledge that his acts may result in the death of crew members, or he has foreseen the consequences of his acts that it may result in death, a virtual certainty.[80]The law here traces the oblique intent to decide criminality. Similarly, in the penal context, the pains are taken to check the proximity with the State intention and to consider the same for calculating penal severity. Hayes divides oblique pain into two categories, general and specific oblique pains. General oblique pains are virtually certain

[78]*Id.*at241; Greesham M Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton University Press, Princeton, 1971).
[79]*Supra* note 77, at 242-243.
[80]A Pedain, "Intention and the Terrorist Example" *Criminal Law Review* 579–593 (2003).

consequences of criminal punishment, though not directly intended by the penal state. The best example would be the lack of employability after a criminal conviction due to the fact of being an offender. The specific oblique pains are the virtually certain consequences that may arise in a particular person or a penal subject, such as a losing family or ex-communication from the community, due to being imprisoned.[81]Hayes states the creation of the specific category of oblique pains is rudimentary to bridge the gap between objectivism and subjectivism. The information relating to such pains would be easily available for the sentencing judge, or the state is responsible for seeking such information. The possibility of social research has to be explored by the policymakers. This category creates room for accounting for the subjective factors which are sufficiently proximate with penal action or intention by the State.[82]

Contextual pain

Contextual paincarries a wide array of possible pains that may arise as a result of the punishment. A prime example would be the loosing of family relationships or any close friends etc. The pain of separation is one of the deepest pain that one may be subjected to. It has a serious impact on the penal subject. Though these types of pain are less predictable, there is a compelling reason to consider some contextual pains while calculating sentencing severity. The role of social workers and other non-state actors would be predominant here.[83]

This model stands as an example of bridging the gap between objectivity and subjectivity. If we contextualise the model to the Indian penal framework, the direct pains would involve the direct aim of the penal state, it will be the deprivation of liberty and individual freedoms and it may also include other peculiar contextualised aims, for instance, some judges explicitly aims to impose specific pains and unpleasantness (like rigorous imprisonment with hard employment and community service). The oblique and contextual pains are a special category where the penal state can understand the fluidity in the experience of punishment in more detail. The oblique pain helps to determine the virtually certain consequences of punishment, like how the intersectionality among the prisoners impacts their punishment, for instance, how a minority poor Muslim prisoner in India experiences their punishment, compared to a majority community prisoner or how a lower caste Hindu woman or a transgender person experience their prison life, compared to other

[81]*Supra* note 77 at 242–245.
[82]*Id.*at243.
[83]*Id.*at 244-247.

majority community prisoners. The category of oblique and contextual pain would help to identify the fluidity in the experience of prisoners more exhaustively.

Once you identify such subjective pains and sufferings, the next step will be to investigate the proximity of such experience to the penal action (the punishment intended by the penal state). If the penal state intervention causes such misery to the individual, then the State has the responsibility to consider such experiences to alleviate the misery, to understand and visualise the punishment from a better perspective and to further justify the institution of punishment itself. The abstract punishment in the book differs from the actual experiences of punishment. If we fail to account for these important elements, the punishment is prone to failure, particularly in a liberal democratic country. Considering pain as a constituent element of calculating sentencing severity helps to include specific violations of norms by individuals due to the fact that pain is sufficiently a pluralistic concept that is accommodative in nature. The discussion of pains and the proximity model can only be a starting point. The State would have to seriously reconsider its sentencing practice to make it compatible with the social reality.

VII Conclusion

The State has to come out of the shell of pure objectivism and accept that it has a responsibility to consider subjective factors as well in calculating sentencing severity. As the author stated, if the State can do the same in a cost-effective administrable manner, why does the State hesitate to do the same? If social reality research makes empirical patterns possible, why does the law fail to use such reality research? The article then puts forth the idea of pain in punishment wherein it argues that first, there needs to be a solid acknowledgment of the fact that modern punishment is indeed painful in its own unique ways, though it might not be physically painful as it used to be in the past centuries. The author argues that the pains of punishment should also be a determining factor for calculating sentencing severity. The pains of punishment will help bridge the gap between objectivity and subjectivity and thereby help to address the subjective challenges to the objective calculation of sentencing severity. Pain as a factor in calculating sentencing severity dodges the difficulties of taxonomy because pain is sufficiently a broader concept that can incorporate diverse experiences like the pains discussed in this article. The pains stated above, like the whole discussion of pains and the subsequent proximity model,exemplify subjectivity in punishments. The discussion is not comprehensive; rather, it is one way of approaching the pains of punishment through a doctrinal study. But the debate should not end here. Asstated, if the State continues to fail in

accounting the subjectivity, the State commits a methodological error in understanding the punishment, defining the punishment, and even theorising the punishment. By evading social reality, it questions the claims of the law, particularly the claims of just deserts and just punishment. Hence, it is the responsibility of the States to take subjectivity seriously when calculating sentencing severity.The pains of punishment would help to bridge the gap between objectivity and subjectivity. It has an obligation to consider the varied pains of imprisonment for better visualization of punishment.

The author takes India as a site of inquiry to understand the reality of social division and how this inequality could affect their subjective experience of punishment. India, as a research site, proves the fluidity in the experience of pain and suffering and the impossibility of dodging the subjective consideration in deciding the sentencing severity to understand the institution of prison as a whole.