

NEOLIBERALISM AND THE RISE OF PENAL POPULISM IN INDIA: IS THERE A WAY OUT?

Pupul Dutta Prasad* & Sanjay Vashishtha**

Abstract

This paper seeks to highlight the effects of neoliberalism on India's penal policymaking. Ever since the advent of neoliberal policies in the economic sphere in India in the 1990s, its impact has been felt in social, cultural, and political spheres too. These factors inevitably shape penal policy. However, there has not been any systematic assessment of how far neoliberalism has influenced India's penal culture. The paper fills this knowledge gap, and argues that neoliberalism is one of the key determinants of factors driving penal populism in India. This point is made based on various illustrations of infotainment-led media, labelling and neoliberal influence on crime. The paper advocates evidence-based policymaking and public criminology for India as a potent antidote to neoliberal punitivism. We also propose an alternative that calls for responsible media, public introspection and participation in the administration of criminal justice. Lastly, the paper discusses the importance of Randomised Control Trials in the quest to achieve Evidence Based Penal Policymaking for a diverse India.

I Introduction

IN ALMOST every country, imprisonment in response to crime has increased. Though the incarceration rates vary, the US surpasses other countries to an extent that it is an outlier, the general trend has been towards more people than ever before being sent to prison and for longer sentences. Perhaps it is rightly said that we live in an age “when freedom is fast becoming the exception rather than a rule.”¹ Prisons are privatised, turned into profit making entities and, as per ‘The Sentencing Project’, at least 11 countries, spread across North America, South America, Europe, Africa and Oceania are engaged in some level of prison privatisation, i.e. private multinationals running prisons ‘for profit’². This article emphasises that the ‘rise of penal populism’ does not merely denote the rise in the level of punitive incarceration at a given time. It needs to

* PhD Candidate, Department of Social Policy, London School of Economics and Political Science, London, UK.

** LL.M, McGill University, Canada, M.Sc. Criminology & Criminal Justice, University of Oxford, UK & Advocate, Supreme Court of India, New Delhi.

1 J.W. Whitehead, “*Jailing Americans for Profit*” (2012), available at: https://www.huffingtonpost.com/john-w-whitehead/prison-privatization_b_1414467.html. (last visited on March 29, 2018)

2 C. Mason, “*International Growth Trends in Prison Privatisation*” (2013) available at: - <http://sentencingproject.org/wp-content/uploads/2015/12/International-Growth-Trends-in-Prison-Privatization.pdf> (last visited on March 14, 2018).

be understood in the context of the socio-economic and socio-cultural settings that have normalised resorting to incarceration and penal laws in far greater numbers than deemed necessary previously.

Whereas the declared aim of imprisonment is to reform offenders, it is impossible to deny the overwhelming retributive or just deserts motive inherent in it. Therefore, one way to see higher incarceration rates is that response to crime in societies has become more harsh and vengeful. In addition to being the most favoured criminal justice response, imprisonment is increasingly being deployed as an aggressive strategy to control and reduce crime. India seems to be following the same pattern. The assumption is that offenders cannot commit further crimes while incarcerated, and, that punishment acts as deterrence to commission of crimes.

Criminologists have tried to understand the phenomenon of increasing reliance on incarceration as a crime control and criminal justice strategy. Studies have revealed that there is more to it than a straight correlation between rise in crimes and the consequent increase in imprisonment. Two points have clearly emerged. First, imprisonment, despite its shortcomings, cannot be wished away as one of the frontline responses to crime. However, the unprecedented level to which imprisonment has escalated fails to achieve its declared aim. In fact, it has quite the opposite effects. Second, there is irrefutable evidence that socially and economically disadvantaged people, marginalised communities, and minorities take the brunt of penal intensification.³

Furthermore, penal policy does not exist in a vacuum. For the purpose of a coherent analysis, any penal policy has to be seen in its socio-economic, political, and cultural contexts. Penal theorists have identified neoliberalism and its attendant forces as exercising the predominant influence on the way crime is imagined, defined, and dealt with in contemporary societies⁴. A key question this paper seeks to address is whether the penal theory and practice in India is marked by growing punitiveness and increasing imprisonment rates as a result of the impact of neoliberalism. The paper highlights that unbridled markets, consumerism, and economic individualism that neoliberalism stands for are not the inexorable reality. Neither is the punitive approach to crime the only alternative. The paper discusses one of the ways in which alternative approaches can be pursued in the Indian context.

3 L. Wacquant "From 'Public Criminology' to the Reflexive Sociology of Criminological Productions and Consumptions" 51(2) *The British Journal of Criminology* 438-448(2010).

4 R. Reiner, "*Law and Order: An Honest Citizen's Guide to Crime and Control*" (Polity Press, London, 2007).

Part II of this paper discusses the contours of neoliberalism and penal practices against the popular belief that neoliberalism is purely an economic phenomenon. It is followed by a causal study of India's neoliberal penal culture vis-à-vis the neoliberal explanation to crime in India, neoliberal labelling and penal populism and the neoliberal Indian media in Part III. Part IV of the paper provides an alternative approach to the growing neoliberal penal culture in India in the form of a 'Public Criminology for India' followed with a conclusion that calls for an 'Evidence Based Policymaking' approach for a diverse India.

II Neoliberalism and Punishment

The term neoliberalism has been used prolifically in recent years and is associated with many of the changes that are experienced in our everyday lives. The frequency of its use has not necessarily resulted in a commonly accepted and precise definition. "Neoliberalism" is deeply contested like most "ism" terms. It is often misunderstood as a purely economic phenomenon. Foucault⁵ rightly emphasizes the need to avoid talking about contemporary neoliberalism as a pure and simple rearrangement of classical economic theories. He shows that the problem of neoliberalism is not how to cut out or contrive a free space of the market within an already given political society, as in the liberalism of Adam Smith. The problem of neoliberalism is rather how the overall exercise of political power can be modelled on the principles of a market economy. Thus, neoliberalism implies that it is the market that supervises the state and not the other way around. What is important and decisive in current neoliberalism is the adoption of the free market as the organizing and regulating principle of the state.

By advocating market solutions to problems in almost all fields of human activity, neoliberalism comes to have a pervasive scope. It is associated among other things with free-market ideals, deregulation of public policies, privatisation of state assets, and globalisation of ideas and cultures. These can be traced long back in time. Nevertheless, most scholars identify the period following 1970 that saw the rise of Ronald Reagan and Margaret Thatcher, the wave of privatizations, and the economic policy prescriptions of the IMF-World Bank "Washington Consensus" of the 1990s as the defining neoliberal turn of events and policies.⁶

The impact of neoliberalism on criminal justice may appear to be something of a paradox if neoliberalism, just as liberalism of the 19th century, is understood in terms only of labels and categories such as 'free v. regulated market', 'market efficiency v.

5 Michel Senellart (e.ds) and Graham Burchell (trans.), M. Foucault "*The Birth of Biopolitics*" (Palgrave Macmillan, Basingstoke, 2008).

6 B.E. Harcourt, "*The Illusion of Free Markets: Punishment and the Myth of Natural Order*". (Harvard University Press, Massachusetts, 2011)

government inefficiency'. Such labels confuse us more than they enlighten us. For example, Amartya Sen has tried to set the record straight about Adam Smith, who is regarded as the father of modern economics. Sen has argued that Smith was not the single-minded dogmatic prophet of capitalism and free markets as he is often made out to be. In fact, Smith recognised the need for nonmarket institutions (like the state) to act for people's welfare.

Apart from causing mischaracterization, labels can hinder separating rhetoric from practice. As Harcourt points out, free markets are illusory as the state is present in all markets. The state is present not only when it explicitly or implicitly intervenes, but also when it chooses to leave the market alone. Therefore, going past the market-driven rhetoric of neoliberalism is crucial to explain its impact in the field of criminal justice.

Neoliberal transformation in most Western nations is seen to have facilitated in direct or indirect ways the expansion of the role of the state in the penal sphere. During the period 1970 to 2010, more people were incarcerated in the United States than were imprisoned in any other country.⁷ In 2008, the United States incarcerated more than 1 per cent of its adult population. A large proportion of prisoners serving a life sentence or Life Sentence Without Parole (LSWP) added significantly to the unprecedented rise in the prison population. Though the US penal phenomenon has been the most astounding, Tonry⁸ argues that the scale is distinctly American—high imprisonment rates have been experienced also in those Western style democracies that have vigorously pursued neoliberal policies. The UK mirrors the US trend to a significant degree.

Penal theorists have been averse to giving a causal explanation of the penal inflation solely in terms of neoliberalism, and reasonably so. It will immediately invite some valid objections and controversies. First, even among European countries that have taken a neoliberal turn, like France, Germany, Italy, for example, the rates of incarceration are comparatively much lower than those of the US/UK. Second, such an explanation fails to account for penal diversity existing within the states in the US. Third, as Bell⁹ points out, there is no inevitability about the link between punitive crime policies and neoliberalism. While some countries, such as Russia and South Africa, have moved towards neoliberalism at the same time as they have reduced their prison populations, other countries, such as China, have arrived at extremely punitive

7 H. A. Thompson, "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Post-War American History" 97(3) *The Journal of American History* 703-743 (2010).

8 M. Tonry, "Why U.S. Incarceration Rates are so High?" 45(4) *Crime & Delinquency*, 19 (1999).

9 E. Bell, "*Criminal Justice and Neoliberalism*" (Palgrave Macmillan, London 2011).

penal policies without embracing the Washington Consensus model of economic growth.

However, it has been clear to many theorists that the growth in imprisonment rates at the turn of the twenty-first century is epochal. It has also been clear that these developments are not simply attributable to single explanations like rising crime rates, or changes in sentencing laws¹⁰. In fact, a number of direct and material explanations have been offered for them. Some theorists have used new ideas such as the ‘new penology’¹¹, ‘culture of control,’¹² and ‘new punitiveness’¹³ to describe the fundamental shifts in the penal sphere. Simon¹⁴ has attempted to depict the culture of fear that has been created around crime, and how that has been exploited by the state in “governing through crime”. Wacquant¹⁵ expressly ties the punitive turn to the evisceration of the welfare state since the 1970s and its replacement with workfare.

Works like those cited above have explored the causes of hyperincarceration over recent decades in great detail. Connecting the dots for a broader picture is equally necessary. What has become obvious is that the increasing harshness in the penal sphere and the growing ascendancy of neoliberalism are not merely coincidental. There is a connection. According to some commentators, the rise of mass imprisonment is consistent with the broad political agenda of the neoliberal state. It is difficult not to agree with the point so authoritatively made by Bell¹⁶ on the issue of connection between neoliberalism and punitiveness. She says that the context of neoliberalism has created the conditions that make the adoption of punitive responses to crime, notably over-use of imprisonment, more likely, even if such responses are not necessarily intrinsic to neoliberalism itself.

Neoliberalism has created a climate in which a number of factors appear to have contributed to the increased use of imprisonment. Fear of crime and feelings of

10 C. Cunneen, D. Brown, *et al.*, “*Penal Culture and Hyper incarceration: The Revival of the Prison*” (Ashgate Publishing, Farnham, 2013)

11 M.M. Feeley and J. Simon, “The New Penology: Notes on the Emerging Strategy of Corrections and its Implications”, 30 *Criminology* 449-474(1992).

12 D. Garland, “*The Culture of Control: Crime and Social Order in Contemporary Society.*” (University of Chicago Press, Chicago, 2001)

13 J. Pratt, D. Brown, M. Brown, S. Hallsworth, *et al.* “The New Punitiveness”, 46(2) *The British Journal of Criminology* 367-370(2013).

14 J. Simon, “*Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*” (Oxford University Press, New York, 2007).

15 L. Wacquant, “*Punishing the Poor: The Neoliberal Government of Social Insecurity* (University Press, Duke, 2009)

16 E. Bell, “The Prison Paradox in Neoliberal Britain”, in D. Scott (eds.), *Why Prison? Cambridge Studies in Law and Society*, 44-64 (Cambridge University Press, 2013).

insecurity among ordinary law-abiding people, rather than objective crime levels, have emerged as the most pressing challenge. Combined with these has been a public perception of the need for 'tougher' penalties. Although the proportionality principle in dealing with crime has not been discarded, it seems to have been increasingly sidelined by growing concerns with public safety and the reduction of risk.¹⁷

Among various punitive measures for preventing crime, imprisonment was favoured over others because of its demonstrable and symbolic characteristic. An ideology, encouraged by the state, took hold that the public would be safer and better protected from the risk of victimization by incarcerating those who had offended against them for as long a time as possible.¹⁸ Incapacitation came to be seen as the most important purpose of criminal punishment, and rehabilitative aims were abandoned. Reliance on incapacitation carries the tendency not only to expand the proportion of cases punished with imprisonment but to extend the duration of prison terms.¹⁹

As a result of these conditions, the role of the state in criminal justice has been scaled up in an unprecedented way. The state's economic, social, and political institutions have become heavily bound up with the practice of punishment. Prisons and jails present the sites where the state's power is most vigorously exercised.

The war on drugs, law-and-order and tough-on-crime political strategies, specific racial discrimination in sentencing and proling, as well as the embrace of actuarial methods, selective incapacitation, mandatory minimum sentences, and three-strikes laws, among other factors, played a direct role, and are immediately responsible for the exponential growth of prison populations.²⁰

Those who fall for the neoliberal rhetoric of contempt for a big government will find it difficult to square it with massive spending on prisons and setting up of a penal Leviathan. "Whatever happened to the rolling back of the state?" they may wonder. To be fair, when the cost of running prisons became too exorbitant, the states did try to bring it down by adopting managerialist principles, and gradually turning to privatization of prisons. Prison expansion thus surely served some big business interests. However, the emergence of the carceral state will continue to cause a sort of cognitive dissonance if neoliberalism is taken to be a neat concept with consistent outcomes across different fields.

17 A. Bottoms, S. Rex, *et.al. Alternatives to Prison: Options for an Insecure Society*. (Willan Publishing, London, 2004).

18 L. Windlesham, *"Politics, Punishment, and Populism"* (Oxford University Press, New York, 1998).

19 F.E. Zimring & G. Hawkins, *"Incapacitation: Penal Confinement and the Restraint of Crime"* (Oxford University Press, New York, 1995).

20 *Supra* note 6 at 5.

Another problem could again be that neoliberalism is at times considered as a factor either on its own or in isolation from the rest of the variables. Perhaps that is why Lacey²¹(2008) specically focuses on the question of neoliberalism, but proposes an additional set of economic, institutional, and cultural dimensions that mediate neoliberalism to help explain some of the penal differences, including the level of inequality, the composition of labour markets, ethnic diversity and migration patterns, welfare support, educational and vocational systems, as well as other political and institutional factors.

The heterogeneity even within neoliberal systems on the question of punishment should not to be overlooked. As Beckett²² mentions, the belief that criminal offenders should be severely punished, for example, coexists with widespread support for policies aimed at rehabilitation. Many Americans continue to attribute crime to environmental and social conditions, a position typically associated with support for prevention and rehabilitation rather than punishment. Just as neoliberalism is not unavoidable (the example being Scandinavian countries), high incarceration rates are not inevitable.

To say that these carceral developments have been facilitated, and not caused, by the rationality of neoliberal penalty, does not mean papering over some of the most pernicious effects of neoliberalism. For example, it has been acknowledged even by the IMF that specific neoliberal policies have caused increased inequality.²³ Increased inequality exacerbates the underlying social and economic problems which are regarded as criminogenic. This, in turn, tends to necessitate, as per the logic and condition of neoliberal penalty, authoritarian approaches to crime to maintain social order.

To sum up, the relationship between neoliberalism and penal policy is a complex one. It is not amenable to easy straight explanations and unchanging universal certainties. That said, the role of neoliberalism in shaping the penal policy of any country will continue to be extremely significant.

III Neoliberalism and India

In the previous section, we drew upon literature to analyse how neoliberalism interacts with penalty in general. In this section, our focus shall be on neoliberalism and India since the 1990s. Social inequality is rampant across India and is being aggravated due to the

21 N. Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies*, (Cambridge University, Cambridge, 2008)

22 K. Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics*, (Oxford University Press, New York, 1997)

23 W. Martin, "Even the IMF is Starting to think we have an Inequality Problem" *Business Insider* available at <http://www.businessinsider.in/Even-the-IMF-is-starting-to-think-we-have-an-inequality-problem/articleshow/52466296.com> (last visited on March 11, 2018).

forces of neoliberalism.²⁴ Thwarted aspiration to achieve neoliberal goals through legitimate institutions is one of the pivotal reasons behind an individual becoming “anti-social”. Social inequality is also rising, though it may be less noticeable in the metropolitan India with its “space programme, sophisticated weaponry, sports towns, growth figures, Formula 1 race track and gleaming malls”.²⁵ The pressure to be a part of the “elite society” is increasing like never before, with the most limited number of available opportunities. The following illustrations shall better highlight the influence of neoliberalism on rising gender, social and economic inequality in India.

Illustration No.1: Despite widespread campaign on women empowerment in emerging 21st century India, hypergamous marriages are still a norm in most of the rural and even urban India. “This has led to a situation...where the suitable boy is in a commanding position to demand a lavish dowry while, on the other hand, the unemployed lower-class male finds it difficult to get married”.²⁶ Good employment, consequently, “not only leads to social honour and position but also translates as an asset in ensuring a good marriage, i.e. a marriage with a large dowry and a ‘better girl’ possibly belonging to a well-connected and influential family”.²⁷ An archaic custom is thereby fostered and reinforced through neoliberal culture that demands wealth and luxury.

Illustration No.2: Vinay Sharma, one of the co-accused in the Delhi gang rape (2012) too was overwhelmed by “India’s rapid growth over the past two decades, kick-started by a period of free-market economic reforms and urbanisation”.²⁸ According to his mother, Champa Devi, he wanted to “make it big” in life.²⁹ He aspired to the kind of life that the victim of the gangrape was striving for; the crucial difference being that

24 Editorial, “The gap between India’s richer and poorer states is widening” *The Economist* 2017, available at: <https://www.economist.com/news/finance-and-economics/21727867-economists-are-baffled-arguing-poorer-states-should-be-catching-up>. (Last visited on March 19, 2018).

25 C. Todhunter, “What has neoliberal Capitalism ever done for India”, *Counter Current*, 2016 available at <https://countercurrents.org/2016/11/29/what-has-neoliberal-capitalism-ever-done-for-india/>, (last visited on March 24, 2018).

26 P. Chowdhury, *The veiled women: Shifting gender equations in rural Haryana*. (Oxford University Press, New Delhi, 2008)

27 *Supra* note 26 at 11.

28 M. Williams, A.R. Choudhury, “Delhi Rape Accused lived on Margins of India’s Boom”, *Reuters Editorial*, 2013 available at <https://www.reuters.com/article/us-india-rape-accused/delhi-rape-accused-lived-on-margins-of-indias-boom-idUSBRE90B05G20130112>. (last visited on March 25, 2018)

29 Editorial, “Infamy he earned is eating me up”, *The Telegraph* 2013, available at https://www.telegraphindia.com/1130113/jsp/nation/story_16436051.jsp (last visited on March 18, 2018).

while the victim was doing so by abiding with socially approved institutional norms such as education etc., Vinay Sharma was perhaps never exposed to the normative institutional platforms. He could have achieved his own legitimate goal had his social surroundings been conducive enough. It might have displaced him from the crime scene. None of this reduces his individual culpability, but only seeks to analyse other factors that have a role to play in crime.

Neoliberal policies distract our society from investing in improving such social surroundings.³⁰ There is hardly any endeavour or collective effort to help others, especially in an era when wealth is a sign of superiority, dominance, power and success. As Christie³¹ so movingly put it, “We function each day, as migrants moving between sets of people which do not need to have any link—except through the mover. Often, therefore, we know our workmates only as workmates, neighbours only as neighbours, fellow cross-country skiers only as fellow cross-country skiers. We get to know them as roles, not as total persons”.

Therefore, fragmentation of the society at large is one major offshoot of the contemporary neoliberal society along with the other factors highlighted above. While devising alternatives to neoliberal public policies, there must be an attempt to knit the fragmented society back to an extent where we envisage collective growth and interpersonal relations. This will help us in empathetically understanding and rehabilitating offenders rather than demanding prolonged incarceration that would actually prove to be counterproductive and costly.

Distinctive Aspects of Neoliberalism and Penalty in India

India even after many years of independence continues to be governed mostly by the colonial era laws and by-laws. Penal policies of the United Kingdom have had a considerable influence over the Indian policies. Further, in today's globalized world, penal policy transfer is a well-known phenomenon. At the same time, the influence of external factors is to be examined rather than assumed. One-to-one policy congruence is not only unlikely because (i) local cultures, values and traditions may determine how a policy borrowed from outside plays out, (ii) the global trend though led by most Western countries is also marked by notable exceptions, and (iii) even when the global policy is implemented, its effects are likely to be mediated by country-specific factors.

Having said this, the convergence of social and economic policies worldwide creates an enabling environment for increasing commonalities. Incidence of crime and the subsequent social construction of crime in a contemporary neoliberal/globalized society

30 *Supra* note 26 at 11.

31 N. Christie “Conflict as Property” 17(1) *British Journal of Criminology* 1-15 (1977).

stems from multiple factors, such as infotainment-led media³², social networking, moral panics, debates and other platforms that host content injurious to public interest. We often isolate the law enforcement agencies, holding them exclusively liable for crime prevention and prosecution in an increasingly complex criminal justice system that is continuously interacting with the prevailing socio-economic-politico-cultural environment. Is that a reasonable approach? Offences like Nirbhaya gang rape attract strong punitive measures. Can strict laws curb crime?³³ Can harsher laws and longer jail terms overcome selective instances of moral panic like Nirbhaya and the demand for penal populism in one of the largest democracies of the world? Is there no alternative to T.I.N.A.?³⁴ Answers to these rhetorical questions perhaps lie in recognising the 21st century ‘consumerist or neoliberalist culture’ itself as a situation that needs to be tackled in India as elsewhere in the world. But before answering these rhetorical questions and exploring the role of neoliberal Indian media in promoting penal populism, we shall discuss how neoliberalism in India has mitigated the gravity and stigma associated with certain white-collar crimes in contrast to conventional crimes while widening social inequality through ‘neoliberal labelling of crimes’.

(a) *Neoliberal Labelling and Penal Populism in India*

The consumerist/neoliberal culture discussed above has not only advanced the role of ‘experts’, it has further strengthened social inequality in the administration of criminal justice in India. While access to justice today depends on access to good lawyers—especially in light of the ever-deteriorating state sponsored legal aid³⁵—access to mental health professionals, for example, has mitigated wrongs committed by those in the higher echelons of society. Where a senior bureaucrat’s wife was in the dock for her online shopping spree of over INR 10 lacs, her friends were quick to label her as someone suffering from a “compulsive buying disorder—psychological disorder characterised by an obsession with shopping that causes adverse consequences”³⁶. She might be genuinely suffering from a psychological disorder that mitigates her guilt

32 Infotainment is a combination of information and entertainment.

33 S. Dogra, “Can Strict Laws Curb Crime.” *Hindustan Times*, 2013. Available at <https://www.hindustantimes.com/chandigarh/can-strict-laws-curb-crime/story4vZr0VLeEVokl5iXh9VWmK.html>. (Last visited on December 31, 2017).

34 T.I.N.A.: a commonly used acronym for the idea that “There Is No Alternative to Neoliberal Policies” (Bell 2014).

35 N.R. Menon, “Serving the Justice Needs of Poor”, *The Hindu* 2013. Available at: - <http://www.thehindu.com/opinion/lead/serving-the-justice-needs-of-the-poor/article5415018.ece>. (last visited on March 24, 2018)

36 Editorial, “IAS Officer’s Wife in Dock for 10 lakh Online Shopping” *The Times of India*, 2016. available at: - <https://timesofindia.indiatimes.com/city/bhopal/IAS-officers-wife-in-dock-for-10-lakh-online-shopping/articleshow/54636598.cms>. (last visited on March 21, 2018)

or *mens rea*. But that is not the point here. The fact that wrongs committed by the marginal and socio-economically backward may not attract similar condonation makes the administration of criminal justice, “pro-rich”. This adds another dimension to the consumerist society where costly services of the mental health professionals are barely within the reach of those who are most affected by mental health disorders. And when their mental health crises go unheard, crimes committed by them are labelled purely as crime or even “heinous crimes” requiring stringent punitive and deterrent measures.

Neoliberalism has not only enabled the privileged or the socio-economically better situated a prompt access to justice, it poses a serious and unprecedented threat to the expenditure on legal aid.³⁷ Classification based on caste, class, socio-economic status and demography etc. is leading to wrongful convictions, accentuating injustice while simultaneously lowering institutional legitimacy throughout India which then acts as a vicious cycle and fuels the demand for penal populism.

In terms of Becker’s³⁸ labelling theory, which highlights the role of “the socially powerful” in labelling individuals—usually marginalised—as deviants, neoliberalism seems to be opening up bigger doors for such labelling to occur. This in turn accentuates the crimes committed by “outsiders” against those who are socially powerful. Therefore, penal policies that are derived from such targeted labelling is hardly a rational response to crime.

Institutions such as media, which is often referred to as the “fourth pillar of the Indian Constitution” can address some of the concerns highlighted in this section through public awareness. However, given the influence of neoliberalism on India’s print and electronic media itself, there is a big question mark on whether it can do so. The next subsection seeks to explore and investigate the role of Indian media in promoting neoliberal labelling and penal populism.

(b) *Neoliberal Indian Media*

In our investigation of the underlying causal mechanisms between penal populism in India and neoliberalism, the ‘infotainment-led contemporary media’ emerges at the forefront. “With the ever-increasing role of media in both reporting crime and shaping it into infotainment, the importance of the interplay between contemporary media and the criminal justice system is greater today than ever before”³⁹. Media has

37 S. N. Kapadia, “India’s Austerity Sham”, *The Business Insider* 2012. Available at: <http://www.businessinsider.com/indias-austerity-sham-2012-8> (last visited on Feb 26, 2018).

38 H.S. Becker “*Outsiders; studies in the sociology of Deviance*” (Free Press of Glencoe, London, 1963).

39 R. Surette “*Media, Crime, and Criminal Justice*” (Cengage Learning, Stamford, 2010).

undoubtedly established its credibility when it comes to reporting corruption, crime and other human rights violations. However, the role of media in fostering moral panics that invariably lead to toughening of penal policies are evidently undeniable as well. As Cohen (2002)⁴⁰ rightly points out, “attribution of the moral panic label means that the thing’s extent and significance has been exaggerated (a) in itself (compared with other more reliable, valid and objective sources) and/or (b) compared with other, more serious problems.”

Lately, the definition of mass media and multi-media has expanded beyond the conventional forms with the advent of social media like Facebook, Twitter, WhatsApp etc. In this era of 24-hour news media, the mass media are the primary source of the public’s knowledge about deviance and social problems⁴¹. While mediatrials are on one side of the spectrum, on the other side, facts are often ‘heated up and sensationalized politically, rather than evidentially’⁴². Moral panics, once ‘unintended outcome of journalistic practice, seem to have now become a goal’⁴³. In fact, moral panics have not only become a way in which daily events are brought to the attention of the public, but it appears to have become an unavoidable *modus operandi* for the media houses in an infotainment-led market wherein TRP or the ‘Television Rating Points’ are the bench mark of productivity. Therefore, criminal incidents are demonised by media through graphic and visual representation of offenders as ‘Folk Devils’.

Due to its immense diversity and socio-demographic complexities, India is especially vulnerable to moral panics and the subsequent public demand for severe penal action (Pai 2015)⁴⁴. It is therefore important that free media does not degenerate into irresponsible media. Unless the media is able to resist the forces of neoliberalism which undermine its freedom and conscience, the risk of the public being whipped into moral panics from time to time will remain. Low public awareness about such ‘profit-making media frenzy’ only heightens the risk. Very few in India who consume news engage in introspection and self-reflection⁴⁵. In this scenario, there are compelling

40 S. Cohen “*Folk Devils and Moral Panics: The Creation of the Mods and Rocker*” (Routledge, Abington, 2002).

41 *Ibid.*

42 I. Loader, “What is to be done with Public Criminology” 9(4) *Criminology & Public Policy* 771-781 (2010).

43 A. McRobbie, S.L. Thornton, “Rethinking ‘Moral Panic’ for Multi-Mediated Social Worlds” 46(4) *The British Journal of Sociology* 559-574. (1995)

44 N. Pai (2015) “All the worlds in a moral pani” *The Hindu*, 2015 available at: <http://www.thehindu.com/todays-paper/tp-opinion/all-the-worlds-in-a-moral-panic/article8001996.ece>. (last visited on January 24, 2018).

45 *Supra* note 43 at 17.

moral and even selfish reasons for the media not to exploit moral panics for commercial gains. Media personnel are eventually the part of the same society they create for all of us.

The threat of ‘trial by media’⁴⁶ taking over trials in courts has been acknowledged in the open. One such acknowledgment was made by a division bench of the Delhi High Court in light of the December 2012 gang rape, wherein the Court, while staying the airing of the documentary ‘India’s Daughter’, observed, “Media trials do tend to influence judges. Subconsciously a pressure is created and it does have an effect on the sentencing of the accused/convict”.⁴⁷ Crime rates and reporting are going up. However, it is often the hypothetical and graphical/pictorial representation of events that indisputably outrage public emotions and aggravate the stigma associated with a criminal conduct. This, in turn, can affect the judges.

There is an urgent need to highlight the role of ‘expert narrative’ in mitigating moral panics, in contrast to the ‘lay narrative’ that quite often aggravate a moral panic. Research suggests that “during moral panics and media frenzies the atypical case is compressed into general categories of crime control (such as juvenile violence)”⁴⁸. Therefore, in order that an issue of concern is proportionately addressed, and yet a moral panic is not brought about, it is essential that media narrative highlight and encourage “socially accredited experts [to] pronounce their diagnosis and solutions, so that ways of coping are evolved...and the condition becomes more visible”⁴⁹

The media must make an honest endeavour to interview individuals with socio-legal backgrounds, who highlight the underlying circumstances pertaining to a given situation and thereafter address the ‘root-causes’ of the problem. Criminologists through the media can highlight that harsher quantitative sentence, at the expense of rehabilitative and restorative sentence/measure, is not an answer to addressing crimes, both violent and non-violent in general.

46 ‘Trial by media’ is defined to mean “the impact of television and newspaper coverage on a person’s reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity court cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial nearly impossible but means that, regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny”

47 A. Mehta, “Dec 16 Documentary: Media Trials tend to Influence Judge, says HC”, *The Hindustan Times* 2015. Available at: - <https://www.hindustantimes.com/india/dec-16-documentary-media-trials-tend-to-influence-judges-says-hc/story-SW4kmavKsT19rHNhMhNqb1K.html>. (last visited on March 11, 2018)

48 *Supra* note 40 at 17.

49 I. Marsh, G. Melville, “Moral Panics and the British Media- A Look at some contemporary ‘Folk Devils’” *Internet Journal of Criminology* (2010).

The above aspects of neoliberalism have undoubtedly influenced penal public policies in India. At the same time, an allied and contributory factor that we must investigate especially in the South Asian context is the extremely limited presence of ‘Public Criminology’. Criminologists across the world have been trying to undo the punitive impasse in penal politics, i.e. the fast track and ineffective political solution to moral panics that aggravate penal policies and ostensibly restore some credibility to the political class. The following section will define and highlight the role of “Public Criminology” in countervailing neoliberal penal populism or the ‘punitive impasse’ referred above.

IV Public Criminology for India

Public Criminology as an alternative to the “punitive impasse” in penal politics is inspired by the work of Loader and Sparks⁵⁰. It is an attempt to draft an exit strategy from the present trend of penal populism. In the words of Wacquant, “[p]ublic criminology is an oblique yet keen response to this traditional drift towards reactive punitiveness, especially in its proposal to deploy ‘cooling devices’ to inject baseline rationality and civic mindfulness into the penal policy goulash.” These ‘cooling devices’, in the words of Bell⁵¹, are “prioritizing human rights; changing the focus from state legitimacy to democratic legitimacy; and moving beyond a crime-oriented politics towards one that focuses on encouraging social justice”.

While the idea of ‘public criminology’ for India does echo the notion of public criminology in the West, the peculiarities of the Indian criminal justice will inevitably condition its nature. The extremely limited public participation within the criminal justice system and in the administration of criminal justice, especially the acute absence of victims and offenders from India’s contemporary crime control model has opened neoliberal doors for ‘tough on crime’ approach as this remains the only avenue for the public to express their concern on real and ostensible issues. Harsher sentences are one of the promptest responses offered to a moral panic or a heinous crime post 2012-Delhi gang rape. While the judiciary is bound by the law of the land, the indulgence of the Indian judiciary in the ‘tough on crime’ approach cannot be negated either. From crimes against women to juvenile offenders, Indian Courts adopted increased incarceration as the preferred sentencing approach in 2016⁵². Low levels of police and institutional legitimacy⁵³ coupled with high levels of illiteracy exacerbate the challenges

50 *Supra* note 43 at 17.

51 *Supra* note 9 at 6.

52 Editorial, “From Crimes Against Women to Juvenile Offenders, Indian Courts acted Tough in 2016”. *DNA India*, 2016.

53 A. Verma, “Politicization and Legitimacy of Police in India” In Mathieu Deflem (Ed.) *The Politics of Policing: between Force and Legitimacy* 115–132. (Emerald Group Publishing Limited, Bingley, 2016)

facing the criminal justice in India. According to a report by the United Nations Educational, Scientific and Cultural Organization, India has the highest population of illiterate adults in the world at 287 million. All this provides a fertile ground for penal populism and forms a major barrier to awareness about ill-effects of neoliberalism including turning a welfare state into a 'penal state'.

The absence of policies such as Victim Impact Statement (VIS) or Victim Personal Statement (VPS) makes the Indian criminal justice system 'expert centric'. Victim Impact Statements are "statements read by, or on behalf of, crime victims at the sentencing phase of criminal trials"⁵⁴. They form a robust mechanism for the victims to participate in the administration of criminal justice and to voice their emotions and concerns. Victims are alienated from the system that does not give them such an opportunity. Another impediment in developing a truly participatory 'public criminology' in India is the dearth of restorative justice policies that promote communication between the offender and the victim.

Norwegian criminologist Nils Christie (1977)⁵⁵ in his distinguished paper titled 'Conflict as Property' unequivocally identified how conflicts are 'stolen' from the parties, especially by lawyers, who are trained to 'prevent and solve conflicts'. The conflict between the offender and the victim (inclusive of the family, friends and the society at large) is stolen by experts in law and sociology. Those who actually own the conflict are thereby left with merely one avenue to express their emotions, i.e. protests and harsher sentences. Therefore, in our opinion, inclusive and participatory criminal justice policies can have a moderating influence on punitiveness. The current system that puts a premium on certified experts who disable individuals from resolving their inter-personal conflict comes in the way of pursuing restorative justice and a public criminology.

Furthermore, "privatisation and commodification of criminology related knowledge is another impediment to developing alternatives and truly public criminology". Private funds cater to vested and sectional interests, thereby commodifying criminology as opposed to bringing out research and evidence based criminological findings. Public research budgets being negligible are unable to fill the vacuum, more so because public institutions in India seem to be reluctant in investing public money into evidence-based policies. The West, on the other hand, seems to be moving in the opposite direction. It is infact austerity and budget cuts that have shaped Evidence Based Policy Making or EBPM in the United Kingdom⁵⁶. The question remains as to how public

54 M. Stevens, "Victim Impact Statements considered in sentencing" *2(1) Berkeley Journal of Criminology* (2000).

55 *Supra* Note 32 at 12.

56 P. Wells "Evidence Based Policymaking in the Age of Austerity" *11(3) People Place and Policy* 175-183 (2018).

criminology would emerge in India. How should we build a strong social consensus against the detrimental effects of neoliberal punitive turn?

There may be something to learn from the past though being fully wary of the risk of romanticizing it. Prior to industrialisation, legal traditions of the world were closely knit. Particularly in Asia, be it the Hindu legal tradition, the Islamic legal tradition or the Confucian legal tradition (Chinese), societies collectively adjudicated the conflict between parties with ample communication between the offender and the victim⁵⁷. This was the phase when societies collectively moved towards “welfare states” and arguably towards the most utilitarian rationale for public policy⁵⁸ in criminal justice aimed at rehabilitating offenders and simultaneously impacting recidivism. However, “criminal law-making mindset today legislates towards an external standard that judges results and not the internal malice” and punitive legislations are portrayed as solving the core societal issues, which is far from reality.

As a possible way out, in the following conclusion we propose an evidence-based approach to penal policymaking in addition to developing a public criminology for India.

V Conclusion: Possible Way Forward

The preceding sections highlighted the scope and impact of neoliberalism, penal populism and unravelled the myths associated with neoliberal policymaking. We have proposed that a viable alternative to the above calls for responsible media, public introspection and increased public participation in the administration of criminal justice.

India needs to learn from “Evidence Based Policymaking” and “Evidence Based Policing” being implemented in the West. EBP as a concept is borrowed from medical science, wherein the same is referred to as “Evidence Based Medicine”. EBM is defined as a process of systematically reviewing, appraising and using clinical research findings to aid the delivery of optimum clinical care to patients. One aspect of clinical research in medicine is the use of Randomized Control Trials or RCTs often referred to as ‘gold-standards’ in medicine. In a RCT, individuals in a group are allocated at random (by chance alone) to receive one of several clinical interventions, and this group is referred to as a treatment group. The remaining others or the control group receives a placebo or a sugar pill or in fact no intervention at all. RCTs thus seek to measure and compare the outcomes after the participants receive the intervention.

57 H.P. Glenn “*Legal Traditions of the World*” (Oxford University Press, Oxford, 2014)

58 M.N. Giuliano “*The Risk of Liberty: Criminal Law in the Welfare*” Foundation for Economic Education (2008).

Likewise, Evidence Based Policing or Policy making is an endeavour to use clinical research to deliver optimum, cost-effective, friendly and crime reducing model of penalty and policing. A public policy based on EBP basically employs the Triple T technique, i.e. Testing an existing policy, followed by Targeting to understand the heterogeneity of a policy decision, and Tracking to track its cost and general effectiveness. This is done in a controlled social setting, especially by experts in their relevant field and is thoroughly checked for its robust internal validity. There are phases to involve public opinion and promote public awareness. However, the result takes away the unfettered political and bureaucratic discretion thereby mitigating neoliberal effects because the policy is derived from social experiments and evidences and not merely intuition or irrational impulses generated by the predominant socio-economic political climate of a country. It is further attractive to political class as well because the accountability in case of a policy failure based on EBP can be attributed to researchers and not to them.

Although evidence-based policing or policymaking has a vast scope and requires close analysis and exhaustive academic discussion, we limit our discussion by introducing EBP as an alternative to neoliberal penal populism especially for India, where EBP is seldom discussed or practised in policymaking. EBP's reliance on causality and the triple T practice highlighted above makes it the need of the hour when India is being affected by neoliberal policy of crime control and penal populism. Perhaps through independent or state sponsored RCTs or EBP we can shed some light on the obsolete nature of certain policies that continue to waste public resources. This would also enable us to build some legitimacy for EBP in India which is bound to have long term positive impact.