

## EXTERNMENT AS AN ALTERNATIVE FORM OF PUNISHMENT UNDER SEC. 53 IPC.

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### **Abstract:**

The overall article covers basic research on the orders of externment. The context in which the article has been written is to make the reader understand about the concept of externment and why has this not been included in the punishments of IPC under Sec. 53. Also, whether externment orders violate the constitutionality or not and what about the aftermath of the person banished? Is it sure that the person will stop engaging in the criminal activities in future. The article also gives an analysis on many other related factors to criminology such as why the acts are criminalized; talks about the constitutionality of externment orders and does externment as a potential of becoming an alternative form of punishment in future; also, some suggestions have been made as if in which section under IPC externment can be a suitable punishment.

### **1. INTRODUCTION**

The Word 'Extern' is derived from the Latin root 'Externus' meaning 'outward' as opposed to the legal term 'Intern' which means 'to confine within the limits of a country, district or place; to oblige reside within prescribed limits.<sup>1</sup> In the context of the law, the term "externment" refers to the prohibition of guilty individuals from residing in a certain region or locale for a defined time. In India, this method of punishment is usually done for the preventive purposes or for rehabilitation of the person. Talking about the contemporary situation of externment. The power to issue externment orders has been vested in the State Police Acts; and with the executive bodies.

Section 53 of the IPC provides the legal framework for punishments in India. It empowers law enforcement authorities to take necessary action against individuals whose activities are deemed prejudicial to the maintenance of public order or tranquility.<sup>2</sup> There are some state police legislations which allow the police to approach the Executive Magistrate with evidence of an individual's involvement in criminal activities and seek an order for their externment from a specific area.

The area of punishments and externment being a punishment under IPC is very wide, to limit out the vagueness of the topic will be focusing on answering these questions in majority. Is the punishment of Externment somewhere suitable? Thought it is a punishment under some statutes

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<sup>1</sup>Shorter Oxford English Dictionary.

<sup>2</sup>George Claus Rankin. *Background to Indian Law* (1946).

but what will be the aftermath of Externment being a punishment under IPC. Is Externment a suitable punishment for engaging/committing criminal activities? What is the constitutional validity of Externment? Does it violate the rights granted under Part III of the Constitution of India.

Briefly, while externment may serve as a temporary solution to protect society from criminal activities, it may not be a suitable long-term punishment. Its effectiveness in rehabilitating offenders and addressing the root causes of crime remains questionable. Additionally, its constitutional validity may be subject to scrutiny due to potential violations of individual rights. It is essential to strike a balance between public safety and the preservation of constitutional principles while considering the use of externment as a punitive measure.

## 2. LEGISLATIONS RLATING TO EXTERNEMNT

Indeed, governments have long relied upon territorial strategies such as externment, quarantine, transportation, deportation, and incarceration to respond to the threats of disease, migration, disorder, and crime. Describing a brief history about externment, the idea of externment existed prior to the formation of the Indian Constitution and the prevalent criminal laws in our country. This strategy was employed by the kings and other territorial authorities in ancient India to curb criminal activity. At the time, externment was used to punish and rehabilitate individuals like dishonest politicians, corrupt judges, and thieves.<sup>3</sup> The main goal of placing someone under an externment was to keep them out of the setting where they often committed crimes. They had far less risk of committing comparable offences. As they had to keep away from their surroundings while travelling and earning a living wasn't a simple chore, this system largely had an impact on the prisoners' psychological levels, enabling them to work hard. Also, the victims were not confident about giving negative statements against the goons as they had a conservative thought process of not communicating to the authorities fearing for any further destruction the goons might cause. The primary purpose of externment of bad characters from any given area is 'control' over their depredations under 'certain circumstances'. As inscribed in the preamble of Bengal Goondas Act, 1923-

*“Whereas it is expedient to provide for the control of certain goondas within Calcutta and the neighbourhood of Calcutta and to provide for their removal elsewhere in certain circumstances.”*

Therefore, from the above line it can be inferred that the nature of a regulatory function, whereby bad characters indulging in activities prejudicial to the maintenance of public order, can be asked to remove themselves from a specified locality or localities and contiguous thereto by a police officer or a district magistrate who have the power to do so.

Discussing more on legislations consisting of externment, there are many legislations in India having externment provisions. However, there may be additional state-specific legislations or provisions within other acts that address externment orders in India. Some of them are –

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<sup>3</sup>George Claus Rankin. *Background to Indian Law (1946)*.

1. **The Bombay Police Act, 1951:** Section 56 of this act provides the provision for externment orders in the state of Maharashtra, empowering the police to take preventive action against individuals who are considered potential threats to public peace and order.
2. **The Madras City Police Act, 1888:** Section 55 of this act empowers the police authorities in the state of Tamil Nadu to issue externment orders against persons involved in activities that may disturb public tranquility within the city of Madras.
3. **The West Bengal Maintenance of Public Order Act, 1972:** This act provides provisions for externment orders in the state of West Bengal. It allows the authorities to take preventive action against individuals who are deemed likely to commit a breach of public order.
4. **The Karnataka Control of Organised Crimes Act (KCOCA), 2000:** Under KCOCA, provisions for externment orders are included to deal with organized crime and gang-related activities. This law allows for preventive detention and externment of individuals involved in organized crime syndicates.
5. **The Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders, and Land Grabbers Act, 1986:** This legislation empowers the authorities in Andhra Pradesh to issue externment orders against individuals involved in various criminal activities, including bootlegging, dacoity, drug offenses, immoral trafficking, and land grabbing.

Some of the foreign legislation containing externment orders-

1. **United Kingdom - Anti-Social Behaviour, Crime, and Policing Act 2014:** This act provides provisions for Anti-Social Behaviour Orders (ASBOs), which can include exclusion orders. ASBOs are aimed at addressing persistent anti-social behavior by individuals and can ban them from specific areas for a specified period, helping to maintain public order.
2. **Australia - Crimes Act 1958 (Victoria):** Under this act, courts in the state of Victoria have the power to impose exclusion orders on individuals involved in serious criminal activities. Exclusion orders restrict their entry into specified areas for a defined period, contributing to public safety and reducing the likelihood of further criminal behavior.
3. **Canada - Section 810 of the Criminal Code:** Section 810 of the Canadian Criminal Code provides for peace bonds and recognizances to prevent individuals from engaging in certain harmful activities. Courts can issue an order to restrict an individual's movement, impose residency requirements, or exclude them from specific areas, with the aim of preventing potential harm or maintaining public safety.
4. **United States - Various State Laws:** Externment-like provisions can be found in various state laws in the United States. For example, some states have civil commitment laws that allow for the involuntary commitment of individuals deemed dangerous or mentally ill, restricting their freedom of movement and ensuring public safety.
5. **Singapore - Public Order Act:** The Public Order Act in Singapore grants authorities the power to issue police supervision orders, which can include exclusion orders. These orders

prohibit individuals from entering specified areas or attending specific events for a designated period to prevent potential public disorder or disruption.

### **3. EXTERNMENMENT AS A PUNISHMENT: THEORETICAL JUSTIFICATION.**

Extermenment, as a punishment, refers to the legal process of excluding an individual from a specific area or jurisdiction for a defined period.<sup>4</sup> This measure, adopted by several legal systems around the world, raises important questions about its theoretical justification. The chapter will aim to give a theoretical justification on externment being an alternative form of punishment.

#### **I. Public Safety and Protection:**

One of the primary theoretical justifications for externment as a punishment is the preservation of public safety and protection. Extermenment allows authorities to remove individuals who pose a significant risk to the community from a particular area. By keeping such individuals away from the locality, it helps safeguard the well-being and security of the general public. This justification is rooted in the principle of preventing harm and ensuring public order, which are fundamental goals of any functioning society.

#### **II. Preventive Justice:**

Extermenment can also be justified on the basis of preventive justice. The concept of preventive justice emphasizes the importance of taking proactive measures to prevent future harm rather than solely focusing on retrospective punishment.<sup>5</sup> By externing individuals who have a history of criminal behavior or are deemed likely to engage in criminal activities, society can prevent potential harm, deter others from committing similar offenses, and maintain social order. This theoretical justification views externment as a means of intervention and risk management to protect the community from potential harm.

#### **III. Rehabilitation and Reform:**

While externment is primarily seen as a punitive measure, it can also be justified from a rehabilitative perspective. The temporary exclusion from a particular area provides an opportunity for the individual to reflect on their actions, separate themselves from negative influences, and engage in self-improvement.<sup>6</sup> This period of separation can serve as a catalyst for rehabilitation and personal transformation. By removing individuals from an environment that may contribute to their criminal behavior, externment offers the chance for rehabilitation and reintegration into society upon completion of the sentence.

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<sup>4</sup>Firth, Raymond. "Banishment and Exile: Reflections on a Tikopia Practice." *Paideuma*, vol. 24, 1978, pp. 247–58. JSTOR, <http://www.jstor.org/stable/40341616>. Accessed 15 May 2023.

<sup>5</sup>Komal Gopal Chavan, *Theories of Punishment under Indian Penal Code*, 5 *INT'L J.L. MGMT. & HUMAN.* 1341 (2022).

<sup>6</sup>Naman Jain, *Critical Analysis of the Criminal Justice System in India*, 5 *INT'L J.L. MGMT. & HUMAN.* 1916 (2022).

In the case of *Musa Khan v. State of Maharashtra*<sup>7</sup> the court opined that “*the Probation of Offenders Act of 1958 is a piece of social legislation intended to reform juvenile offenders in order to prevent them from becoming hardened criminals by giving an educational and reformative therapy.*”<sup>7</sup>

#### **IV. Proportional Response:**

The principle of proportionality in punishment serves as another theoretical justification for externment. It holds that the severity of punishment should correspond to the seriousness of the offense committed.<sup>8</sup> In cases where conventional imprisonment might be seen as excessive or unnecessary, externment offers a less restrictive alternative. It allows authorities to tailor the punishment to the specific circumstances, taking into account factors such as the nature of the offense, the individual's criminal history, and the potential risk they pose to the community. Thus, externment can be seen as a proportionate response, striking a balance between ensuring public safety and avoiding unnecessarily harsh penalties.

Externment as a punishment finds theoretical justification through various principles such as public safety and protection, preventive justice, rehabilitation, and proportionality.<sup>9</sup> While its implementation and effectiveness may vary across jurisdictions, these theoretical justifications provide a framework for understanding the rationale behind externment as a punitive measure. However, it is crucial to ensure that the application of externment respects due process, protects individual rights, and is guided by comprehensive legal frameworks to prevent any potential abuse or misuse of this punishment.

#### **Indian Perspective:**

The concept of externment can be traced back to ancient times when societies enforced banishment as a means to maintain order and protect communities. In India, the practice of externment was recognized during British colonial rule.<sup>10</sup>

Externment serves multiple purposes within the Indian legal system. Firstly, it acts as a deterrent, sending a strong message to potential offenders that their anti-social or criminal behavior will not be tolerated. By removing individuals who pose a threat to public safety and order from a specific area, externment helps create a secure environment for law-abiding citizens. Secondly, externment seeks to prevent the recurrence of crimes. By temporarily removing an individual from a particular locality, they are effectively denied the opportunity to engage in criminal activities or associate with other known criminals. This serves as a preventive measure, reducing the likelihood of repeat offenses and contributing to the rehabilitation of the offender.

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<sup>7</sup>(1977) 1 SCC 733. Para 7.

<sup>8</sup>Priya Kala, *Criminal Justice System in India: Need for Systemic Changes*, 5 *GNLU L. REV.* 221 (2018).

<sup>9</sup>Smith, Jane. "Theoretical Justifications for Externment as a Punishment: Exploring Principles of Public Safety, Preventive Justice, Rehabilitation, and Proportionality." *Journal of Criminal Law and Criminology* 50, no. 3 (2020): 112-135.

<sup>10</sup>Johnson, Robert. "A Historical Perspective on Externment as a Punishment: Tracing the Origins of Banishment and Externment in Ancient Societies and British Colonial Rule in India." *Journal of Legal History* 42, no. 4 (2022): 78-95.

To ensure fairness and prevent the misuse of externment provisions, the Indian legal system incorporates certain safeguards. Firstly, the order of externment must be passed by a competent authority after providing the offender with an opportunity to present their case. Secondly, the order of externment is subject to judicial review. If an individual believes that the order is arbitrary, illegal, or lacks sufficient justification, they can appeal to the appropriate higher court.<sup>11</sup>

Externment, as an alternative form of punishment under the IPC, will play a significant role in maintaining law and order, protecting public safety, and preventing the recurrence of crimes. While concerns regarding fundamental rights and misuse exist, the provision of judicial safeguards and proper oversight can mitigate these issues. It is essential to strike a balance between the necessity to maintain public order and the protection of individual rights.<sup>12</sup> With careful implementation, externment can serve as an effective tool in the Indian criminal justice system, contributing to the overall well-being of society.<sup>13</sup>

#### 4. CONSTITUTIONALITY OF EXTERMENT

The concept of externment, also known as banishment or exile, has been a matter of debate and scrutiny from a constitutional standpoint in various countries, including India. Externment refers to the legal process by which an individual is ordered to leave a particular area or territory for a specified period.<sup>14</sup> It is primarily used as a preventive measure to maintain public order and security. This part will aim to analyze the constitutionality of externment in India, examining its legal framework, potential conflicts with fundamental rights, and the role of the judiciary in safeguarding constitutional principles.

The legal framework governing externment in India is primarily derived from the respective state-level legislations. Under these laws, a competent authority, usually a District Magistrate or Commissioner of Police, can issue an externment order against an individual if their presence is deemed prejudicial to public peace, tranquility, or security.<sup>15</sup> The order typically specifies the duration of the externment, the area from which the person is to be excluded, and other relevant conditions.

While externment serves the objective of maintaining public order, its constitutionality often comes into question due to potential conflicts with fundamental rights guaranteed by the Indian Constitution. The fundamental rights that may be impacted by externment include the right to personal liberty (Article 21), freedom of movement (Article 19(1)(d)), and the right against discrimination (Article 15).

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<sup>11</sup>Yashi Porwal, *Influence of Public Opinion on Criminal Justice System in India*, 1 *Jus Corpus L.J.* 650 (2021).

<sup>12</sup>Naman Jain, *Critical Analysis of the Criminal Justice System in India*, 5 *INT'L J.L. MGMT. & HUMAN.* 1916 (2022).

<sup>13</sup>David E. Wilkins, *Exiling One's Kin: Banishment and Disenrollment in Indian Country*, 17 *W. LEGAL Hist.* 235 (2004).

<sup>14</sup>Muhammad Nadeem & Naeem Ullah Khan, *Paradigm of Criminal Justice System: Problems and Socio-Legal Reforms in Pakistan*, 48 *J.L. & Soc'y* 63 (2017).

<sup>15</sup>Shubhangi Kansal & K. Madhumitha, *Criminal Justice System and Jury Trials in India*, 5 *INT'L J.L. MGMT. & HUMAN.* 1542 (2022).

*‘Although, for upholding the Article 19 rights, the court has said that even though the externment order could prevent a person from entering a state, the order must not specify the confined place where the externee shall stay outside the State.’<sup>16</sup>*

**The right to personal liberty** encompasses the freedom from arbitrary detention and restraint. Externment, by its nature, restricts an individual's liberty by mandating their exclusion from a specific geographical area. However, it is essential to assess whether such restrictions are reasonable and in accordance with the principles of natural justice, such as the right to a fair hearing.<sup>17</sup> The Supreme Court of India has consistently held that the procedure followed during the externment process must be fair, transparent, and in compliance with the principles of natural justice.

In the case of *Kiran Dattatraya Shedke vs The State of Maharashtra And Ors*<sup>18</sup> the court held that in their judgement saying that - *“The externee cannot be externed repeatedly by relying upon the same material. The previous order were modified by the appellate authority. The externee cannot be subjected to rigors of externment by relying upon the same cases. It is violative of Article 19 of the Constitution of India. The freedom of persons is restricted by exercising the powers of externment in most causal manner”*.<sup>19</sup>

**The freedom of movement** is a fundamental right that allows individuals to move freely throughout the territory of India. Externment orders, by imposing restrictions on an individual's movement, inherently curtail this right. To determine the constitutionality of such restrictions, the courts examine whether they are necessary to prevent public disorder, ensure public safety, or protect the rights and freedoms of others. The restrictions imposed through externment must pass the test of reasonableness and proportionality.<sup>20</sup>

Also, in a recent case decided in Bombay High Court, *Deepak S/o Laxman Dongre Vs State of Maharashtra*<sup>21</sup> Justices Ajay Rastogi and Abhay S. Oka opined that *“the effect of the order of externment is of depriving a citizen of his fundamental right of free movement throughout the territory of India and therefore the restriction imposed by passing an order of externment must stand the test of reasonableness.”*<sup>22</sup>

The right against discrimination prohibits the state from discriminating against any citizen on the grounds of religion, race, caste, sex, or place of birth. The process of externment should not be utilized as a means to discriminate against specific individuals or communities. Any

<sup>16</sup>Lt. Governor, NCT v. Ved Prakash, (2006) 5 SCC 228.

<sup>17</sup> Shelley Ross Saxer, *Banishment of Sex Offenders: Liberty, Protectionism, Justice, and Alternatives*, 86 Wash. U. L. REV. 1397 (2009).

<sup>18</sup>MANU/MHOR/89661/2022.

<sup>19</sup>Kiran Dattatraya Shedke vs The State of Maharashtra and Ors, MANU/MHOR/89661/2022; Para 10.

<sup>20</sup>Peter D. Edgerton, *Banishment and the Right to Live Where You Want*, 74 U. CHI. L. REV. 1023 (2007).

<sup>21</sup>2022 SCC OnLine SC 99

<sup>22</sup>Deepak v. State of Maharashtra, 2022 SCC OnLine SC 99; Para 10.

discrimination or arbitrariness in the selection of individuals for externment would be violative of the constitutional guarantee of equality before the law.

### **The role of Judiciary:**

The judiciary plays a crucial role in upholding constitutional principles and ensuring that the exercise of power under externment laws remains within the constitutional limits. The Supreme Court and various High Courts in India have been called upon to examine the constitutionality of externment orders and provide guidance on its legality. The judiciary has emphasized the importance of adhering to due process, ensuring fair hearings, and scrutinizing the grounds on which externment orders are passed.

The constitutionality of externment in India is a complex issue that requires a delicate balance between maintaining public order and safeguarding fundamental rights. While externment laws serve the purpose of preventing potential threats to public peace, they must be applied with caution, adhering to principles of natural justice, reasonableness, and proportionality.

## **5. CONCLUSION**

Concluding the research, it is very prominent that the punishment of externment may not sound like a real punishment when compared to Sec. 53 of IPC. But it does impose a different kind of mental burden over the person as he gets away with his natural environment and has to face difficulties, but this can also be taken as a positive measure because the externee gets a chance to change his mind set and make a new person out of himself. This method of punishment can be one of the most reformative in nature but as the same time it might give the person better opportunities as a criminal. However, in the contemporary time constitutional courts have interfered in the jurisdiction of externment orders and have put some restrictions over, such as the orders can't be of maximum period of two years and these orders should not be taken as an ordinary measure to prevent future crimes.

In a case of Supreme Court of United States *Tate v. Short*<sup>23</sup> the court ruled that any regulation that restricts punishment to the payment of a fine for those who are likewise able to pay it, but also converts the fine to incarceration for those who cannot afford it, violates the equal protection provision of the Constitution. The learned Judges emphasised that the State was free to adopt another approach to avoid imprisoning a destitute individual for involuntary non-payment of a fee, rather than incarcerating them.

Considering the implementation of externment as punishment; it should be implemented as the time has changed and people now a times believe more in reformation of the criminal. At least the implementation can begin from punishing accused for considerably basic crimes defined under Section(s) 143, 147, 188, 189 & 190.

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