Reimagining

Crime & Punishment in India

Criminal Law That Ought to Be- A Primer

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Introduction

A fundamental role of the State is to ensure 'public order' and protect the lives and interests of its citizens. Criminal law, by laying down and enforcing rules of conduct, performs a critical role in this. However, criminal law goes beyond that; it holds the power to deny individuals their most cherished rights - life and liberty. This monopoly over the right to impose punishment places criminal law at the centre of governance, and India is no exception.

In this primer, we attempt to understand the Indian State's view on crime, punishment, and its expectations from criminal laws. We start by examining the most fundamental questions on the purpose of criminal law in the Indian context. We then attempt to identify the theoretical basis of India's legislative and judicial policy on criminalisation by analysing a select set of criminal laws, judgments and reports of various committees. This theoretical construct is then used to evaluate India's criminal laws and understand the value in criminalisation across different kinds of laws.

India's theory of Criminalisation

The colonial thinking on crime and criminalisation

Prior to the enactment of the Indian Penal Code ('IPC') in the 19th century, criminal justice in India was administered through a complex and inconsistent web of laws. Different courts in British India applied different sets of criminal laws, depending on the location and the religion of the accused. For example, the Supreme Courts in the Presidency Towns followed English Law and Company Regulations, while the criminal courts in Mofussils applied Muslim Law.[1] These laws often prescribed conflicting definitions of offences, different standards of evidence and inhumane punishments.[2] These inconsistencies and irregularities across all the criminal laws posed significant difficulties in the administration of criminal justice. Therefore, there arose a need for a comprehensive and uniform code of criminal law.

Thomas Babington Macaulay, a member of the first Indian Law Commission and the mind behind the IPC, was averse to the idea of simply consolidating these existing laws. Influenced by the Utilitarian theories of Bentham and Mill, Macaulay drafted the IPC

[1] M.C. Setalvad, *The Common Law of India* (Hamlyn Trust, 1960).
[2] The Indian Penal Code, 1837, Prefatory Address to the Governor General in Council, p. X.

based on the principles of comprehensiveness, clarity and precision. The 19th century, therefore, saw a rational analysis and systematisation of criminal law in India.

The theory of utilitarianism holds that the object of any law should be to promote the greatest happiness for the greatest number of people and to minimise pain and suffering. For criminal law, the purpose is to either prohibit such conduct that generates pain or to minimise the effects of such conduct by prescribing punishments. The utility of punishment lies in its capacity to prevent future crime by deterrence. However, for the punishment to be justified, it must be proportionate to the crime, ensuring that the overall happiness is maximised. (Bentham, *An Introduction to the Principles of Morals and Legislations*)

Drawing from this idea of utilitarianism, the IPC classified such acts as offences which generated harm or evil for the community. Deterrence became central to crime prevention and punishments were designed to induce fear among the native Indians, to effectively deter them from committing crimes. Offences and their punishments were designed to be proportionate to each other, with the severity of punishment indicating the degree of disapproval by the state, serving as an effective deterrent to crime. For instance-

a) For offences such as rape and mutilation, harsh punishments were deemed necessary because of the evil these crimes produce and the terror they spread through the society;
b) For offences against property, criminal law was seen as a guard to protect civil rights;
c) Embezzlement of public money by public servants was criminalised and punished because it caused injury to revenue;
d) Pleading falsely before a court was punished because it impeded the administration of justice;
e) Offences against religion were recognised because of the inherent nature of Indian society and that such offences may sometimes even lead to armed insurrection. [3]

"The pain which is caused by punishment is unmixed evil. It is by the terror which it inspires that it produces good."

Indian Penal Code, 1837, Appendix, Note A, p.94

[3] The Indian Penal Code as originally framed 1837, Appendix Note K, p. 137.

Drafters of the Indian Penal Code, 1837 on various punishments

Death Penalty

Was needed to distinguish gravity of murder from other crimes and provide a restraining motive. It was thought of as an appropriate punishment because 'nothing' is so dear to a person as life.

Transportation for life

Was considered to be an appropriate form of punishment for Indians because they regarded it with 'peculiar fear'. It was because of this; transportation was expected to 'inspire more terror' than the actual pain it caused.

Imprisonment

Was considered as an efficacious punishment, if it was accompanied with strict restraint, regular employment in labour and deprivation of all indulgence.

Forfeiture of property

Was considered to be an appropriate punishment for persons guilty of political offences. The objective was to deprive people of their territorial possessions that enable them to disturb peace.

Fine

Was considered as the most common form of punishment with great advantages and painful to the person who was paying it. It was deemed relevant for offences where the offender is prompted by greed.

The Post-Colonial legislative policy on crime and criminalisation

The British saw the IPC as a solution to the problems thrown by the widely different, but 'defective' and 'inconvenient', penal codes enforced in British India, of which none was deemed worthy of presenting even a rudiment of a good penal code.[4] But that was not all, it was also projected as a touchstone for all future criminal laws. These laws were expected to be consistent with the IPC in terms of their concepts and style.[5] Even today, as the analysis below shows, the IPC covers a major portion of crimes in India and lays down the conceptual foundation for the newer criminal laws.

The post-colonial legislature in India has continued to rely on the British idea of deterrence. This is evident in a number of special laws that have been enacted post-

[4] The Indian Penal Code, 1837, Prefatory Address to the Governor General in Council, p. X.
[5] Cheong-Wing Chan, Barry Wright, and Stanley Yeo (eds), *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (1st edn, Routledge 2011).

independence, such as the Narcotic Drugs and Psychotropic Substances Act, 1985[6] and the Unlawful Activities (Prevention) Act, 1967, which provides for severe punishments as effective deterrents.

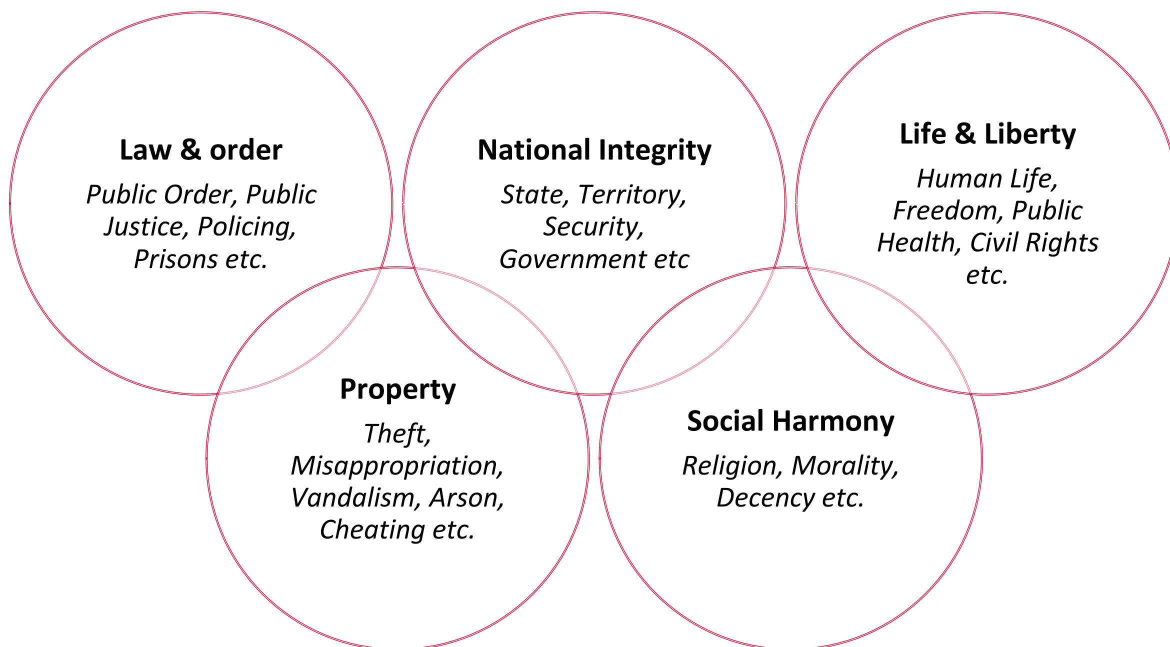
For a better understanding of how this policy on criminalisation has impacted post-colonial criminal law making, we analysed a select set of laws related to the criminal justice system enacted post-independence.[7] These include laws providing for substantive offences, laws relating to criminal procedure and laws setting up and regulating various institutions involved in criminal justice, such as the police, prisons and other functionaries.

We assessed these laws on the basis of their subject, the nature of conduct deemed criminal by the legislature, and the severity of punishment deemed appropriate for such criminalised conduct.

Our analysis shows that most of these criminal laws are enacted for the purpose of advancing certain values that are fundamental to the existence of a state and government. Just like the IPC, these laws broadly aim to protect life, liberty, property, law and order, and security of the State. Criminal law is seen as a necessary instrument to address a range of challenges such as to counter terrorism,[8] communal violence, industrial unrest,[9] destruction of property[10] and other issues that may pose a threat to social and political order.

[6] There were recommendations to further enhance the punishments than what was laid down in the bill. Death Penalty was suggested as 10 years imprisonment didn't seem to be deterrent enough.
[7] We analysed 25 post- independence laws that have been categorised as laws relating to criminal justice by the Law Commission of India in its 248th report; Law Commission of India, 'Obsolete Laws : Warranting Immediate Repeal' (2014) 248 <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081643-1.pdf> accessed 9 February 2023.
[8] The Unlawful Activities (Prevention) Act 1967, Statement of Objects and Reasons.
[9] The National Security Act 1980, Statement of Objects and Reasons.
[10] Prevention of Damage to Public Property Act 1984, Statement of Objects and Reasons.

Values that criminal laws protect



In addition to its role in protecting social and political order, criminal law is also seen as a reflection of the society's conscience which may regard a particular practice or wrong as evil and worthy of condemnation.[11]

In order to protect these values, criminal law is expected to generate a sense of fear and alarm, to prevent acts that are crimes.[12] Prevention of crime through deterrent[13] punishment[14] seems to be a general theme across legislative debates and laws.[15]

Judicial view of criminalisation

Consistent with the legislative policy, courts view criminal laws as tools to protect:

1. Established order of values[16];

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[11] Henry M. Hart Jr., 'The Aims of the Criminal Law' (1958) 23 Law and Contemporary Problems 401.; *Navtej Singh Johar* v. *Union of India*, 2018.
[12] The Criminal Law Amendment Bill 1958.
[13] *Lok Sabha Debates* (Parliament Secretariat) 26 September 1955 <https://eparlib.nic.in/bitstream/123456789/895211/1/01_X_26-09-1955_p37_p92_PII.pdf> accessed 22 August 2023.
[14] Ministry of Finance (Department of Revenue), 'The Prevention of Money Laundering (Amendment) Bill, 2011' 56 <https://eparlib.nic.in/bitstream/123456789/64156/1/15_Finance_56.pdf> accessed 22 August 2023.
[15] *Lok Sabha Debates* (Parliament Secretariat) 23 November 1959 <https://eparlib.nic.in/handle/123456789/900619?view_type=search> accessed 22 August 2023.
[16] *Kartar Singh v State of Punjab* (1994) 3 SCC 569.

2. Stability and safety of society;[17]
3. Social harmony;
4. Public rights;[18]and,
5. Prevent invasion of rights and liberties of other persons.[19]

Further clarifying the scope of criminal law, the Supreme Court has drawn a correlation between the object of the law and the need for criminalisation and thus recognised that sometimes criminal provisions may be needed to realise the object of the law.

For instance, upholding the criminalisation of anomalies in paperwork or clerical errors under the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994, the Supreme Court observed that any dilution of provisions related to maintenance of clerical records would defeat the object of the law i.e. to prevent female foeticide.[20] Similarly, the Supreme Court has also upheld criminalisation of contempt of court because the object of criminalisation is to maintain public confidence in the administration of justice.[21]

In their attempt to limit the scope of criminal law, courts have struck down provisions criminalising begging[22], homosexuality[23], attempt to suicide[24] and adultery.[25] In these cases, the courts have laid down a general guiding principle that discourages criminalisation if it violates fundamental rights, personal autonomy, or if the criminal provision is discriminatory.

Striking down the provision criminalising adultery, the Supreme Court in *Joseph Shine v. Union of India*[26] held that autonomy of an individual must be protected from criminal law. In *Navtej Johar v. Union of India*[27], the court deemed consensual sexual acts between consenting adults as purely private and incapable of threatening stability and security of a society - thus not a subject of criminal law.

Other debates on crime and criminalisation

In its analysis of various criminal provisions, the Law Commission of India ('Commission') has often probed the value in criminalisation and has also broadly

[17] *P.S.R. Sadhanantham v Arunachalam* (1980) 3 SCC 141.
[18] *Subramanian Swamy v Union of India*, (2016) 7 SCC 221.
[19] *Mohd. Shahabuddin v State of Bihar*, (2010) 4 SCC 653.
[20] *Federation of Obstetrics & Gynaecological Societies of India v Union of India*, (2019) 6 SCC 283.
[21] *In Re: Arundhati Roy*, (2002) 3 SCC 343.
[22] *Harsh Mander v Union of India*, (2018) SCC OnLine Del 10427.
[23] *Navtej Singh Johar and others v Union of India*, (2018) 1 SCC 791.
[24] *P. Rathinam v Union of India*, (1994) 3 SCC 394.
[25] *Joseph Shine v Union of India*, (2019) 3 SCC 39.
[26] (2019) 3 SCC 39.
[27] (2018) 1 SCC 791.

identified the object and the limits of criminal laws. For instance, while analysing the issue of honour killings,[28] the Commission noted that the object of criminal law is 'social protection'. Similarly, 'social disapproval' of the practice of homosexuality was seen as sufficient to justify its criminalisation. [29] Treason was deemed the gravest crime as it was directed at the 'very existence of the State'.[30] Acid attacks were seen as 'vicious crimes' because they cause perpetual suffering to the victim;[31] and penal sanctions were seen as necessary to counter rising incidents of cruelty against women to afford 'valuable protection to vulnerable sections of women'.[32]

The Commission has also, on various occasions, tried to limit the scope of criminal laws. It has argued that criminal law must only be used where its effectiveness can be proved.[33] Similarly, it has been noted that interference of criminal laws should be limited if there are better ways of addressing problems, for instance in matters of family, and women and child welfare.[34] The Committee report on the Draft National Policy on Criminal Justice,[35] echoed these views, underlining that criminal sanctions should be used as a last resort.

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[28] Law Commission of India, 'Prevention of Interference with the Freedom of Matrimonial Alliances (in the Name of Honour and Tradition): A Suggested Legal Framework.' (2012) 242 <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081053-3.pdf> accessed 10 September 2023.

[29] Law Commission of India, 'Indian Penal Code' (1971) 42 <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022082456.pdf> accessed 10 September 2023.

[30] Law Commission of India, 'Offences against the National Security' (1971) 43 < https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080552-1.pdf> accessed 10 September 2023.

[31] Law Commission of India, 'The Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a law for Compensation for Victims of Crime' (2009) 226 <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081066.pdf> accessed 10 September 2023.

[32] Law Commission of India, 'Section 498A IPC' (2012) 243 <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081023.pdf> accessed 10 September 2023.

[33] Law Commission of India, 'Humanization and Decriminalization of Attempt to Suicide' (2008) 210 < https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081095.pdf> accessed 10 September 2023.

[34] Law Commission of India, 'Indian Penal Code' (1971) 42 <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022082456.pdf> accessed 10 September 2023.

[35] Ministry of Home Affairs, Government of India, 'Report of the Committee on Draft National Policy on Criminal Justice' (2007) <https://www.mha.gov.in/sites/default/files/2022-09/DraftPolicyPaperAug_4%5B1%5D.pdf> accessed 10 September 2023.

Rules of criminalisation in India

Our analysis of the legislative and judicial understanding of crime and punishment in India shows that object and the expectations from criminal law are spelt out with a reasonable amount of clarity. Criminal law's profound impact on the lives of citizens is often acknowledged, suggesting the need for cautious criminalisation and an expectation that criminal law must operate in a limited sphere.

Based on the above assessment, we have arrived at the following principles broadly summing up India's policy on criminalisation:

1. A criminal provision must protect a specific value that is vital for the existence of the society and its political establishment.
2. A constitutionally protected right/action must not be criminalised either directly or indirectly by use of vague terminologies.
3. The punishment for a crime must align with the goal of safeguarding values - i.e., criminalisation must either remedy the wrong; exact revenge; or, prevent future crime through incapacitation, deterrence or reformation.

The above mentioned principles highlight the contours of India's policy on criminalisation. These principles enable identification of the values that Indian criminal law aims to protect and also helps visualise the harm that it seeks to redress. These principles also provide us with a broad framework to analyse the current landscape of laws with criminal provisions and identify any gaps and deviations from the policy.

For example, in the IPC, criminalisation of the act of killing another person acknowledges the harm that it may bring and seeks to protect the value of human life. The offences of kidnapping and abduction recognise the value of personal liberty and thus criminalise immediate and direct threats to it.

Similarly, the act of counterfeiting coins directly threatens a sovereign function; manufacture and trafficking of prohibited drugs threatens public health and order; and forcing a transgender person to leave their household or village, threatens their civil rights, thus justifying criminalisation.

This, however, is often not the case with many criminal provisions. There is a growing trend of using criminal provisions for regulating a wide range of behaviours, even those that may not pose a significant threat to the societal order or any value that is vital for the existence of the society.

Moving away from established rules

Evidencing overcriminalisation

Even with a general consensus on the object of criminal law and the principles of criminalisation, criminal law-making practices in India appear to be alarmingly anomalous and arbitrary. This is particularly true in relation to criminal provisions in laws that relate to social and regulatory issues.

Regulating everything from how kites will be flown[36] to how industries will be registered,[37] criminal provisions appear to be ubiquitous. They are seen as solutions to problems ranging from lack of exercise to household pets[38] to driving an uninsured vehicle[39]. In essence, criminalisation has been used as a legislative response to a myriad of social, regulatory and governance issues.

For instance, the Prize Competitions Act, 1955 was enacted to regulate prize competitions, but uses criminal provisions to ensure that the promoters of the competitions maintain statements of accounts. In fact, failure to keep a statement of accounts can attract an imprisonment of up to one month. Similarly, the Industries (Development and Regulation) Act, 1951 was enacted to facilitate development of industries, but criminalises failure to register an industrial undertaking in the time and manner prescribed by the government. Such regulatory non-compliance may lead to imprisonment for up to six months.

Preposterous as it may seem, failing to give notice of a treasure valuing more than ten rupees can attract imprisonment for up to one year[40] and being "unclean" can attract a two-year imprisonment for navy personnel.[41]

Evidencing irrational punishments

The above examples illustrate how criminal laws have been arbitrarily used as a default response in matters of everyday governance. However, this arbitrariness is not limited to enactment of criminal provisions, it extends to and is perhaps more

[36] The Aircraft Act 1934, s 11. Dangerously flying a kite can attract imprisonment for up to two years.
[37] The Industries (Development and Regulation) Act 1951, s 24. Failure to register an industry as per norms laid down can attract imprisonment for up to six months.
[38] The Prevention of Cruelty to Animals Act 1960, s 11.
[39] The Motor Vehicles Act, 1988, s 196.
[40] The Indian Treasure-trove Act, 1878, s 20.
[41] The Navy Act, 1957, s 53.

capricious when it comes to the prescription of punishment.

For instance, the punishment for failing to give notice of a treasure is the same as the punishment prescribed for the offence of assaulting and using criminal force to wrongfully confine a person - imprisonment for one year. Similarly, the punishment for the failure to comply with registration formalities under the Industries (Development & Regulation) Act, 1951 is the same as the punishment for the offence of taking part in a mass training with arms - imprisonment for six months.

The offence of assault or using criminal force carries a punishment of three months,[42] while flying a kite dangerously can lead to a prison term of two years. The punishment for the offence of non-maintenance of health records of workers working in a hazardous factory[43] and assaulting or using criminal force with the intent to disrobe a woman[44] is the same - imprisonment for a term which may extend to seven years.

Reimagining Crime & Punishment

While examining the present state of criminal law in India, it becomes apparent that it has expanded far beyond the confines originally envisaged. Of the total 892 union laws currently in operation[45], a staggering 421 incorporate criminal provisions. This "one size fits all" use of criminal provisions has resulted in overcriminalisation of the legislative landscape in India, and has hindered an honest assessment of the fundamental purposes and expectations of criminal law.

It is well established that India's criminal justice system is in shambles and is in urgent need for reform. To establish a more responsive, equitable, and efficient system, we must shift our approach towards evidence-based solutions and emphasize the importance of reform and rehabilitation.

Through a concerted commitment to thoughtful reform, and a collective vision for a just society, we can lay the foundation for a criminal justice system that truly serves the needs of India in the 21st century.

[42] The Indian Penal Code, 1860 s 352.
[43] The Factories Act, 1948, s 41C read with s 96A.
[44] The Indian Penal Code, 1860 s 354B.
[45] As available on IndiaCode.

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