

Second in series

Reimagining
Crime & Punishment



Towards
better criminal
law making

November 2023

VIDHI
Centre for Legal Policy



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November 2023

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Introduction

Our previous primer on 'Criminal law that ought to be' explored India's view on crime, punishment, and its expectations from criminal laws. We found that criminal provisions are routinely used to ensure social and regulatory compliance. Our analysis of all central laws showed that there are over 6000 criminal offences in 421 central laws. These laws cover matters not just related to everyday crime, but at least 40 other subject matters, such as taxes, labour relations, marriage, women and child development, corporate governance, regulating professions etc.

We also saw rampant arbitrariness and inconsistency in the prescription of punishments. For instance, the offence of assault or using criminal force carries a punishment of three months¹, while flying a kite dangerously can lead to a prison term of two years². The offence of non-maintenance of health records of workers working in a hazardous factory³ and assaulting or using criminal force with the intent to disrobe a woman⁴ is the same - imprisonment for a term which may extend to seven years.

This has led to a massive problem of excessive and indiscriminate criminalisation. In this primer, we attempt to understand the different mechanisms that can be used to check overcriminalisation and guide the prescription of punishment. To do this, we have analysed laws, rules, policy papers and legislative guidelines of select countries across the world⁵. We document how diverse countries approach the following broad questions and what creative solutions they have found:

- *What to criminalise?*
- *How to arrive at the nature of punishment for a particular crime?*
- *How to determine the quantum of punishment for a particular crime?*

¹ The Indian Penal Code, 1860, s 352.

² The Aircraft Act 1934, s 11.

³ The Factories Act, 1948, s 41C read with s 96A.

⁴ The Indian Penal Code, 1860 s 354B.

⁵ Albania, Canada, Croatia, Cyprus, Denmark, Finland, Germany, Greece, Hong Kong, Kenya, Netherlands, New Zealand, Scotland, Singapore, Slovenia, Spain, Switzerland, The United Kingdom (UK), The United States of America (USA).

What is the use of criminal law and what to criminalise?

To lay down and limit the scope of criminal law, the countries we analysed use the following approaches -

- Principle-based criminalisation;
- Necessity and feasibility tests.

Principle-based criminalisation

'Principle-based' criminal law-making relies on certain policies or statutory guidelines, to determine whether an act or omission can be criminalised. Several countries specify that criminal sanctions may only be used to protect the constitutional order, basic human dignity, personal freedoms and social coexistence.

Countries like Albania, Croatia and Slovenia have such principles enshrined in the first clauses of their criminal statutes. Others, such as Austria and Spain, lay down such principles in their statement of motives. Table 1 gives examples of how countries limit the scope of criminal law.

Table 1: Examples of delimiting the scope of criminal law

State	Source	Delimitation
Albania	Article 1/b of the Criminal Code ⁶	Criminal law is used to protect the state's territory, human dignity, human rights, freedoms, constitutional order, property, environment etc.
Croatia	Article 1 of the Criminal Code ⁷	Criminal sanctions can only be prescribed for acts threatening or violating personal liberties and human rights, as well as other rights and social values guaranteed and protected by the Constitution.

⁶ Criminal Code of the Republic of Albania 1995 <https://adsdatabase.ohchr.org/IssueLibrary/ALBANIA_Criminal%20Code.pdf>.

⁷ Criminal Code of the Republic of Croatia 1997 <http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation__Criminal-Code.pdf>.

State	Source	Delimitation
Spain	Organic Law of 1995 on the Penal Code ⁸	Criminal law must protect basic values and principles of social coexistence.
Slovenia	Article 2 of the Criminal Code ⁹	Criminal law can apply only when and to the extent that the protection of human beings and other basic values cannot otherwise be assured.

Necessity and feasibility tests

A more common method of defining the scope of criminal law is by way of pre-legislative procedures. These procedures either require legislators to assess, or assist legislators in assessing, the necessity of criminalising a particular act and the feasibility of enforcement. These procedures also encourage legislators to explore alternative means of achieving the policy objective.

In practice, for laws that create new crimes or change punishments, pre-legislative procedures predominantly focus on:

- **Fiscal impact assessment** - to determine whether the government and affected departments have the financial resources to implement the law, for example, to appoint additional police personnel or create space for additional convicts in prison.
- **Justice system impact assessment** - to determine the impact of the creation of a new criminal offence on the working of lawyers, judges, correctional institutions, and other actors in the justice system.
- **Human rights impact assessment** - to determine the compatibility of the law with the country's obligations under international and regional human rights treaties. It can also concern whether the law will disproportionately impact on racial, ethnic, religious or gender minorities.

In several countries listed below, pre-legislative impact assessments are part of the law making process and a precondition for a draft legislation to be cleared. Other jurisdictions, like Hong Kong, encourage conducting an assessment but do not mandate it. While some jurisdictions have procedures that are specific to criminal law-making, others have procedures covering all law-making.

⁸ Organic Law 10/1995, Penal Code of Spain <<https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>>.

⁹ Criminal Code of the Republic of Slovenia 2005 <https://www.vertic.org/media/National%20Legislation/Slovenia/SI_Criminal_Code.pdf>.

Table 2: Examples of pre-legislative procedures

Country	Source	Specific to	Procedure
Canada	Department of Justice Act 1985 ¹⁰	Any legislation	The Minister of Justice must set out the potential effects of all new legislations on the rights and freedoms that are guaranteed by the Canadian Charter of Rights and Freedoms.
Cyprus	Impact Assessment in Legislative Drafting Guidelines (2008) ¹¹	Any legislation	The draft legislation must include the results of an impact assessment that covers economic impact, impact on public administration, environmental impact, and social impact.
Finland	Assessment in Legislative Drafting Guidelines (2008) ¹²	Any legislation	The draft legislation must include the results of an impact assessment that covers economic impact, impact on public administration, environmental impact, and social impact.
Hong Kong	Guidebook by the Department of Justice (2012) ¹³	Any legislation	Legislators are encouraged to assess whether the behaviour in question is sufficiently serious to be criminalised, whether the offence is enforceable in practice, and whether a non-criminal sanction is more appropriate for the contravention.
New Zealand	Legislation Guidelines (2021) ¹⁴ and Cabinet Manual (2023) ¹⁵	Criminal law	For the legislation to receive approval, legislators must show that the Bill is in accordance with the legislative guidelines. For this, they must assess whether a policy objective can be achieved without state intervention, provide compelling reasons to justify the application of criminal law to human conduct, and list factors to be considered while determining whether conduct should be criminalised.

¹⁰ Department of Justice Act 1985 <<https://laws-lois.justice.gc.ca/eng/acts/J-2/page-1.html>>.

¹¹ Handbook for Legislative Drafting <bit.ly/3tmt3lx> accessed 27 October 2023.

¹² Ministry of Justice, Finland, 'Impact Assessment in Legislative Drafting: Guidelines' <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/76118/omju_2008_4.pdf?sequence=1&isAllowed=>> accessed 27 October 2023.

¹³ Department of Justice, Hong Kong, 'Drafting Legislation in Hong Kong: A Guide to Styles and Practices' <https://www.doj.gov.hk/en/publications/pdf/drafting_book_2012_e.pdf> accessed 26 October 2023.

¹⁴ Legislation Design and Advisory Committee, New Zealand, 'Legislation Guidelines' <<https://www.ldac.org.nz/assets/documents/LDAC-Legislation-Guidelines-2021-edition.pdf>> accessed 26 October 2023.

¹⁵ Cabinet Office, Department of the Prime Minister, New Zealand, 'Cabinet Manual' <<https://www.dpmc.govt.nz/sites/default/files/2023-06/cabinet-manual-2023-v2.pdf>> accessed 26 October 2023.

Country	Source	Specific to	Procedure
United Kingdom	Justice Impact Test Guidance, Ministry of Justice (2018) ¹⁶	Criminal law	Departments must fill in a Justice Impact Test Form and a mandatory memorandum of compatibility with the European Convention on Human Rights, which must receive policy clearance. The form asks if the creation of a new criminal offence is proportionate and necessary, and requires the treasury to scrutinise the cost implication and funding arrangements for the creation of new criminal offences.
USA (State of Iowa)	Iowa Code (2022), Section 2.56 ¹⁷	Criminal law	Legislators must provide a correctional impact statement to any Bill which proposes a change to penal law, which must include information concerning the estimated number of criminal cases per year that the legislation will impact, the fiscal impact of confining persons, the impact of the legislation on minorities, the impact of the legislation upon existing correctional institutions, and more.
USA (State of New Jersey)	Racial Impact Statement Measure S-677/A-3677 (2018) ¹⁸	Criminal law	Legislators must prepare a racial and ethnic impact statement for each proposed criminal justice bill, resolution, or amendment that would affect pre-trial detention, sentencing, probation, or parole policies. This must include an assessment of the potential impact on racial and ethnic minorities, including whether it is likely to have a disproportionate or unique impact on them, and if yes, the rationale for this disproportionate impact.

¹⁶ Ministry of Justice, UK, 'Justice Impact Test: Guidance' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/733337/justice-impact-test-guidance.pdf> accessed 26 October 2023.

¹⁷ Iowa Code 2022, s 2(56) <<https://www.legis.iowa.gov/docs/code/2.56.pdf>>.

¹⁸ Act No. 677 State of New Jersey 2017 <https://pub.njleg.gov/bills/2016/S1000/677_R3.PDF>.

How to arrive at the nature of punishment?

Most penal codes include a provision in their penal code that lists all possible punishments that can be imposed for offences. Even as some countries continue to permit the death penalty as a form of punishment, imprisonment and fine are the two most common forms of punishment. Other forms of punishment include community service, compensation orders or similar punishments oriented at restorative justice. Most of these punishments are given as 'accessory punishment', i.e., in addition to imprisonment or fine.

While the majority of countries include a general list of permissible punishments in their penal code, no country lays down specific rules for lawmakers to determine which of them to specifically assign to which crime. A United Kingdom White Paper (1990) states broadly that when financial penalties are not enough, legislators should consider restrictions on liberty.¹⁹ It is therefore largely left to the lawmakers whether to prescribe only a fine, or also imprisonment, as a form of punishment for an offence.

Table 3: Forms of punishment generally permitted in penal codes

Jurisdiction	Death	Imprisonment	Fine	Other forms
The Netherlands ²⁰	Not prescribed for any offence	One day - maximum term of rest of life	€3 - 810,000	Community service
				Disqualification from certain rights (only as an accessory punishment)
				Confiscation (only as an accessory punishment)
				Publication of the court decision (only as an accessory punishment)

¹⁹ Home Office, UK, 'Crime, Justice and Protecting the Public' <https://books.google.co.in/books/about/Crime_Justice_and_Protecting_the_Public.html?id=0hRiQgAACAAJ&redir_esc=y> accessed 26 October 2023.

²⁰ Criminal Code of The Netherlands 1881 <<https://antislaverylaw.ac.uk/wpcontent/uploads/2019/08/Netherlands-Criminal-Code.pdf>>.

Jurisdiction	Death	Imprisonment	Fine	Other forms
India ²¹	Permitted for around 58 offences, including aggravated rape and gang rape, murder and attempted murder etc.	No statutory minimum - maximum term of life imprisonment	No statutory minimum or maximum, but shall not be excessive ²²	Forfeiture of property
				Detention
				Forfeiture of right to carry on business (only as an accessory punishment)
				Compensation/ reparation payment
				Finding security to keep the peace
				Community service
Slovenia ²³	Not prescribed for any offence	15 days - 30 years	Minimum five to maximum 1500 daily amounts *1 daily amount corresponds to 1/60th - 1/3rd of the average net salary	Ban on driving motor vehicles (only as an accessory punishment) (Three months - One year)
				Deportation (only as an accessory punishment)
Singapore Penal Code ²⁴ and Criminal Procedure Code ²⁵	Permitted for 33 offences, including murder, drug trafficking, terrorism, use of firearms, abduction and mutiny.	No statutory minimum, maximum term of life	No statutory minimum or maximum	Caning
				Forfeiture of property
				Under limited circumstances set out in CrPC 2010, 337(1): Community-based sentences, including day reporting and community work

²¹ The Indian Penal Code 1860, s 53.

²² The Indian Penal Code 1860, s 63: "Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive."

²³ Criminal Code of the Republic of Slovenia 2005 <https://www.vertic.org/media/National%20Legislation/Slovenia/SI_Criminal_Code.pdf>.

²⁴ Penal Code of Singapore 1871 <<https://sso.agc.gov.sg/Act/PC1871>>.

²⁵ Criminal Procedure Code of Singapore 2010 <<https://sso.agc.gov.sg/Act/CPC2010>>.

Jurisdiction	Death	Imprisonment	Fine	Other forms
Kenya ²⁶	Permitted (despite de facto moratorium) for offences of murder, treason, and robbery and attempted robbery with violence	No statutory minimum, maximum term of life	No statutory minimum or maximum, but shall not be excessive	Forfeiture of property
				Detention
				Forfeiture of right to carry on business (only as an accessory punishment)
				Compensation/ reparation payment
				Finding security to keep the peace
				Community service
Australia ²⁷	Not prescribed for any offence	No statutory minimum, maximum term of life	Maximum of 4175 penalty units ²⁸ *One penalty unit is 110 AUD ²⁹	Intensive correction order (for offences punishable with two - four years imprisonment)
				Restrictions on movement and association
				Drug and alcohol treatment orders (for offenders sentenced to imprisonment of one - four years)
				Disqualification from certain rights
				Reparation orders
				Place restriction orders
				Non-association orders
				Good behaviour orders

²⁶ Penal Code of Kenya 2012, ch 63 <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/PenalCode_Cap63.pdf>.

²⁷ Crimes (Sentencing) Act 2005 <<https://www.legislation.act.gov.au/a/2005-58/>>.

²⁸ Penalties and Sentences Act 1992 <<https://www.legislation.qld.gov.au/view/pdf/2017-10-27/act-1992-048>>.

²⁹ Penalties and Sentences Act 1992 <<https://www.legislation.qld.gov.au/view/pdf/2017-10-27/act-1992-048>>.

How do countries determine the quantum of punishment for a particular crime?

As seen above, some countries specify a minimum and maximum punishment that may be prescribed in general. A range of punishments is also provided individually for all offences. To supplement this, countries also lay down sentencing guidelines for courts to help them decide on the punishment to be imposed within the prescribed punishment range.

In order to arrive at such penalty ranges, the Council of Europe in 1992 recommended³⁰ that the maximum and minimum penalties should form a coherent structure, reflecting the relative seriousness of offences. It also underlined that the range between minimum and maximum sentences should not be too wide. Generally, countries use frames of reference to decide appropriate penalty ranges. This means they compare offences to similar ones, or more severe ones, to identify an appropriate maximum punishment. Once the appropriate maximum punishment is decided, the minimum punishment can be set in relation to it.

For instance, in Austria, the minimum punishment for COVID-19 law transgressions was fixed at 10% of the maximum punishment³¹. Additionally, the Criminal Code of the Republic of Slovenia specifies that if lawmakers prescribe an upper limit of two years of imprisonment, they need not prescribe a minimum term³².

30 Committee of Ministers, Council of Europe, 'Recommendation No. R (92) 17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing' <<https://rm.coe.int/16804d6ac8>> accessed 27 October 2023.

31 Health Committee, Austria, 'Minimum Penalties for Violations of Corona Protective Measures' <https://www.parlament.gv.at/aktuelles/pk/jahr_2021/pk1434> accessed 27 October 2023.

32 Criminal Code of the Republic of Slovenia 2005 <https://www.vertic.org/media/National%20Legislation/Slovenia/SI_Criminal_Code.pdf>.

To ensure coherence in the prescription of punishments, countries such as Sweden in 1988³³, the Australian state of Victoria in 1989³⁴, Switzerland in 2010³⁵, and Germany in 2022³⁶ have attempted to harmonise punishments under their criminal laws.

Short-term imprisonments

Countries have, however, differing views on whether imprisonment can be imposed as punishment for short periods. For offences of less severity, some countries do not prescribe short custodial sentences, but prescribe fines instead. Some countries have no minimum term of imprisonment enshrined in their penal code. Others, such as Switzerland and the Netherlands, have a minimum duration of a prison sentence, but set it very low, one day and three days respectively. Switzerland justifies this on the basis that imprisonments have a higher deterrent effect than fines.

Germany and Scotland, though technically allow imprisonments for one month and 15 days respectively, generally prohibit imprisonment for such short periods unless there are good reasons. This is rooted in the notion that imprisonment should cause a disrupting or stigmatising effect, which is not the case with small-term imprisonments³⁷.

33 Nils Jareborg, 'The Swedish Sentencing Law' (1994) 2 European Journal on Criminal Policy and Research volume 67.

34 Sentencing Advisory Council, Key Events for Sentencing in Victoria. <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/key-events-for-sentencing-in-victoria>> accessed 11 September 2023.

35 Federal Department of Justice, 'Summary: Consultation Process on the Report and the Preliminary Draft of the Amendment to the Criminal Code and the Military Penal Law' <<https://www.news.admin.ch/NSBSubscriber/message/attachments/24534.pdf>> accessed 28 September 2023.

36 Federal Office of Justice, A new start in Criminal Justice Policy <https://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2022/0719_Sanktionenrecht.html> accessed 28 September 2023; Federal Office of Justice, 'Explanatory report to amend the Criminal Code and the Military Criminal Law.' <<https://www.bj.admin.ch/dam/bj/de/data/sicherheit/gesetzgebung/archiv/sanktionensystem/vn-ber-d.pdf.download.pdf/vn-ber-d.pdf>> accessed 28 September 2023.

37 European Commission, 'Commission Staff Working Paper Impact- Assessment (Part I) accompanying the document proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law' <https://eur-lex.europa.eu/resource.html?uri=cellar:bfb485e1-a17c-44f7-86cd025fed94ac6c.0001.02/DOC_1&format=PDF> accessed 28 September 2023.

Table 4: Minimum duration of imprisonment as punishment

State	Source	Delimitation
Denmark	Criminal Code of Denmark, Section 33 ³⁸	Imprisonment shall be imposed either for life or for a fixed period of no less than seven days.
Germany	German Criminal Code, Article 38 ³⁹	The minimum term of a custodial sentence is one month. However, a court shall not impose imprisonment of less than six months unless special circumstances exist that strictly require this.
Greece	Greek Penal Code, Article 53 ⁴⁰	The duration of imprisonment is not less than 10 days.
Scotland	Criminal Procedure Act 1995, Sections 206 and 204(3A) ⁴¹	The minimum term of a custodial sentence is 15 days. However, a court must not pass a custodial sentence of 12 months or less unless there is no other appropriate option.
Switzerland	Swiss Criminal Code, Article 40 ⁴²	The minimum term of a custodial sentence is three days.
The Netherlands	Dutch Penal Code, Section 18 ⁴³	The term of the temporary prison sentence is at least one day.

³⁸ Criminal Code of Denmark 2012 s 33. <<https://antislaverylaw.ac.uk/wp-content/uploads/2019/08/Denmark-Criminal-Code.pdf>>.

³⁹ Criminal Code of Germany 1998 s 38 <<https://www.gesetze-im-internet.de/stgb/StGB.pdf>>.

⁴⁰ Penal Code of Greece 2013 s 53 <<http://www.c00.org/2013/01/greek-penal-code-article-53.html>>.

⁴¹ Criminal Procedure (Scotland) Act 1995 s 206. <<https://www.legislation.gov.uk/ukpga/1995/46/section/206>>.

⁴² Swiss Criminal Code 1937 s 40. <https://fedlex.data.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/54/757_781_799/20200701/en/pdf-a/fedlex-data-admin-ch-eli-cc-54-757_781_799-20200701-en-pdf-a.pdf>.

⁴³ Dutch Penal Code 1881 s 18. <https://sherloc.unodc.org/cld/uploads/res/document/nld/1881/penal-code-of-the-netherlands_html/Netherlands_Penal_Code_1881_as_amd_2014.pdf>.

Key Take-Aways ▶▶▶

Limiting the scope of criminal law, proportioning punishments and rationalising sentences has been at the core of reform in the criminal justice system across countries. While some countries have relied on principle-based criminalisation and pre-legislative tests to ascertain the need for criminalisation, others have increased the use of alternative forms of punishments such as probation, community sanction orders, disqualification from rights etc. To restrict arbitrariness in the prescription of punishments, attempts have also been made to lay down specific criteria to determine an appropriate quantum of punishment for a particular crime.

While the effectiveness of these measures in achieving their respective goals remains to be seen, these represent positive steps forward. In India, however, the efforts have not been commensurate with the scale of the problem.

Despite having a pre-legislative consultative policy in place, which requires ministries to scrutinise and publish information on the fiscal impact of legislation, its impact on fundamental rights and the lives of affected people, and to consult with stakeholders, only a limited number of bills have been scrutinised this way. Additionally, while the problems associated with over-reliance on prison terms have been recognised by the State⁴⁴, the attempts to address this problem still reflect a conservative and traditional mindset. This is evident in the existing alternatives to imprisonment and the way they are utilised in India.

⁴⁴ Ministry of Home Affairs, Government of India, Notification No. 17011/2/2010-PR, <https://www.mha.gov.in/sites/default/files/2022-09/OvercrowdingPrison09052011%5B1%5D_0.pdf> accessed 25 October 2023; Bureau of Police Research and Development, 'Alternatives to Imprisonment' <<https://bprd.nic.in/WriteReadData/userfiles/file/6515844528-Part%20V.pdf>> accessed 25 October 2023.

Both the Probation of Offenders Act, 1958 and the Code of Criminal Procedure, 1973 provide for Probation⁴⁵ and Admonition⁴⁶ as alternative forms of punishment for a wide range of offences. While Probation can be ordered for all offences that are not punishable with death or imprisonment for life, Admonition can be ordered for all offences punishable with imprisonment for not more than two years. However, even the debates⁴⁷ on the introduction of these provisions demonstrated reluctance to depart from the longstanding and well-worn practice of relying on imprisonment for crime control. This hesitance has been reflected in practice as well with both the alternatives being severely underutilised⁴⁸. The Allahabad High Court in the case of *Hargovind v. State of Uttar Pradesh* (2019) observed that the trial courts have not properly utilised alternatives such as probation and admonition, which are particularly relevant and important in India's system of justice, where trials often take a long time to conclude.

Even the Bharatiya Nyaya Sanhita Bill, 2023, which purports to move away from punishment, has incorporated community service as a form of punishment under clause 4, but has only made it applicable to a select number of low-stakes offences, such as theft of low-value goods, defamation, and public misconduct.

Looking at international practices might be a reminder for India to adopt a principle-based approach towards criminal law-making and prescription of punishment.

⁴⁵ Probation of Offenders Act, 1958, s 4; Code of Criminal Procedure, 1973, s 360.

⁴⁶ Probation of Offenders Act, 1958, s 4; Code of Criminal Procedure, 1973, s 360.

⁴⁷ During the Parliamentary debates on the Probation of Offenders Act, 1958, legislators repeatedly argued that only heavy punishment could rehabilitate criminals, and that probation would not be a deterrent to crime. Even the member who proposed the bill repeatedly emphasised that probation would be given only to offenders who had committed minor offences. Members also drew a distinction between offences committed due to economic necessity and those committed by "inherently criminal" people, arguing that rehabilitation was only suitable for the former.

⁴⁸ Bureau of Police Research and Development, 'Status of Probation, Parole and Leave and their impact on Overcrowding of Prisons' p. 224, <<https://bprd.nic.in/WriteReadData/userfiles/file/201608040935426398846Report.pdf>> accessed 25 October 2023.



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