



DRAWING THE LINE: RETHINKING CRIMINALISATION IN INDIA

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ABSTRACT

This article examines the critical evolution of India's legal landscape as it transitions from the colonial-era Indian Penal Code (IPC) of 1860 to the Bharatiya Nyaya Sanhita (BNS) of 2023. It explores the fundamental principles that should govern criminalisation, advocating for a framework rooted in harm, proportionality, necessity, and justice to ensure laws remain fair, rational, and effective. The text highlights significant challenges within the current system, including the risks of over-criminalisation, the political misuse of legislation such as sedition to stifle dissent, and the resulting judicial backlogs and prison overcrowding. Furthermore, the article identifies emerging domains of law, such as digital harms, environmental crimes, and the shift toward restorative justice measures like community service and mediation. By drawing on comparative international perspectives and landmark Indian legal cases, such as the decriminalisation of homosexuality in Navtej Singh Johar vs. Union of India, the study concludes that India must move beyond archaic colonial frameworks. It calls for a humane and equitable legal system that prioritises the protection of human rights and individual liberties over mere state control and repression.

Keywords: Bharatiya Nyaya Sanhita (BNS), Indian Penal Code (IPC), Criminalisation, Harm Principle, Proportionality.

INTRODUCTION

Criminal law is a powerful tool of state power that the state uses to define what actions are considered right and what are wrong. It makes us understand that what we can do or cannot do.¹ Beyond the legal implications of the state, criminalisation focuses on deeper political, societal, and ethical considerations, forming the moral boundaries within which society

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¹ H.L.A. Hart, *The Concept of Law* (Oxford Univ. Press, 1961), 181-195

functions.² In India, this becomes an issue because the country is converting the way it imagined crime and punishment.³ The new law in the present time is called the Bharatiya Nyaya Sanhita (BNS)⁴ which came in 2023, is going to replace the Indian Penal Code (IPC) of 1860. This new legislation prompts a hypercritical re-evaluation of what actions or behaviours should be considered as a crime. The BNS of 2023 establishes a victim-centred approach, like community service, electronic FIRs, and video-recorded evidence collection, representing a turning point from punitive to restorative measures. This demonstrates a comprehensive film towards justice, reparation, and accountability instead of mere punishment.⁵ BNS 2023 also criminalises mob lynching and organised crime, directing contemporary social realities which the IPC failed to ensnare.

This essay is going to look at what makes something a crime. It mentions that we should consider the foundational principles such as harm, proportionality, necessity and justice when we determine what a crime is.⁶ We should not consider any action as a crime just because a few individuals think it is awful or because it is straightforward or undemanding. We are examining how laws in India are changing and how they contrast with the laws in various countries of the world.⁷ By looking at what's happening in India and other countries, we can think about how to make criminal law better, which is fair, compassionate, rational and eventually very effective. We want to make sure that the laws are fair, kind and effective. This will assist us in having a discussion about crime and punishment in the region of India. It is also required for us to examine what is best for the people and for society altogether.

Criminalisation is when the state determines that an unspecified action done by an individual is in opposition to the law. This is done to protect people, keep society safe and make sure that everyone follows the rules. If anyone commits any unlawful acts, criminal law subsequently prescribes punishment through its framework. The main focus of this process is to protect the people, maintain harmony in the society, and to shield the institutions from latent harm, while making sure that public order is taken care of and justice is provided.⁸ Nonetheless, this journey of criminalisation is fraught with various challenges and risks. One critical concern is the

² Émile Durkheim, *The Division of Labor in Society* (1893), Book III, Ch. 2

³ Upendra Baxi, *The Crisis of the Indian Legal System* (1982), 145-167

⁴ Bharatiya Nyaya Sanhita, No. 45, Acts of Parliament, 2023 (India)

⁵ Ministry of Home Affairs, *Victim-Centric Reforms in BNS* (2024)

⁶ John Stuart Mill, *On Liberty* (1859), Ch. 1 (harm principle); *Principles of Criminal Law*, UoLLB (2024)

⁷ Bharatiya Nyaya Sanhita, 2023 v. IPC, 1860; Nordic Model of Restorative Justice

⁸ Ashworth, A., *Principles of Criminal Law* (9th ed., 2019), 28-35

circumstances of over-criminalisation and under-criminalisation.⁹ There are problems with this. Sometimes the state says that many actions of the people are against the law. This can lead to people being treated unfairly and the courts and prisons becoming too full. On the other hand, if the state does not say that enough actions of the people are against the law, people might not feel safe. It may abandon victims, defenceless and aggravate a decreasing trust in the legal system between individuals.

Emerging domains of criminalisation are growing in significance in today's evolving societal landscape, specifically in the environs of environmental crimes, digital harms, and restorative justice.¹⁰ As the collision of climate change becomes more noticeable, a push around the globe towards penalising rigorous ecological damage is gaining momentum, encouraging countries such as India to scrutinise a structure that comprises proportional sanctions for industrial waste producers whose actions hurt the environment.¹¹ This increasing awareness underlines the urgency for laws which not only dissuade harmful practices but also spur on sustainable behaviour. Moreover, the increase of digital technology has initiated various new challenges, like cyberbullying, misinformation, and data theft, all of these emphasize the crucial necessity for comprehensible definitions and legislative frameworks encompassing digital offences.¹² The current persistent uncertainties in this orbit pose a substantial peril for the enforcement of the law and the quiescent for misapprehension of laws. Finally, the concept of restorative justice is gaining momentum as an alternative to traditional disciplinary measures, advocating for approaches like mediation, community service, and reparative dialogue.¹³ These alternatives not only focus on mitigating the weight of prison overcrowding but also cultivate appeasement and healing within the communities that are swayed by crime. Collectively, nascent sectors indicate a critical shift in how societies conceive and direct the behaviour of criminals, demonstrating a comprehensive grasp of justice in present-day times.

In India, the way that crimes are defined has a history. In the year 1860, in the distant past, the Indian Penal Code (IPC) was created.¹⁴ This law was brought by the British, who were ruling over the Indian territories then.¹⁵ The law of IPC stated that some acts were crimes, such as being in a same-sex relationship under Section 377 and the actions of sedition under Section

⁹ Kadish, S., *Criminal Law and Its Processes* (10th ed., 2016), Ch. 2 (over-criminalization risks)

¹⁰ BNS Chapter XV (public health offences); UNEP, *Global Judicial Integrity Network* (2023)

¹¹ BNS §§270, 279-280, 324 (environmental pollution, water contamination)

¹² BNS §317 (cyber crimes, identity theft); IT Act, 2000 §66A amendments

¹³ BNS §4(f) (community service); BNSS restorative provisions

¹⁴ Indian Penal Code, Act No. 45 of 1860 (India).

¹⁵ Macaulay, *IPC Drafting Minutes* (1837), Parliamentary Papers

124A or saying something contrary to the government.¹⁶ After India became independent, many of these laws stayed the same. They were sometimes used to stop people from speaking out against the government. Recently, India has made some changes to its laws. The new law, the Bharatiya Nyaya Sanhita (BNS), 2023, is trying to make the legal system better, particularly in relation to criminalisation.¹⁷ It is adding crimes, like those related to organised crime and terrorism.¹⁸ It is also trying to make the laws more in line with what people in India think is right and wrong today. It is punctuated by its responsiveness to the burden of historical legacies and the contemporary challenges that society faces today.

WHY CRIMINALISATION NEEDS A FRAMEWORK

If we do not have a framework for deciding what a crime is, we can end up with laws that are unfair and arbitrary.¹⁹ This can result in societal problems. One of the problems in society is the anomaly of moral policing.²⁰ This arises when laws focus on decreasing obscenity or forbidding the “hurting of religious sentiments” that individuals may endeavour to enforce their ethical principles on others, and are instead based on personalised moral judgments, conversely, a universally accepted understanding of what is right or what is wrong.²¹ This can lead to laws that are not fair to everyone. In addition to this, the exploitation of laws such as sedition and preventive detention leads to serious apprehensions.²² For example, these are the laws that state what people can and cannot wear or what they can and cannot say. Instead of encouraging a vibrant exchange of ideas, the persecution of such legislation results in a climate of fear and repression.

A further problem is that the government may use laws to make people silent who don't agree with them. This can result in a society where people are frightened to speak out. With a lot of different ideas and opinions, we might have a society where everyone is too afraid to say what they think. Furthermore, the criminalisation of actions related to poverty, like begging or vagrancy, talks about another dimension of injustice in our legal system.²³ We also need to think about how we treat people who are poor or homeless. Rather than making laws that punish them, we should try to help them. We should try to figure out that why they are in this kind of

¹⁶ IPC §377; IPC §124A

¹⁷ Ibid, effective July 1, 2024; PRS India, *The Bharatiya Nyaya Sanhita, 2023*

¹⁸ BNS §§111, 113

¹⁹ Feinberg, J., *The Moral Limits of the Criminal Law* (1984), Vol. 1

²⁰ Navanitha v. State of Tamil Nadu (Madras HC, 2025); Drishti Judiciary on moral policing

²¹ IPC §§292-294 (obscenity); BNS §§294, 296 (obscene acts)

²² IPC §124A

²³ Bombay Prevention of Begging Act, 1949; *Criminal Law and Poverty* (Kadish, 2016)

situation and should look out for some solutions to see if we can do something to help. Such a framework could make sure that laws uphold justice, promote equality, and protect the rights of all citizens of the country, framing a legal base that genuinely aims to provide service to the common good.

To ensure that our laws are just and fair, we should aim to acquire a framework that directs us. This framework should be based on principles like harm, proportionality, necessity and justice.²⁴ If something hurts an individual, it should only be considered a crime. We must ensure that the punishment also fits the crime. We should only use the law when it is really necessary. We should also ensure that our laws are crystal clear and easily understandable. We also need to think about what kinds of acts should be taken as crimes. We should contemplate things such as violence against individuals, crimes in opposition to property and crimes against the state. We must also consider the kinds of crimes, such as cybercrime and human trafficking. We must not make such acts crimes just because some mere humans in society don't like them. We should esteem the liberties of the individuals and only make some acts a crime if it usually hurts someone else.²⁵

The framework for criminalisation, which is justified, must collide with a balance between the freedoms of individuals and mutual protection, and abide by the principles that are essential or fundamental.²⁶ The Harm Principle, which is shaped by John Stuart Mill, affirms that behaviour should be criminalised only if it imposes harm on others; for example, acts such as murder and theft certainly result in harm, whereas non-harmful activities like homosexuality and adult sex work don't.²⁷ The principle of Proportionality stipulates that the seriousness of punishment lines up with the extent of imposed suffering,²⁸ which means that petty theft should not be penalised as seriously as organised fraud. Criminalisation of petty offences can result in overcrowding in jails and place demands on the justice system of the country.²⁹ The principle of Necessity reflects that criminalisation must be a last resort, such as when matters like environmental violations are adequately addressed with administrative penalties.³⁰ Laws must signify Clarity and Precision to evade misuse; enigmatic language can lead to arbitrary enforcement. Conclusively, the principles of Justice and Equality require that criminalisation

²⁴ John Stuart Mill, *On Liberty* (1859), Ch. 1 (harm principle); *Principles of Criminal Law*, UoLLB (2024)

²⁵ John Stuart Mill, *On Liberty* (1859), Ch. 1 (harm principle)

²⁶ NITI Aayog, *Towards India Tax Transformation: Decriminalising and Trust-Based Governance* (2025)

²⁷ John Stuart Mill, *On Liberty* (1859), Ch. 1 (harm principle)

²⁸ Ashworth, A., *Sentencing and Criminal Justice* (7th ed., 2015), 78-92

²⁹ NCRB Prison Statistics India 2024 (overcrowding data)

³⁰ Environment Protection Act, 1986 §§15-17 (administrative penalties)

doesn't disproportionately affect the underrepresented population, as demonstrated by the laws of anti-begging that punish poverty.³¹ Collectively, these principles provide a framework for equitable and just criminalisation.

The conceptual framework for identifying criminalisation reiterates the values of society and the requirement of the state for maintaining order. Violent actions against individuals, like murder, assault, and rape, are universally sentenced and deserves to be in criminalization due to the rigorous act that harm any individual is created by them. Crimes in regard to property, such as theft, fraud, and corruption, deteriorate trust and safety, emphasising their forbiddance by law. Moreover, dangers to the safety of the public emerging from terrorism and organised crime demand unwavering responses.³² Recent challenges in the digital era, which include cybercrime and harm to the environment, also need awareness. On the other hand, criminalisation is not apt for actions like homosexuality, sex work, and the use of personal drugs, as they don't affect others. Offences related to the status of an individual, such as begging, often come from socio-economic problems rather than moral shortcomings. Furthermore, speech-related offences, such as sedition and the laws of ambiguous obscenity, obstruct free expression and the examination of warrants. In conclusion to this, victimless crimes, that consists of gambling, provoke a discussion about legal proceedings in personal choices, intimating that various behaviours must not sustain criminal penalties. This frame of reference advocates a careful law-making approach that highlights the safety of the public while honouring the liberties of individuals.

There have been some cases in India which depicts how the law is changing. For instance, the landmark case of Navtej Singh Johar vs. Union of India,³³ which decriminalised homosexuality in the service as an example of coming forward in protecting the constitutional safeguards mainly for the LGBTQ+ community. The honourable Supreme Court of India upholds the principles of privacy and human dignity, which demonstrates an incremental change in societal attitudes. In addition to this, the discussion on marijuana legalisation gives a way to the complexities inbuilt in stabilizing the harm principle with dominant moral conservatism. Recommendations for legalisation frequently highlight the requirement for evidence-based policies which alleviate harm, whereas opponents argue from a moral standpoint in opposition to its acceptance. Still, there exist many things that we require to think about, such as the laws

³¹ Bombay Prevention of Begging Act, 1949

³² BNS §§111, 113

³³ Navtej Singh Johar v. Union of India AIR 2018 SC 4321

revolving around sedition and free speech. We must ensure that our laws are just and fair and that they respect the liberties of the people living in the country. Together, these case studies show the active engagement between law, society, and the development of cultural norms in India.

While exploring the progress of criminal law across various regions, it is emphasised that many comparative viewpoints offer valuable insights for India. The United Kingdom has inclined towards the harmful principle, focusing on the liberties of individuals while encouraging the decriminalisation of homosexuality and blasphemy,³⁴ demonstrating an escalating acceptance of personal freedoms. On the contrary, the United States remains a strong commitment to free speech; though its laws on drugs are conspicuously severe,³⁵ emphasising a sophisticated equilibrium between liberty and regulation. In the countries of the Nordic region, there exists a clear significance of rehabilitation over punishment,³⁶ along with minimal criminalisation of behaviours that seem to be non-harmful, recommending a more proactive approach to justice. These varied paradigms give a framework for India to view as it attempts to maintain the liberties of individuals along with the societal order. Challenges in India regarding criminal law consist of political resistance, where governments are usually indecisive to abrogate archaic laws that provide them remarkable control, and the pressures of a conservative society that shapes public morality and drives numerous behaviours in criminalisation.³⁷ The backlog of the judiciary intensifies these kinds of issues, as over-criminalisation results in dilatory tactics in justice, while the over-populated prisons subject petty criminals to harsh conditions, commemorating a pattern of decriminalisation that is a cycle of injustice.³⁸ Progressing towards a more sensible law of crime, necessitating the diligence of a roadmap for legislators, highlighting the harm principle, correspondence in sentencing, and the requirement of laws which demonstrate societal values. In addition to this, a mobile judicial review process is fundamental to break down the criminalisation that is unjust, parallel to this, cultivating a public debate encouraging people to evaluate in-depth how a crime should be defined. Eventually, investigating restorative justice substitutes for long-established punitive measures

³⁴ *R v. Secretary of State for the Home Dept., ex p. Simms* 2 AC 115 (UK harm principle); Sexual Offences Act 2003

³⁵ *New York Times v. Sullivan* 376 U.S. 254 (1964); Controlled Substances Act, 21 U.S.C.

³⁶ *Pratt & Morgan v. Jamaica*, UNHRC (1989); Nordic Prison Model (Tham, 2005)

³⁷ NITI Aayog, *Decriminalisation Report* (2025), Ch. 3

³⁸ National Judicial Data Grid (NJDG) Statistics, Feb 2026 (50M+ pending cases)

that would clear the way for a more lenient and impactful legal system that stands up for the rights and dignity of all people.

The recent landscape of the judiciary experiences critical concerns which debilitate the efficacy of the delivery of justice.³⁹ One of the most paramount concerns is the perseverance of judicial backlog, which is majorly energized by over-criminalisation.⁴⁰ These sensations not only obstruct the courts but also lead to overcrowded prisons, forming a system that is hard to deliver fair and timely justice. As we accumulate the cases, the delays deprive individuals of their right to an instantaneous resolution, regularly leading to lengthened detentions pre-trial and a distention on judicial resources. Merging this issue is the political misuse of laws, mainly those concerning sedition and preventive detention.⁴¹ These laws have progressively been utilised as tools in opposition to dissent, bringing up alarming questions about the true objective of criminal law in contemporary society. Despite being in the mechanism for protection and justice, they usually seem to act as the instruments of control by stifling legitimate expressions of opposition and diminishing the constitutional safeguards like civil liberties. The intersection of such issues demands urgent attention to reform judicial practices and safeguard democratic principles.

CONCLUSION

In India, the methodology of criminalisation must evolve beyond the entrenched moral framework of the colonial era and the frequent self-serving nature of political advantage.⁴² To execute a more equitable and just legal system, it is necessary to adopt a framework that is principled in nature, which highlights the key tenets like harm, proportionality, necessity, clarity, and justice.⁴³ This approach intends to make sure that criminal law should be in the service of its very basic role of protecting society while also respecting and protecting the rights and freedoms of the people. The latest reforms of BNS symbolise a significant step forward in this circumstance, signalling a more forward-looking legal standard.⁴⁴ Our criminal justice system aims to provide genuine protection to individuals and communities rather than merely focusing on control and imposing order.⁴⁵

³⁹ Law Commission of India, 277th Report (2018), Criminal Justice Reforms

⁴⁰ NCRB Prison Statistics India 2024 (overcrowding data)

⁴¹ IPC §124A

⁴² Committee on Reforms of Criminal Justice System, *Report* (Govt. of India, 2003), Vol. I

⁴³ John Stuart Mill, *On Liberty* (1859), Ch. 1 (harm principle); *Principles of Criminal Law*, UoLLB (2024)

⁴⁴ *Ibid*, effective July 1, 2024; PRS India, *The Bharatiya Nyaya Sanhita, 2023*

⁴⁵ Republic Day 2026, MHA Tableau: "From Punishment to Justice" principle

The trajectory in the legal and societal future of India merged upon this very choice.⁴⁶ To promote a more comprehensive and humane society, prioritising protection, dignity, and justice over procedures of control and repression is essential. By enfolded this transference in perspective, we can surely make sure that criminal law not satisfy its functions of protection furthermore validate the values of respect and fairness for human rights. With this lens only, can we fully comprehend the dormancy of our criminal justice system to effectively be in the service of its intended motive effectively.

⁴⁶ NITI Aayog, *Three Year Action Agenda* (2017), criminal justice reforms