

“Over Criminalization and its Effects on the Criminal Justice System”

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Abstract

There is hardly any society which is not beset with the problem of crime. Crime has been regarded as a normal phenomenon. Even a society composed of persons with angelic qualities would not be free from violations of the norms of that society. In fact crime is a constant phenomenon changing with the social transformation. Different groups have different and often incompatible interests in the society which give rise to conflicts which eventually result in the incidence of crime. The object of criminal justice is to protect the society against criminals by punishing them under the existing Penal Law. Thus punishment has been regarded as a method of reducing the incidence of criminal behavior either by deterring the potential offenders or by incapacitating and preventing them from repeating the offence or by reforming them into law-abiding citizens. Punishment approaches, towards anti-social behaviors have been referred to as criminalization. Today one of the biggest challenges before the criminal justice systems of the world is the issue of over criminalization. Over criminalization is not a problem of numerous crimes, rather it is a phenomenon which encompasses a broad array of issues. It has been referred to as the abuse of the supreme force within a particular criminal justice system. It is reflected as the implementation of impositions or crimes of sentences without any unjustified reasons. Over criminalization has been viewed as a phenomenon as grossly allowing disproportionate penalties.

The paper discusses the concept of over criminalization in the light of Indian context, its effects on the criminal justice delivery system and on the fundamental rights of the persons who are subject to disproportionate punishment. Overcrowding in prisons is one of the immediate aftermaths of over criminalization. Imprisonment is an expensive and largely ineffective way of reducing crime. To do way with the problem of over criminalization, it is being proposed that a new concept of Justice reinvestment be incorporated in the criminal justice system of India. Justice reinvestment advocates that, funding for prisons should be reduced and redirected towards addressing the underlying causes of crime in communities with high levels of incarceration. Incarcerated individuals overwhelmingly come from the poorest and marginalized sectors of society. Justice reinvestment therefore proposes shifting resources away from incarceration towards prevention, early intervention and rehabilitation of the disadvantaged communities who are in need of care and concern. Another effective way of dealing with the issue of over criminalization is decriminalization of wrongs which are harmless in nature and are against private morality. Such wrongs should be kept out of the purview of the definition of

crime. Also, the paper stresses upon the need of decriminalizing victimless crimes. Victimless crimes refer to such illegal behaviours which do not violate or threaten anyone's rights. Purpose of criminal justice system is to do justice by punishing the offender. Decriminalization of petty wrongs, wrongs against private morality will enable the criminal Justice system in India to perform its essential task of protecting persons and property against serious offences.

Key words: Over criminalization, Justice reinvestment, Victimless Crimes.

Introduction

There is hardly any society which is not beset with the problem of crime. Crime has been regarded as a normal phenomenon.¹ Even a society composed of persons with angelic qualities would not be free from violations of the norms of that society. In fact crime is a constant phenomenon changing with the social transformation. Different groups have different and often incompatible interests in the society which give rise to conflicts which eventually result in the incidence of crime. The object of criminal justice is to protect the society against criminals by punishing them under the existing Penal Law. Thus punishment has been regarded as a method of reducing the incidence of criminal behavior either by deterring the potential offenders or by incapacitating and preventing them from repeating the offence or by reforming them into law-abiding citizens. Punishment approaches, towards anti-social behaviors have been referred to as criminalization. Criminal law being a core institution of the liberal state and of the free society provides us with a sense of security and purposefulness. Coercion and condemnation are the two core elements on the basis of which criminal law functions in society as a means of social control. Through the medium of punishment, it not only condemns the wrongful act but also coerces an individual to abide by the law. Of late, criminal justice system has been accused of being unprincipled and chaotic owing to the principle of over criminalisation and subject to the unreflective and populist practices of politicians, practitioners and other social actors. Thus, not only are we experiencing an unprincipled, chaotic and populist criminal law, we are also using it as if it were the main way or perhaps the only way by which the state can put its policies into practice. As a foreseeable consequence, many prisons have become overpopulated and ended fulfilling a role not very different from dumps of human. It has become a matter of concern for many criminologists, that why a welfare institution has gone so wrong as to be deemed a "lost cause"² used for perverse and immoral ends"³

¹ Emile Durkheim, *On Crime and Punishment*, (Dissertation.Com,2002)

² Andrew Ashworth, "*Is Criminal Law a Lost Cause*", 116 *Law quarterly Review* 225 (2000)

³ Douglas Husak, *Over criminalisation, The Limits of the Criminal Law* (Oxford University Press,2009)

1. What is over criminalization?

Over criminalisation indicates the unprincipled extension of the practice of criminalizing conduct. It refers to the abuse of coercive power by the state through the enactment of criminal statutes. In other words it is a phenomenon primarily and mainly related to the enacting of criminal laws. Over criminalisation is a complex multifaceted concept that involves different emphasis and considerations. In order to determine whether or not we are facing over criminalization, we do not need to look anywhere else but to penal statutes themselves. Over criminalisation includes (1) untenable offences, (2) Superfluous statutes, (3) doctrines that overextend culpability, (4) crimes without Jurisdictional authority, (5) grossly disproportionate punishments, (6) excessive or pre-textual enforcement of petty violations. The phenomenon of over criminalization covers most of the different stages of the criminal justice system, including jurisdictional and legislative matters, use of power by the police, proportionality of sentencing and punishment. Over criminalisation is regarded pernicious mainly because it produces unjust punishments which are excessive or are inflicted for conduct that should not be criminalized at all. There is a complex relationship between criminal law and the punishments. Expansion in the criminal law increases levels of punishment in obvious ways. Punishments have been regarded as the most coercive practice of social control in the modern state because these restrict freedom of movement ,take away civil and political rights, terminate the life of an individual .If the practice of punishment is unjust beyond the base line ,the practice itself becomes deeply objectionable .

2. Most salient and Pervasive forms of over criminalisation.

i) Overlapping Offences.

There are a number of statutes that criminalize conduct that has already been criminalized by a different statute within the same jurisdiction. Since duplicating statutes generally render sentences harsher which are a violation of basic human rights of the individuals. On many occasions, overlapping offences relate to penal populism. Governments use criminalization in order to satisfy the demands of the public, particularly after some criminal conduct has received great public attention .Overlapping offences make the state more popular with those voters who desire tough-on-crime type of policies. Unjustified expansion of substantive criminal law by enacting duplicate statutes is seen as a violation of the principle of rule of Law.

ii) Ancillary Offences.

Ancillary offences represent a second instance of over criminalisation. These offences typically bear some kind of direct or indirect auxiliary relationship to the primary harm. They are described here as ancillary crimes .The main function of ancillary offences is to facilitate the role of the prosecutorial part, especially when the offence of which these offences are ancillary is for some reason difficult to prosecute. The existence of these ancillary offences in the act

criminalizing conduct that would otherwise be innocent, allows the prosecution to allege some success in tackling the core offence. Ancillary offences help to increase sentences, since defendants can be charged, prosecuted and sentenced for more types of offences. As a consequence, ancillary offences have become a well-cemented instance of over criminalization in current penal legislation.

iii) Jurisdictionally Mistaken Offences.

This type treats as a criminal offence what should either be a civil offence or no offence at all. Such an approach supports the expansion of the criminal law into areas that should be beyond its jurisdiction. Examples of this type of offences are statutes that criminalize acts which are of a very trivial nature, criminalization of same-sex sexual intercourse, or the criminalization of beliefs, immoral acts such as prostitution, gambling, drug abuse etc. These cases are jurisdictionally mistaken offences because they criminalize conduct that is not part of what the criminal law should criminalize or of what the law should regulate at all. Personal morality, and individual conscience, is prima facie beyond the proper jurisdiction of the criminal law.

3. Causes of over criminalization.

Various factors have been attributed as some of the most distinct causes of over criminalisation.

i) Vested interest of the state.

The politics of law and order which the political parties play in order to gain maximum vote banks has been attributed as one of the prime causes of over criminalisation. The ruling party in order to avert any opposition and to seek the effective implementation of its policies resort to over criminalisation. This attitude of the ruling parties has resulted in an ever-increasing crime rate within the country and has exacerbated severity of punishments. The severity of punishments has been noticed to be leading to massive injustices on the offenders, and in turn, cases of over criminalization have been eminent. It is noted that the severity of the punishments to some levels are not justified because they are executed without any justifications or arguments.

ii) Deterrent and Retributive approaches towards crime and criminal behavior. Criminal justice systems of many countries aim to control crime through deterrent and retributive means. Retributive concept of punishment does not treat punishment as an instrument for securing public welfare. Retributive justice suggests that evil should be returned for evil without any regard to consequences. It suggests that punishment is an expression of society's disapprobation for offender's criminal act. The principle of deterrence presupposes infliction of severe penalties on the offenders with a view to deterring the offenders from committing crime. Therefore

following the principle of retribution and deterrence as an effective way to control crime, many criminal systems have adopted and incorporated it in the substantive and procedural laws. In this context, punishment has been viewed as an effective means of reducing crime through incapacitation. This has resulted in unduly harsh punishment which are disproportionate to the wrong committed. This attitude of the lawmakers has exacerbated the problem of over criminalization.

iii) The irrelevance of the harm principle.

The problem of over criminalization is viewed with respect to the wrongs which go beyond the traditional and most fundamental principles of criminal law i.e. mens rea. Also the problem of over criminalisation is viewed in relation to offences which are immoral, less harmful and of a very trivial nature. In dealing with wrongs more of a civil and regulatory nature, the principle of criminalization which is based on the harm principle has been rendered irrelevant and redundant due to the unlimited and unbridled application of substantive criminal law, to bring within its ambit immoral, trivial and victimless offences.

iv) Over criminalisation as being caused by professional and structural factors.

Professional advancement and growth within a career in the justice system has contributed to over criminalisation. Like other professionals within their field of expertise, police and prosecutors also seek the promotions within their jobs. With the system evaluating who to promote through looking into the number of arrests and convictions a police makes, this is a loophole that leads to over criminalisation practices. Thus, the more crimes a police has on the books, higher the probability of their promotions. On the same note, it is paramount that with numerous crimes in the books, attorneys and judges would want to be recognized as productive by resolving the cases the fastest possible.

4. Consequences of over criminalization. Having understood the causes of over criminalisation, it is ideal to look into the consequences of the same. In this case, looking into the consequences brings out the big picture of what underlies the phenomenon and would later help in establishing some solutions.

i) Infringement of constitutional and human rights.

Over criminalization is a phenomenon which has numerous consequences. It affects varying subjects in different ways. The distended application of substantive criminal law has adverse effect on the freedom and liberty of the people. The unprincipled application of the principle of over criminalisation has made the enforcers of law omnipotent and all powerful. They have assumed the place of parties seeking arrests and convictions. The police and law enforcement

agencies exercise unbridled power to squeeze out information from the offenders. Custodial violence and torture are some of the examples of abuse of power by the investigating agencies. This practice greatly violates the constitutional rights of the prisoners such as right against self-incrimination. In fact over criminalisation leads to guilty pleas that are unjustified and severely unfair. Finally it results in unfair judgments leading to unfair sentences. Across the globe few drivers travel without breaking traffic rules, but this does not justify the punishments infringed on them. It is from this assumption that the police tend to criminalize every driver on the road and charging them heftily even for crimes not committed. Police have developed behaviour of stopping any driver even without a justified reason because they have been influenced by over criminalization behaviors being practiced within their profession.

ii) Overcrowding in prisons.

The concept of over criminalisation has direct relation to the overcrowding in prisons. Disproportionate expansion of criminal law means more punishments. More punishments mean more imprisonment. The net result is overcrowding in prisons.

iii) Extra burden on the state finances. Over criminalization encourages poor management and misallocation of limited resources within a country. In an effort to prove a point and criminalize an act, the government uses a lot of resources which could be channeled to other fruitful activities about development. To the extremes, over criminalization encourages poor management and misallocation of limited resources within a country. Many governments squander funds on criminalizing prostitution, gambling, drug abuse and on futile policing. Instead, it would be better if law enforcers utilize the resources to track down other dangerous criminals such as child molesters and rapists.

iv) Biased/prejudicial decisions and unjust Punishments.

Law enforcement agencies in order to implicate the offenders use corrupt and immoral practices to collect false evidence. Threatening of the witnesses and the suspect is a normal tactic which is generally adopted by the investigating agencies. Sentence pronounced on the basis of fabricated evidences results in biased prejudicial decisions which pave way for unjust /harsh and excessive punishments.

v) Over criminalisation breeds corrupt practices and lowers down the moral force of law.

The enactment and deployment of the criminal sanction targeting behavior that is harmless weakens the moral force of law within a country, because the law enforcement agencies dwell in biases, prejudice discrimination and various unlawful and dilatory practices to justify and substantiate their allegations and accusations.

5. Solutions to check Over criminalisation.**i) Adoption of reformatory principles in checking certain wrongful behavior.**

Most part of the criminal justice systems is dominated by the retributive approaches towards the control of crime causation. Strict application of retributive principle in handling the commission of crime has resulted in disproportionate punishment which is unjust and excessively severe. Therefore it is pertinent to consider the reformatory approaches which aim at changing the attitude of offender so as to rehabilitate him as a law abiding member of society. Reformatory theory condemns all kinds of corporeal punishments. The major emphasis of the reformist movement is rehabilitation of the deviants in peno-correctional institutions so that they are transformed into good citizens. This approach advocates humane treatment of inmates inside the prison institutions. Parole, Probation, Open prisons are an extension of reformatory principle. Less harmful wrongs, victimless crimes such as drug abuse, immoral acts like prostitution, gambling should be dealt with reformatory approach.

ii) Review the Criminal Justice System.

To counter the problem of over criminalization, it is necessary to review the entire criminal justice system. Certain constitutional principles which adhere to basic human rights principles must be practically incorporated in the procedural criminal law. It too calls for a review of the constitutional provisions, so that unprincipled and chaotic expansion of substantive law could be checked and controlled. With appropriate checks, harsher punishments and unjustified laws and policies can be controlled as well as reviewed to prevent discrimination in the system practice.

iii) Decriminalization of certain category of offences.

To check the unprincipled growth of overcriminalization, which has increased the percentage of criminal activities in many countries, decriminalization in the field of private morality has been suggested. Cases involving public morality are generally victimless crimes which do not directly harm the other party. Prostitution; prohibited sexual behavior, gambling, and drug abuse have been identified as the crimes which do not involve the second party as a victim. It is sincerely proposed that such wrongful acts must be decriminalized. Rather a reformatory approach towards the wrong doers must be adopted so that they could be rehabilitated and assimilated in the society as normal human beings.

iv) Justice Reinvestment.

There is a plethora of evidence-based data which go on to suggest that, despite effective punitive measures in the form of punishment (imprisonment) the problem of crime and criminal behavior

still persists. The moot question to be contemplated upon is, whether imprisonment of people guilty of deviant behavior is a fool proof solution to the growing menace of crime in the world societies? Can, societies of the world guarantee to rehabilitate the criminal through imprisonment?.A new approach, in the form of Justice reinvestment as a means to effectively solve the problem of criminality and over criminalisation is being approached.The concept of Justice reinvestment is based on the premise that imprisonment is an expensive and largely ineffective way of reducing crime⁴.It advocates that, funding for prisons should be reduced and redirected towards addressing the underlying causes of crime in communities with high levels of incarceration. Incarcerated individuals overwhelmingly come from the poorest and marginalized sections of society. Justice reinvestment therefore proposes shifting resources away from incarceration towards prevention, early intervention and rehabilitation of the disadvantaged communities who are in need of care and concern.

v) Strict adherence to the constitutional law.

To check the growing scourge of over criminalisation, strict adherence to the constitutional provision of right to life and liberty must be observed while implementing and expanding the substantive criminal law. Fundamental principle of Article 21 which states that no one shall be deprived of his life except according to the procedure established by law must be strictly adhered to.

vi) Accountability of the Government.

Investing in government accountability is also a strong solution that could be of high value in establishing appropriate solutions for over criminalisation. For impunity and corruption to end and for a country to end over criminalisation, it is crucial for the system to develop theoretical justification in using criminal sanctions. Such a strategy is crucial as it helps to resolve the enormous problem of overuse of power to discriminate against others and the revival of the harm principle.

Conclusion

Over criminalization is not a problem of numerous crimes within the justice sector, rather it is a phenomena, which encompasses a broad array of issues. Through this paper it is attempted to highlight some causes of over criminalization including political influences on the established systems, impunity among the lawmakers, irrelevance of the harm principle, corruption within the system and other professional and structural factors. Thus there are identified consequences of

⁴ Australian National University, National Centre for Indigenous Studies, Reducing incarceration using Justice Reinvestment: an exploratory case study.

over criminalisation including loss of the moral force of a country's justice system, harmful social costs across the society increased corruption within the system, misallocation of limited resources, disparity of power and an inefficient justice system within the country. Some possible solutions of over criminalization have also been identified in this discussion. They include review of the constitution and the existent laws, investing in government accountability and an overhaul of the entire system to revive the strong mission of fighting against over criminalisation.