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What is 'Overcriminalisation', and How does the Jan Vishwas (Amendment of Provisions) Bill, 2022 deal with it?

JASPREET SINGH[1]

ABSTRACT

The Indian sphere of law comprises mainly the criminal laws that govern the crimes and punishment if those crimes are committed. For this purpose, India has a set of substantive and procedural criminal codes. Criminal law has been growing at a high pace without any principled basis for such an extreme overgrowth, and legislation has been playing a key role in it. Such over-criminalisation creates multiple repercussions like overcrowding of prisons, the pendency of cases, unnecessary expenditure of economic resources, degradation of laws and others which are discussed in detail in this paper. To control the problem of over-criminalization, the Jan Vishwas Bill of 2022 has been introduced in Parliament. The bill attempts to decriminalise minor offences under many existing legislations across the nation and replaces many imprisonment provisions for certain offences by setting a monetary penalty or by increasing the already existing one. However, it has been found that the Bill is insufficient for many purposes in various aspects. The scope of the Bill is restricted. The limitations have also been a matter of discussion in the paper.

I. INTRODUCTION

Criminal law is that instrument which controls, regulates and imposes sanctions for any crime committed in the form of punishment and imposition of fines depending upon the gravity of the offence. Hence, Criminal law refers to the body of laws that applies to criminal acts. For the application of criminal laws, the offences or crimes must be properly defined and classified. Such defining of the crimes and determining what constitutes such crimes must be subjected to detailed scrutiny before declaring any act as a crime. The *Australian Law Dictionary* has defined crime as 'an activity that the state prohibits by law and punishes'[2] and, therefore, puts the state in a position where the main focus while criminalising an act is clearly not on the nature of the act but on the law criminalising it. Lord Atkin, in *Proprietary Articles Trade Association v AG (Canada)*[3], remarked that 'the criminal quality of an act cannot be ascertained by intuition; nor

[1] Author is a student at The Law School, University of Jammu, India.
[2] Trischa Mann (ed), Australian Law Dictionary (2010) 152.
[3] [1931] AC 310 at 324

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can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?'[4] Whatever goes against the object of the law laid down by the state becomes a crime. This approach to rendering an act of crime is heavily loaded with the autonomy of the state in deciding crimes. The criminal law has been growing in modern India without much restraint, and the number of acts that are getting the tag of 'crime' is rapidly increasing because new laws are being formulated and promulgated every rising day whose object is to bring as many acts under the umbrella of criminal law as possible. Even the least morally wrong crimes are being classified as crimes.

II. THE RISING PROBLEM OF OVERCRIMINALIZATION AND ITS CONSEQUENCES

Many a times criminal law is used as an apparatus by the politicians who desire to get to the power or remain in power by criminalizing the minutest of the act which might just have a touch of wrongness and which in the common knowledge would not be easily accepted as a crime. The governments and those in power, hence, over-criminalize the acts and set disproportionally stringent punishments and other sanctions. This leads to the problem of overclassification of crimes. Governments take such stance to create an image of themselves for the public where they would be discerned as responsible and opposed-to-crime governments. And such a political -legal experiment by the governments has often proved advantageous in getting addition in their vote banks as modern states are grappling with the problem of rise is criminal attempts and citizens desire to live and work in a protected environment and therefore vote for such governments. Legislators hope to be perceived as "doing something" to combat unwanted behaviors.[5] Tabloids and the popular media thrive on accounts of how offenders "get away" with crime by escaping through loopholes and technicalities. Policies are enacted most easily when they are unopposed, and no significant organization wants to represent the "crime lobby" by protesting our eagerness to resort to criminalization and punishment."[6] This supernumerary criminalization of the acts without necessary and satisfying justification can, therefore, be called 'overcriminalization'. Overcriminalization can take various forms such as superfluous statues, doctrines which overextend culpability, grossly disproportionate punishments, untenable offences, extreme enforcement of petty violations, overlapping and ancillary offences etc.

[4] Ibid
[5] Husak, D. N. (2008). *Overcriminalization : the limits of the criminal law*. New York: Oxford University Press.
[6] Julian V. Roberts, et al.: Penal Populism and Public Opinion (New York: Oxford University Press, 2002)

1. Pendency of cases - As per the National Judicial Data Grid, of the 4.3 crore pending cases, nearly 3.2 crore cases are in relation to criminal proceedings.[7] The number of growing criminal cases share a visibly direct link with the number of criminal laws.

2. Increase in prison population - According to the Prison Statistics of 2021 released by the National Crime Records Bureau, the capacity of the Indian prisons is 4.25 lakh but an unbalancing number of 5.54 lakh prisoners were confined in them.

3. Economic resources - When the collateral expenses on prisoners are taken into consideration for the equation, the capital exhausted on punishment procedures is astronomical. This overwhelming expenditure of resources cannot be rationalized by any social benefit. No one should underestimate the importance of economic factors in shaping—and ultimately in changing the policies.

4. Destruction of the Rule of Law - The intensification in criminalization damages the rule of law. It is a sacrosanct idea that the extent and size of criminal law destabilizes the principle of legality. Legal logicians and philosophers typically interpret the rule of law to entail that criminal statutes are enacted by legislative organ of the government and encompass an in-depth and comprehensive description of the prescribed conduct to be followed. Nevertheless, the scope of prohibited behavior cannot be determined without drifting outside the confines of criminal laws and examining noncriminal statutes. Hence, the criminal law undergoes outsourcing, that is, it subcontracts with other sources.

5. Unjust punishments – The issue of overcriminalization is obnoxiously disagreeable in its very fundamental level as it has the expressive propensity to produce excessive and profligate punishment. Hence, unjust punishments are the direct result of overcriminalization. *The primary victims of this injustice are the persons who incur penal liability.*[8] The foremost drawback of overcriminalization is its impact on those who are punished, 'rather than from its effects on taxpayers, our culture of compliance, the rule of law, or society generally. Injustice is most glaring when defendants are sentenced for conduct that should not have given rise to criminal liability at all—in other words, when punishments are imposed for conduct that fails to satisfy our best theory of criminalization.'[9]

[7] Bajpai, A. K. & G. S. (2022, December 28). Letter and Spirit | A failed attempt at decriminalisation. *The Hindu*. Retrieved from https://www.thehindu.com/news/national/a-failed-attempt-at-decriminalisation/article66315018.ece

[8] Husak, D. N. (2008). *Overcriminalization : the limits of the criminal law*. New York: Oxford University Press.

[9] Ibid

6. Degradation of criminal laws – A significant view in the context of criminal laws is that overcriminalization takes qualitative dimensions and such dimensions are very much important to the veracity and effectiveness of the criminal law than its already established and evaluated quantitative aspects. To put it simply, overcriminalization has a tendency of degrading the quality of criminal laws, codes, statutes. and to weaken the exertion of the utilitarians and retributivists to provide fair, correct and proportionately balanced punishments for the offence committed. 'A code that is too large and grows too rapidly will often be poorly organized, structured, and conceived. The resulting laws may not be readily accessible or comprehensible to those subject to their commands.'[10] Furthermore, fast expanding criminal code is particularly prone to contain crimes in which the most important and forming elements of crime - conduct of the criminal (actus reus) and mental element (mens rea) are expatiated to some extent. Such forms of drafting and explanatory faults can deliver unwarranted and unintended stroke to criminal laws and act as a menace by leaving scope for severely disproportionate punishment.

III. JAN VISHWAS BILL OF 2022

The central government of India introduced the Jan Vishwas (Amendment of Provisions) Bill, 2022 during the winter session of the parliament for discussion after which it was sent to a Joint Parliament Committee consisting of thirty-one members. The Department for Promotion of Industry and Internal Trade has put forward this Bill.

(A) Objective of the Bill

The Bill aims at decriminalization certain number of minor offences under various legislations. It also aims at rationalization of penalties under the current laws governing many sectors like food, information technology, agriculture, postal service and many others. Another objective of the bill is to improve and enrich the comfort of living and carrying out business activities in India with ease. It includes many proposals to amend many clauses relating to environment, prevention of air pollution and forests.

In total, 183 offences under 42 legislations (administered by 19 ministries including agriculture, posts, finance, road transport and highways) are to be decriminalized under this Bill. Such legislations include the Environment (Protection) Act of 1986, Public Debt Act of 1944, The Public Liability Insurance Act of 1991, Cinematograph Act of 1952, The Information Technology Act of 2000, Copyright Act of 1957, Prevention of Money-Laundering Act of 2002,

[10] See Stephen F. Smith, Proportionality and Federalization, 91 VA. L. REV. 879, 887–88 (2005).

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Legal Metrology Act of 2009 and many others.

(B) Provisions of the Bill

In consonance with the objectives. the bill contains the following provisions:

1. Decriminalization of offences

Under the bill various offences accompanying captivity punishment in the form of imprisonment term in previously existing Acts have been decriminalized by imposing only a punishment of fine.

For instance, under the Agricultural Produce (Grading and Marking) Act, 1937, copying grade classification marks is culpable accompanying imprisonment which can be extended up to three years and a fine extending up to five thousand rupees. Under the 1937 Act, Grade label mark signifies the quality of an item. The Bill replaces the exiting punishment provisions with the fine penalty of eight lakh rupees.

Similarly, under the Information Technology Act, 2000, disclosing private details in falling out of a lawful contract is culpable accompanying imprisonment punishment extending up to three years, or a fine of maximum five lakh rupees, or in some cases, both the imprisonment and the fine. The Jan Vishwas Bill replaces these existing provisions with a punishment of fine of twenty-five lakh rupees.

For many offences that imposed the punishment of fine, a new substituted provision has been placed replacing the existing one. The new provision imposes a penalty and not fine. The Patents Act of 1970 has undergone a change in this respect. If a person sells an article which is falsely represented as patented in India is liable to pay a fine which may extend up to one lakh rupees under the previously existing provisions of the Patents Act of 1970. The Jan Vishwas Bill provides for the replacement of the said provision by a new provision that imposes a penalty which can be increased up to ten lakh rupees. And if the claim is continuing in nature, an additional penalty is to be imposed that will be one thousand rupees per day.

The acts of trespass and pasturing of cattle are punishable under the Indian Forest Act, 1972 by an imprisonment term. However, the Jan Vishwas Bill removes the imprisonment term but retains the fine of five hundred rupees.

Discharging pollutants can attract imprisonment as provided under the Environment (Protection) Act of 1986. The Jan Vishwas Bill eliminates the provision providing for the punishment of imprisonment but retains the monetary penalty with an increase in the amount to be paid as fine.

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2. Review and alteration of fines

The Jan Vishwas Bill increases the amount in fines and penalties for many of the offences mentioned in the Bill. Under the Bill, 10 percent of the minimum amount of these fines and penalties will be increased every year. In the light of the green offences, the Bill provides to remove the imprisonment terms and increases the penalties. The amount of the penalty increases with the increasing gravity of the offence.

3. Appointment of Adjudicating officers

A provision has been added in the Bill regarding the appointment of adjudicating officers. The central government has been conferred the power to appoint one or more adjudicating officers to determine the penalties for the offences under the Acts like the Agricultural Produce (Grading and Marking) Act, 1937, the Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986, and the Public Liability Insurance Act, 1991 etc.

Further the adjudicating officer has been conferred the following powers:

- Summoning the individuals for evidence
- To inquire for the violations of the mentioned Acts

4. Appeal against the order of the Adjudicating officer

There is the incorporation of the mechanism for an appeal against the order of he adjudicating officer. If the party who approaches the officer related to the penalty awarded is not satisfied with the order so passed, the aggrieved party can resort to the appellate mechanism specified in the Bill. For example, in the Environment (Protection) Act of 1986, appeals against the order of the adjudicating officer can be filed with the National Green Tribunal after the passing of the order within 60 days.

5. Limitations of the Bill

The Jan Vishwas Bill attempts at decriminalization of offences and shifts the focus of law more on the penalty side of the punishment from the from the imprisonment side. However, the following limitations of the Bill restrict the scope of the Bill:

a) The number of offences deregulated under the Bill is way less than the total offences – According to the report titled *Jailed for Doing Business* released by the Observer Research Foundation, there exist more than 26,134 clauses providing for imprisonment under 843 legislations dealing with the regulation of economic activities and business. Therefore, India's regulatory framework consists of an array of legislations which need to be decriminalized but

the Bill covers only a few of the legislations. Hence, a significant intensity of decriminalization cannot be achieved under the Bill.

b) Quasi - decriminalization of offences – Ashworth in his work *Is the Criminal Law a Lost Cause?*[11] has attempted to distinguish between the penal offences and the regulatory offences. he has exemplified such a distinction through the functional distinction between a fine and a tax. Tax and fine are similar to each other as are penal and regulatory offences. however, the considered pairs and their elements differ in their functions. The object of tax is regulatory in nature whereas when a person is fined for a wrong, his esteem is affected and the elements of stigma and censure attach to the situation. There must be a clear demarcation between the offences which are regulatory in nature and those which are grave. And such demarcation is being diluted as stigma and censure are being deployed to regulatory domains.

c) Limited to regulatory domains – The implied interpretation of the object and manner of the Bill is that the government has such a rationale of decriminalization which limits decriminalization to the regulatory domains only despite the fact that there is an urgent need to decriminalize many penal offences as well which include sedition (Section 124A of IPC), various offences under the UAPA and the NDPS Act, anti-conversion laws etc. An assessment of these and related offences under a principle is required.

6. Narrow legislative intention behind the Bill- Major reasoning behind the introduction of the Bill is the ease of doing business but this reduces the scope of the bill in the light of legislative intention. The Bill should have been brought with the intention of rectifying the ailing criminal law system in India.

IV. CONCLUSION

For every society to be a civilized one, punishment is a necessary evil, as no social aggregation of human beings is free from the curse of crime. Therefore, a considerable amount of punishment is necessary. The amount and severity of punishment should be proportionate. Jeremy Bentham remarks, "But is the vast amount of punishment we inflict really necessary to achieve a greater social good—like crime reduction?[12] Crime reduction cannot be directly linked to the increase in the punishment of crimes. To reduce crime in a state, proper and effective implementation of laws should be the main concern instead of shifting the focus to the deliberation of new legislation.

[11] Ashworth, A. (2015). *Positive obligations in criminal law*. Oxford: Hart Publishing.
[10] Jeremy Bentham: Principles of Morals and Legislation (London: Methuen, 1970), p.158. According to utilitarians such as Jeremy Bentham, all punishment is an evil

New rules and procedures mostly contain perfunctory language that can be interpreted in a way to imply that any person who fails to comply will face a criminal prosecution under regulations. The factors that lead regulators to seek criminal rather than civil sanctions when legal rules are broken remain a source of controversy and uncertainty.[13]

But whatever the exact number of criminal offences may be, the figure is bound to increase before it decreases. It is unpredictably easier to enact criminal laws than to repeal them. It is the possibly very likelihood that a criminal statute gets to face the fate of becoming an unused law than being removed by a deliberation of the legislature because no government would want to repeal a law which made them look strong as a political force when it was enacted. Loss of political support would threaten the government with the removal of such a law.

The principle of proportionality should be the basis for the theory of criminalisation. The harshness of the sentence should be measured by the gravity of the crime. When punishments are disproportionate, the evil of injustice prevails in society. The offender undoubtedly deserves punishment, but that punishment should be according to the gravity of the crime committed or attempted.

If overcriminalization is looked upon as a quantitative problem, then there are only two ways to deal with it. They must be repealed by the legislature, or the judiciary must come into the picture, and the courts should strike down such laws as being arbitrary and, therefore, unconstitutional. But according to the prominent account of the criminal law's political economy, "lawmakers' political and institutional incentives "always push toward broader liability rules, and toward harsher sentences as well"[14]. The Constitution, as presently interpreted, not only fails to counteract this dynamic, it actually promotes it, albeit unintentionally, by regulating the criminal procedure and taking a laissez-faire approach to the funding of indigent criminal defence and to substantive criminal law (i.e., what can and cannot be punished criminally, and how crimes must be defined). This is perverse; Professor Stuntz explains because it "encourage[s] bad substantive law and underfunding."[15]. Viewed as a quantitative matter, in short, overcriminalisation is a problem without a constitutional "fix."[16]

The punishment of imprisonment for minor offences is a bugbear for the common man and is a contributing factor in obstructing the growth and progress of the business ecosystem and

[11] For a useful study, see Keith Hawkins: Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency (Oxford: Oxford University Press, 2002)
[14] Stuntz, supra note 1, at 510
[15] William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 YALE L.J. 1, 6 (1997)
[16]Husak, D. N. (2008). *Overcriminalization : the limits of the criminal law*. New York: Oxford University Press.

individual assurance in India. Trust deficit is caused by the set of outdated regulations. And what is required in the ongoing time is the principle of *Minimum Government, Maximum Governance*, to redefine the regulatory landscape of India in the context of criminal law. The Jan Vishwas Bill of 2022 aims to address this issue by swapping minor offences with monetary penalties.

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