
DYNAMIC DECRIMINALIZATION: INVESTIGATION OF THE EXPANDING PENUMBRA OF INDIAN CRIMINAL LAW

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ABSTRACT

This research paper investigates Indian criminal law, with an emphasis on the decriminalization of specific offenses. It investigates historical history, legislative changes, and sociological dynamics to comprehend the influence of decriminalization on the legal system, individual rights, and the larger societal fabric. The study delves into the historical roots of Indian criminal jurisprudence, dating back to British colonial authority, post-independence legal changes, and early criminal statutes. An in-depth examination of crucial legislative developments takes place, including substantial adjustments to the Penal Code and historic laws influencing the decriminalization landscape.

The research investigates the impact of court precedents on decriminalization and basic rights within a developing legal environment. It also looks into social perspectives on criminality, including evolving attitudes and the interactions between public opinion, law enforcement, and the prison system.

A critical analysis section examines the benefits and drawbacks of decriminalization, considering the difficult balance necessary between individual liberty and societal order. Comparative views from other jurisdictions expand the discussion by providing a more comprehensive picture of global decriminalization tendencies.

The study also investigates the problems and debates surrounding this paradigm change, including opposition, unforeseen consequences, and potential legal gaps. Future legal reform recommendations are offered, with a focus on possible areas for further decriminalization, strengthening legal protections, and increasing public awareness and education.

Finally, the study summarizes its results, providing a complete vision of the future of criminal jurisprudence in India. The research intends to add substantively to the academic discussion by providing insights that are relevant to the country's emerging criminal legislation.

Keywords: decriminalization, criminal jurisprudence, criminal legislation, penalty, offenses, sedition, societal order, individual liberty.

INTRODUCTION:

Dynamic decriminalization is a term for a policy strategy that adjusts the legality of actions over time based on public opinion, empirical data, and pragmatic concerns. This approach is more adaptable than static criminalization, which maintains laws despite changing circumstances.

The dynamic nature of legal systems is evident in the expanding penumbra of Indian criminal law, which raises concerns about overcriminalization and power abuse by law enforcement officials while also strengthening individual rights and public interests through the expansion of criminal statutes.

As Henry Hart pointed out in his classic article *The Aims of the Criminal Law*, criminal law legislation's main task is making a “sound job of reflecting community attitudes and needs.” In Hart’s words, “What distinguishes a criminal from a civil sanction is the judgment of community condemnation that accompanies and justifies its imposition.”¹

The Indian Penal Code, 1860, the Indian Evidence Act, 1872, the Code of Criminal Procedure, the Police Act, 1861, and the Prisons Act, 1894 were the primary laws governing criminal justice in British India. Other special laws sanction specific acts and processes.

The Unlawful Operations (Prevention) Act of 1967 addresses terrorist activities and illegal acts. The Protection of Children from Sexual Offenses Act of 2012 protects children from pornography and sexual abuse. The Food Safety and Standards Act of 2006 penalizes food-related offenses. The Bharatiya Sakshya Bill, 2023, replaces IPC, CrPC, and IEA, with the Committee on Home Affairs reviewing them.²

SHOULD CRIMINAL LAWS BE REFORMATIVE OR PUNITIVE IN CHARACTER?

In 1979, the Indian Supreme Court emphasized that the main goals of criminal justice administration should be the reformation and rehabilitation of criminals rather than only discouraging crime.³ Reformatory elements for criminal law were suggested in the Report on

¹ THE TRANSFORMATIONAL FUNCTION OF THE CRIMINAL LAW: IN SEARCH OF OPERATIONAL BOUNDARIES

² Report No. 248, ‘The Bharatiya Sakshya Bill, 2023’, The Standing Committee on Home Affairs, Rajya Sabha, November 10, 2023.

³ 1979 AIR 964, Bishnu Deo Shaw @ Bishnu Dayal v. State of West Bengal, Supreme Court, February 22, 1979.

the Draft National Policy on Criminal Justice (2007). These included mainstreaming settlement without trial, decriminalizing offenses through civil process, and permitting community service and compensation for offenses like vagrancy. The bills maintain the punitive aspects of the criminal justice system while offering community service as an alternative to jail for certain offenders. The classification of offenses as bailable and compoundable is inconsistent; for example, snatching is a bailable offense, but theft is not.⁴

Summarily tried minor infractions are not compoundable; instead, they need to be proven guilty through trial and conviction.⁵ The California Criminal Code was revised in 2022 to mandate that legislatures take into account alternatives to jail, including collaborative justice court programs, diversion, restorative justice, and probation, and to handle criminal cases using the least restrictive methods possible.⁶

DEFINING THE TRANSFORMATIONAL FUNCTION OF THE CRIMINAL LAW:

The text discusses the connection between criminal law and social change, referring to both criminalization and punishment as distinct legal procedures. These activities are social and cultural, and the goals and purposes of punishment, which involves applying a criminal penalty, and criminalization, which is the legislative action of making a behavior a criminal offense, do not always align.

However, it is indisputable that criminal statutes have two essential components: a description of what behavior is forbidden and a punishment for breaking it. The choice to designate a certain behavior as illegal is, in theory, closely linked to the imposition of criminal sanctions. Punishment plays a crucial role in maintaining societal norms and values as well as safeguarding individual and group interests that are considered particularly important through criminalization.⁷

⁴ Criminal Justice Reform', United Nations Office on Drugs and Crime.

⁵ Report of the Committee on the Draft National Policy on Criminal Justice, Ministry of Home Affairs, July 2007.

⁶ Section 17.2, Preliminary Provisions, California Penal Code.

⁷ Alessandro Corda, THE TRANSFORMATIONAL FUNCTION OF THE CRIMINAL LAW: IN SEARCH OF OPERATIONAL BOUNDARIES, *New Criminal Law Review: An International and Interdisciplinary Journal*, Vol. 23,pg-594,<

https://www.jstor.org/stable/48740606?searchText=au%3A%22Alessandro+Corda%22&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dau%253A%2522Alessandro%2520Corda%2522&ab_segments=0%2Fbasic_phrase_search%2Fcontrol&refreqid=fastly-default%3A4a83634964d455366eece729f7f6cd23> assessed on Feb. 21, 2024

The criminal code is "framed in terms of punishing bad conduct" and "operates as the ground for authorizing state punishment" structurally. Consequently, criminal law, which is part of the legal system that establishes guidelines for social behavior, does not fully achieve its goals if criminalization is not followed by the punishment of offenders. Nevertheless, it is important to remember that criminal laws can nevertheless have a significant effect, even if they are merely dead letters. For instance, although they were mainly unenforced, so-called sodomy laws that made homosexuality illegal in the US forced lesbians and gays to self-police because they influenced the public's perception of homosexuality.⁸

IDENTIFYING CHALLENGES FACED IN THE IMPLEMENTATION OF DYNAMIC DECRIMINALIZATION:

Dynamic decriminalization presents a number of obstacles, reflecting the intricacies of legislative reforms and cultural responses. Resistance to change in society, particularly among conservatives, can stymie the smooth implementation of dynamic decriminalization. Traditional beliefs and cultural norms may conflict with shifting legal ideas. Striking the correct balance between individual liberty and preserving public safety is an ongoing problem. Policymakers must ensure that decriminalization attempts do not jeopardize public order or have unexpected repercussions.⁹

Decriminalization attempts may be misused or misinterpreted, thus leading to unforeseen effects. Balancing individual rights protection with legal requirements for abuse prevention needs significant thought.¹⁰ The ability of the legal system to respond to dynamic developments, including educating law enforcement and legal personnel, is a substantial challenge. Ensuring that the legal apparatus is well-prepared for new legal frameworks is crucial for effective implementation.¹¹

⁸ See Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL . L. R EV . 643 (2001). Sodomy laws also made gay people targets for physical assaults sometimes "perpetrated as de facto enforcement of sodomy laws... by both private individuals and police officers." Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 H ARV . C.R.-C.L. L. R EV . 103, 110 (2000)

⁹ Defamation Act, 1992, New Zealand; The Coroners and Justice Act, 2009, The United Kingdom; Section 297, Canada Criminal Code; Section 187, The German Criminal Code.

¹⁰ Tapp, June Louin, and Felice J. Levine. "Legal socialization: Strategies for an ethical legality." *Stan L. Rev.* 27 (1974): 1.

¹¹ Gulbrandsen, Lars H., "Dynamic governance interactions: Evolutionary effects of state responses to non-state certification programs." *Regulation & Governance* 8.1 (2014): 74–92.

Furthermore, a lack of public knowledge and comprehension of the grounds for decriminalization measures might hamper their success. Public education initiatives are essential for promoting a clear understanding of legislative developments. To implement legislative reforms, parliamentarians must demonstrate political will and consensus. Differences in political beliefs might slow down the legislative process, impeding the implementation of dynamic decriminalization.¹² Collecting reliable and comprehensive statistics on the effects of decriminalization can be difficult. Monitoring the real-time effects on crime rates, societal behavior, and other pertinent elements needs effective data gathering and processing techniques.

Drawing lessons from successful overseas models while taking into account India's distinct socio-cultural setting might be difficult. Effective implementation requires adapting best practices to the local situation. It is difficult to manage cases and people who have previously been criminalized. To achieve fairness and justice, retroactively addressing situations impacted by law reforms must be carefully considered. Finally, the legal and judicial backlog makes it difficult to resolve cases impacted by decriminalization on time. Maintaining public faith in the judicial system requires a quick and efficient legal process.¹³

To effectively negotiate the complexity of dynamic decriminalization, politicians, legal experts, law enforcement, and civil society must work together to address these problems.

INVESTIGATE THE SOCIETAL ATTITUDES AND PERCEPTIONS TOWARD DYNAMIC DECRIMINALIZATION:

The study examines social attitudes and perspectives towards dynamic decriminalization in India, revealing that younger generations and urban communities tend to hold progressive views, despite differing perspectives and issues. They may be more open to reforms that reflect shifting societal norms and individual liberties. Traditional or conservative parts of society may express misgivings or opposition to decriminalization measures, especially if they contradict established moral or cultural values. This is especially obvious in more rural or conservative

¹² Supra 18

¹³ Katharina.kiener-Manu, "Crime Prevention & Criminal Justice Module 6 Key Issues: 2. Current Trends, Key Challenges and Human Rights" <<https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-6/key-issues/2--current-trends--key-challenges-and-human-rights.html>> assessed on February 27, 2024

places.¹⁴

Human rights advocates and organizations often promote dynamic decriminalization as a method of safeguarding individual rights, decreasing arbitrary arrests, and addressing issues regarding overcriminalization. Legal practitioners may hold differing views. Some may argue for a careful approach, ensuring that decriminalization measures are well-balanced and do not jeopardize public safety, while others may fight for more sweeping reforms in line with changing legal philosophies. Those who advocate for victims' rights may support decriminalization measures that prioritize the avoidance of arbitrary arrests and the misuse of legal protections while still providing justice to victims.¹⁵

The media has a significant influence on public opinion. The media's portrayal of both the good and bad elements of legislative reforms might impact public opinion on dynamic decriminalization. Religious and cultural values may have a considerable impact on society's views. Some groups may see decriminalization attempts positively, but others may be more traditional due to religion or cultural values. Some members of society may be concerned about the possible impact of decriminalization on public safety. Striking a balance between individual rights and ensuring public order is an important factor in society's attitudes.¹⁶

Investigating societal views necessitates taking into account the varied viewpoints found in India, a country with a rich cultural, social, and economic diversity. Public opinion might shift over time as understanding rises and debates about the implications and advantages of dynamic decriminalization persist.¹⁷

RECOMMENDATIONS FOR REFINING THE CURRENT APPROACH TO DYNAMIC DECRIMINALIZATION IN INDIAN CRIMINAL LAWS:

Refining the approach to dynamic decriminalization in Indian criminal laws requires a comprehensive strategy that considers legal, societal, and implementation aspects. Here are

¹⁴ Social Change and Modernity”

<<https://publishing.cdlib.org/ucpressebooks/view?docId=ft6000078s;chunk.id=0;doc.view=print>>

¹⁵ Ibid.

¹⁶ Bhosekar, Sailee. *SPACE, STIGMA, AND SOCIETY: URBAN DYNAMICS AND COMMUNITY ATTITUDES IN PUNE'S RED LIGHT AREA*. Diss. Politecnico di Torino, 2023.

¹⁷ Supra n22

recommendations for refining the current approach:¹⁸

- To conduct a thorough assessment of current criminal legislation, engaging legal experts, practitioners, and key stakeholders. This assessment should identify outmoded provisions, evaluate their impact on society, and provide recommendations for revisions or repeals.
- To collect feedback from different populations, organize town hall meetings, public forums, and online consultations. Launch intensive awareness campaigns through various media to explain the basis for decriminalization measures and clear any misunderstandings.
- Engaging the legal experts to draft legislation with the utmost clarity, using precise language to avoid ambiguity. Conduct workshops and seminars for lawmakers to enhance their understanding of the nuances involved in decriminalization, ensuring the legislation aligns with constitutional principles.
- By establishing a tiered system for offenses based on severity and emphasizing alternative measures for less serious infractions. Develop guidelines to help lawmakers categorize offenses appropriately, ensuring that criminal sanctions are proportionate to the harm caused.
- Through collaboration with international legal experts and organizations to study successful models. Tailor these models to India's unique socio-cultural context, considering aspects like diversity, cultural values, and legal traditions.
- To establish an independent organization responsible for ongoing monitoring and assessment of decriminalization outcomes. Create performance measures to evaluate the impact on crime rates, individual rights, and societal well-being, and utilize the results to inform evidence-based policy changes.
- By working with social workers, psychologists, and community organizations to develop and execute rehabilitation programs. Address the underlying reasons for

¹⁸ Baxi, Upendra. *The crisis in the Indian legal system. Alternatives in Development: Law*. Stranger Journalism, 1982.

criminal behavior, establish support networks, and facilitate impacted persons' reintegration into society.

CONCLUSION:

A perceptible movement towards decriminalization is taking place in the dynamic terrain of Indian criminal laws, indicating a responsive legal system tuned in to growing society norms, individual rights, and harm reduction principles. Notable legal reforms, such as the historic decriminalization of consenting homosexual behavior under Section 377, demonstrate a dedication to matching legal measures with shifting societal norms. Ongoing legislative assessments highlight a dynamic and adaptable strategy in which the legal system assesses and refines its legislation to address developing difficulties while adhering to international best practices. This dynamic nature is distinguished by an ongoing balancing act between protecting individual liberty and ensuring public order.

The forward-looking perspective on decriminalization in Indian criminal legislation predicts continuing progress and refinement. Policymakers are urged to stay alert when tackling emerging difficulties, ensuring that law reforms reflect society's ever-changing dynamics. Furthermore, future changes are anticipated to place a heavy focus on education and awareness initiatives, with the goal of increasing public knowledge of decriminalization activities. Anticipated creative ways may include utilizing technology, international cooperation, and interdisciplinary tactics to improve the efficacy of decriminalization efforts. Collaborative governance, which includes legal professionals, civil society, and public participation, is positioned to play a critical role in creating an inclusive, responsive, and just legal framework that reflects the different viewpoints of the Indian community.

At last, quoting Sir Winston Churchill thought,

“The mood and temper of the public in regard to the treatment of crimes and criminals is one of the most unfailing tests of the civilization”.