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When Everything Becomes a Crime: Penal Excess and the Expanding Reach of Indian Criminal Law

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ABSTRACT

This article examines over-criminalisation in India the progressive expansion of criminal law beyond its legitimate constitutional and jurisprudential boundaries. Drawing on the Harm Principle, constitutional doctrine, and legislative analysis, it argues that Indian penal law suffers from the proliferation of vague offences, erosion of mens rea standards, weaponisation of preventive detention, and structural subordination of liberty to security. The article traces these pathologies through the Indian Penal Code 1860, special legislation, and the under-trial prisoner crisis, with particular focus on Jammu and Kashmir as a concentrated site of penal excess. It concludes that meaningful reform requires a principled recommitment to constitutional morality, proportionality, and the foundational purposes of criminal law.

Keywords: over-criminalisation, Indian Penal Code, constitutional morality, preventive detention, Jammu and Kashmir, under-trial prisoners, penal reform.

I. Introduction

Criminal law, properly conceived, is the *ultima ratio* of the social order the State's coercive instrument of last resort, reserved for conduct so harmful that the full moral weight of public punishment is warranted. Yet in India, the criminal law has long ceased to function as a last resort. It has become a first response, stretched across regulatory, political, and social domains in ways that sit uneasily against any coherent account of what punishment is for.

Over-criminalisation the tendency to deploy criminal sanction beyond the domain of conduct that punishment can justifiably reach manifests in India through several overlapping pathologies: the multiplication of offences whose rationale is disproportionate or absent; provisions drafted with deliberate vagueness; the progressive weakening of *mens rea* requirements; routine use of arrest as coercion rather than adjudication; and special legislation that suspends ordinary constitutional protections.[1]

The constitutional stakes are significant. Article 21 guarantees that no person shall be deprived of life or personal liberty except according to procedure established by law.[2] Since *Maneka Gandhi v Union of India*,[3] that procedure must be fair, just, and reasonable. Penal expansion without principled limits strikes at this guarantee at its core. This article traces those limits, maps the excesses, and argues for a principled return to the foundational logic of the criminal law.

[1]Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008) 3.
[2]Constitution of India 1950, art 21.
[3]*Maneka Gandhi v Union of India* AIR 1978 SC 597.

II. The Concept of Over-Criminalisation: Theoretical Foundations

The Harm Principle, articulated by John Stuart Mill, holds that the only legitimate basis for State coercion is the prevention of harm to others.[4] Joel Feinberg refined this into a concept of harm as a setback to interests the victim has a right to have protected excluding mere offence, inconvenience, or moral disapproval.[5] HLA Hart extended the argument to insist that the criminal law must not be used to enforce private morality where no tangible harm to identifiable others results.[6] These principles find strong resonance in Indian constitutional doctrine, particularly in Article 21 and the reasonableness requirement under Article 19.

The tension between harm-based constraints and moralistic criminalisation has played out acutely in Indian law. The most instructive example is Section 377 of the Indian Penal Code, which criminalised consensual same-sex conduct for over 150 years before the Supreme Court, in *Navtej Singh Johar v Union of India*, struck it down on grounds of dignity, autonomy, and constitutional morality.[7] The Court's invocation of *constitutional morality* the values embedded in the constitutional text rather than the preferences of legislative majorities provides the central standard for evaluating and challenging over-criminalisation across Indian penal law.[8] A law that survives popular approval but cannot survive constitutional scrutiny has no legitimate claim to the coercive machinery of the State.

III. The Legislative Landscape: Colonial Inheritance and Statutory Accumulation

The Indian Penal Code 1860, drafted by Macaulay's First Law Commission for a colonised population, was conceived as an instrument of order and obedience rather than emancipation. Several of its provisions remain fertile ground for penal excess in independent India.[9] Sections 141 to 160, governing unlawful assembly and rioting, are routinely invoked against political protesters and trade unionists. Section 124A the sedition provision criminalises the expression of disaffection towards the Government, and has been deployed against journalists, academics, and civil society critics in circumstances far removed from any credible security threat.[10] The Supreme Court in *Arnesh Kumar v State of Bihar* was sufficiently alarmed by the casual use of arrest powers to issue guidelines restricting arrest without prior judicial scrutiny an intervention whose necessity itself attests to the depth of the problem.[11]

Beyond the IPC, a dense thicket of special legislation has accumulated over decades. The Unlawful Activities (Prevention) Act 1967 (UAPA), as amended most recently in 2019, permits the designation of individuals as terrorists without conviction, authorises preventive detention for up to 180 days without charge, and effectively forecloses bail. The Prevention of Money Laundering Act 2002 (PMLA) reverses the ordinary presumption of innocence and imposes bail conditions so onerous as to render release practically impossible for most accused persons.[12] Section 66A of the Information Technology Act 2000 criminalising "grossly offensive" online communications provided the starkest illustration of how vague

[4]John Stuart Mill, *On Liberty* (John W Parker and Son, 1859) ch 1.
[5]Joel Feinberg, *Harm to Others* (Oxford University Press, 1984) vol 1, 31.
[6]HLA Hart, *Law, Liberty and Morality* (Oxford University Press, 1963) 20.
[7]*Navtej Singh Johar v Union of India* (2018) 10 SCC 1.
[8]Mahesh Chandra Sharma, "Overcriminalisation and Constitutional Morality in India" (2019) 61 *Journal of the Indian Law Institute* 45, 48.
[9]Law Commission of India, *Forty-Second Report: Indian Penal Code* (1971) para 2.1.
[10]Indian Penal Code 1860, ss 124A, 141–160.
[11]*Arnesh Kumar v State of Bihar* (2014) 8 SCC 273.
[12]Unlawful Activities (Prevention) Act 1967 (as amended 2019); Prevention of Money Laundering Act 2002.

penal provisions attract systematic abuse, until the Supreme Court struck it down in *Shreya Singhal v Union of India* for failing the basic constitutional test of reasonable restriction.[13]

IV. Constitutional Constraints and Judicial Enforcement

The Constitution provides a substantial framework for constraining penal excess. Articles 14, 19, 20(3), and 21 together guarantee equality, civil freedoms, protection against self-incrimination, and procedural fairness in the deprivation of liberty.[14] The Supreme Court affirmed in *State of Madras v V G Row* that restrictions on fundamental rights must bear a reasonable and proportionate relation to the objects they serve.[15] The recognition in *KS Puttaswamy v Union of India* of the right to privacy as a fundamental right has further reinforced a proportionality framework that subjects criminal legislation to meaningful scrutiny.[16]

Judicial enforcement has, however, been uneven. In the domain of national security, deference to the executive has been pronounced. In *NIA v Zahoor Ahmad Shah Watali*, the Court interpreted UAPA bail provisions so restrictively as to render relief almost inaccessible, effectively converting preventive detention into pre-conviction punishment.[17] Despite the Supreme Court's landmark holding in *Hussainara Khatoon* on the right to speedy trial,[18] compliance across the subordinate judiciary remains inconsistent illustrating that appellate pronouncement and operational reality are not the same thing.

V. The Under-Trial Prisoner Crisis: Punishment Before Conviction

The most visible consequence of over-criminalisation in India is the condition of its prison population. According to the National Crime Records Bureau, over 75 per cent of India's prisoners at the end of 2022 were under-trial persons not yet convicted of any offence.[19] This proportion has remained constant for decades. The majority of those held in Indian prisons are, in law, innocent: they are being punished, in practice, by a system that has not yet determined whether they deserve punishment at all.

Bail provisions for serious and special-act offences are often so stringent, or so dependent on surety, that poor accused persons cannot secure release regardless of the merits of their case.[20] Although the Supreme Court has repeatedly affirmed that bail is the rule and imprisonment the exception,[21] the operational reality inverts this principle daily. The under-trial crisis is not merely a consequence of over-criminalisation it is itself a form of it. Its burden falls disproportionately on the poor and marginalised those least able to navigate a system whose formal protections bear little resemblance to its operational practice.[22]

VI. Jammu and Kashmir: A Regional Study in Penal Excess

Jammu and Kashmir presents a concentrated instance of the pathologies identified in preceding sections.

[13] *Shreya Singhal v Union of India* (2015) 5 SCC 1.
[14] Constitution of India 1950, arts 14, 19, 20(3), 21.
[15] *State of Madras v V G Row* AIR 1952 SC 196, 200.
[16] *KS Puttaswamy v Union of India* (2017) 10 SCC 1.
[17] *NIA v Zahoor Ahmad Shah Watali* (2019) 5 SCC 1.
[18] *Hussainara Khatoon v Home Secretary, State of Bihar* AIR 1979 SC 1360.
[19] National Crime Records Bureau, *Prison Statistics India 2022* (Ministry of Home Affairs, 2023) 5.
[20] Sudipta Bhattacharjee, "Bail Jurisprudence in India: A Study in Systemic Failure" (2020) 62 *Journal of the Indian Law Institute* 112, 118.
[21] *Satender Kumar Antil v CBI* (2022) 10 SCC 51; *Sanjay Chandra v CBI* (2012) 1 SCC 40.
[22] Upendra Baxi, *The Crisis of the Indian Legal System* (Vikas Publishing, 1982) 67.

The region has been governed through a layered architecture of exceptional legal powers the Armed Forces (Special Powers) Act 1958 (AFSPA), the Public Safety Act 1978 (PSA), and the UAPA that displace or modify the ordinary constitutional safeguards applicable elsewhere. AFSPA confers powers of warrantless arrest, lethal force, and premises search upon deployed personnel, with effective immunity from prosecution absent prior Central Government sanction.[23] The Supreme Court in *EEVFAM v Union of India* held that this immunity does not extend to unlawful killings and directed investigation of alleged fake encounters,[24] but implementation has remained halting.

The PSA permits administrative detention for up to two years without charge or trial. Detention orders routinely recycle boilerplate language, and the practical barriers to habeas corpus challenge are formidable. The Act has been characterised by human rights organisations and occasionally by courts as a *lawless law*.[25] The constitutional reorganisation of August 2019 the revocation of the region's special status and its bifurcation into Union Territories was accompanied by a communications shutdown lasting several months.[26] The Supreme Court in *Anuradha Bhasin v Union of India* held that freedom of expression through the internet is a fundamental right and that shutdowns must satisfy necessity and proportionality.[27] Yet in *Foundation for Media Professionals v Union Territory of J&K*, the Court declined to directly restore 4G connectivity, instead constituting a Special Committee a disposition widely criticised as excessive deference in a matter of fundamental rights.[28]

The ordinary criminal law has equally been deployed as a tool of political management. Charges under IPC Sections 124A, 153A, and 505, alongside UAPA provisions, have been brought against journalists, lawyers, and human rights workers in circumstances that stretch those provisions far beyond their legislative purpose.[29] The chilling effect on civil society the contraction of space for dissent, independent reporting, and academic inquiry is a form of over-criminalisation that operates not merely through prosecution but through the inhibitory force of legal risk.

VII. Reform: Principles and Prospects

A principled response to over-criminalisation requires, first, a systematic legislative audit: identifying offences that serve no harm-based purpose, provisions whose vagueness confers unacceptable enforcement discretion, and special legislation that has outlived its justification or has been systematically abused. The PMLA bail jurisprudence illustrates the stakes: the Supreme Court in *Nikesh Tarachand Shah* struck down onerous bail conditions under Section 45 as violating Articles 14 and 21,[30] only for Parliament to amend the provision and the Court in *Vijay Madanlal Choudhary* to uphold the amended version in terms critics argue restore an effective presumption of guilt.[31] The cycle points to the need for structural bail reform rather than case-by-case adjudication.[32]

[23] Armed Forces (Special Powers) Act 1958, s 4.
[24] *Extra Judicial Execution Victim Families Association v Union of India* (2016) 14 SCC 536.
[25] Jammu and Kashmir Public Safety Act 1978, s 8; Amnesty International, *India: Public Safety Act in Jammu and Kashmir — A Lawless Law* (Amnesty International, 2011) 7.
[26] Constitution (Application to Jammu and Kashmir) Order 2019 (CO 272); Jammu and Kashmir Reorganisation Act 2019.
[27] *Anuradha Bhasin v Union of India* (2020) 3 SCC 637.
[28] *Foundation for Media Professionals v Union Territory of Jammu and Kashmir* (2020) 16 SCC 315.
[29] Noor Mohammad Bhat, "Counter-terrorism Legislation and Human Rights in Jammu and Kashmir" (2018) 60 *Journal of the Indian Law Institute* 77, 80.
[30] Nikesh Tarachand Shah v Union of India (2018) 11 SCC 1.
[31] Vijay Madanlal Choudhary v Union of India (2022) SCC OnLine SC 929.
[32] Piyali Bhattacharjee, "PMLA and the Dilution of Bail Norms" (2023) 65 Journal of the Indian Law Institute 34, 41.

Section 124A the sedition provision is a further example. The Supreme Court in *Kedar Nath Singh* and *Vinod Dua v Union of India* narrowed its application to incitement of violence or public disorder,[33] yet the provision continues to be invoked against conduct that plainly falls outside it. The Law Commission has recommended abolition,[34] and that recommendation is well-founded: a colonial instrument of political suppression is not saved by judicial gloss.

More fundamentally, the concept of constitutional morality, as elaborated in *Navtej Singh Johar*, offers a standard for measuring any penal provision against the constitutional values of dignity, equality, and liberty. Applied consistently not only in cases reaching the Supreme Court but in the daily operation of district courts, police stations, and legislative committees it would subject many currently unreformed provisions to the scrutiny they have too long evaded.

VIII. Conclusion

When everything becomes a crime, nothing retains the moral weight that criminal condemnation is supposed to carry. The integrity of the criminal law depends on its restraint on the State's willingness to deploy its most coercive instrument only where conduct genuinely warrants it, and only through means that are proportionate and constitutionally sound. India's penal system, as presently constituted, fails this test across several dimensions: in the range of conduct it criminalises, in the procedures it employs, in the populations it disproportionately burdens, and in the regional exceptionalism it tolerates.

The constitutional resources for correction are genuinely available. Part III of the Constitution, read through the prism of proportionality and constitutional morality, provides ample authority for the legislative and judicial reform that the situation demands.[35] What is needed is the institutional will to use that authority consistently. As Upendra Baxi has observed, the gap between the law on the books and the law in action is the defining crisis of the Indian legal system.[36] Closing that gap, in the domain of criminal law, is not a technical exercise. It is a matter of constitutional commitment.

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[34]Law Commission of India, Report No 277: Wrongful Prosecution (Miscarriage of Justice): Legal Remedies (2018) para 1.3.
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