

Public Welfare Offences under Criminal Law: A Note

Deepa Kansra*

I. Introduction

The state has often used the instrument of criminal law to give effect to its policy of condemning acts either antisocial or unacceptable to the conscience of the law and society. The existence of criminal law is well justified on grounds of ‘social welfare’ or “reinforcement of those values most basic to proper social functioning”.¹ This initiates or sustains the process of criminalization.² The relativity of ‘social welfare’³ makes law ‘dynamic’ as well as ‘varying’, vis-à-vis its ambit and scope. Current scholarship is critical of what is referred to as the trend of overcriminalization or rapid increase in criminalizing of acts, as leading to ‘uncertainty’⁴ in criminal law. It initiates challenge to the state policy of criminalization vis-à-vis particular offences. The rationale for such a critique is that there are a great deal of acts that need not be tagged as offences, if they don’t possess the potentials to cause damage that criminal law seeks to protect. This paper attempts to critically examine the criminalization of certain offences labeled as *public welfare offences*⁵. These offences have been subjected to scrutiny⁶ on the grounds of overcriminalization.

II. Public Welfare Offences

Public welfare offences are those offences that are capable of widespread damage. They pervade every stratum of the society and are inclusive of the whole range of business, professional or trade practices. The acts of corruption, hoarding, adulterating, smuggling etc are most suitable examples. They are a special creation of the state, for better administration of wide range of activities. In India, there are many statutes dealing with *public welfare offences*⁷; The Customs Act (1962), The Essential Commodities Act (1955), The Securities Contracts Act (1956), The Income Tax Act (1961), The Prevention of Corruption Act (1947), The Indian Forest Act (1927), The Factories Act (1948), The prevention of Food

* Assistant Professor, Campus Law Centre, University, Delhi, India. (Email: dkansra@gmail.com).

¹ Andrew Ashworth, *Principles of Criminal Law* 19 (1992)

² Gradually widening the ambit of criminal law by creating new offences.

³ The concept of social welfare is very much relative varying with times.

⁴ Uncertainty in criminal law can be clarified by deeply studying criminal law and its jurisprudence. Uncertainty of the state as to what is criminal law is resulting in overcriminalization, difficult to correct.

⁵ ‘Public welfare offences’ are inclusive of socio economic offences and white collar crimes for the purpose of studying the trend of overcriminalization.

⁶ The existence of public welfare offences is not absolutely accepted and depending on how we approach the subject and nature of criminal law, they may just fit.

⁷ Law Commission of India, 29th Report, (1966)

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Adulteration Act (1954), Opium Act (1857) etc. protecting public health, economic health and development and penalizing evasion of tax or duty or misuse of public office, misappropriation and breach of trust.

There can be a brief generalization drawn in terms of the various socio-economic crimes/ public welfare offences.

1. Their central/primary concerns are activities in the course of trade, profession or otherwise, likely to damage interests of a large section. There is adequate literature⁸ talking on how offence of adulteration or sale of banned drugs, tax invasion etc is injurious too the society, directly or remotely. For e.g.⁹ the Factories Act, makes the occupier responsible to answer in cases of violation of the provisions of the Act relating to health, safety and welfare of the workers. It regulates the behavior of employers, under whose jurisdiction factories operate
2. The *public welfare offences* are not incorporated under the IPC, which is a collection of offences declared to be antisocial or ‘criminal’ (*malum in se*) by the community itself. They are offences because the state has declared them to be (*malum prohibitum*) i.e. emerging from a positive act of the state, rather than collective conscience of the society to penalize them. “Such regulations¹⁰ cannot deal with harms which are ‘intrinsically wrong’, they must be mere conventions,’ wrong’ merely because prohibited by positive law”.¹¹ They are not designated as traditional crimes of theft, rape, robbery etc’.¹²
3. Some of the *public welfare offences* are also defined under the IPC, e.g. offences of theft, cheating, adulteration (ss. 272,274,275), breach of trust (s. 405), misappropriation etc. But the difference is, IPC is primarily individual-centric, defining an offence and providing for punishment on violation. Whereas the statutory offences are ‘public centric’. They regulate the whole set of activity prior to breach of code violations. E.g. Food Adulteration Act authorizes Food Inspectors to take food samples for detecting adulteration etc, to verify license conditions etc.
4. The statutes give great amount of discretion in the hands of the government. Including the power to frame rules and appoint machinery for the purpose of the Act. The Drugs and Cosmetics Act (1940), authorizes the central government to prohibit import of drugs and cosmetics in public interest. The Essential Commodities Act (1955), authorizes the

⁸ Law Commission of India, 29th and 47th report.

⁹ K.M Pillai, *Labour and Industrial Law*, 10th Ed, 507, (2005)

¹⁰ Using regulations because public welfare offences are also called ‘regulatory offences’.

¹¹ Jerome Hall, *General Principles of Criminal Law*, 2nd Ed, 340 (1986).

¹² Joshua Dressler, *Encyclopedia of Crime and Justice*, 2nd Ed, vol 1 at 347.

government to make provisions in the interests of general public, for control of production, supply and distribution of trade and commerce in commodities, which are spelled as essential commodities. Government notifications declare commodities as essential, depending on the requirement of the public. The IPC does not create such authority.

5. Statutory provisions are more or less directed to a certain class of people. Like the Factories Act is directed to impose duties on the factory owner, Food Adulteration Act on persons dealing with food products for mass consumption, Essential Commodities Act, towards persons with licence to deal in essential goods etc.

These generalizations provide a broader understanding of the whole range of *public welfare legislations*.

III. Benefits of Criminalization

The debate on overcriminalization revolves around one issue, i.e. whether criminal law is only about ‘traditional serious’¹³ crimes¹⁴, or in other words, are public welfare offences serious enough to be dealt under criminal law? Criminal law definitely stands out from the whole range of other kind of laws constructed by the state. Once an act is tagged as ‘criminal’, there is a lot that follows. And what follows is not relative, but relatively a part of social and political life subsequently.

Firstly, the entire code of crimes stands as a stringent warning to all people to act in conformity. The fear of sanction/punishment is operative even before the actual commission, attacking on the criminal tendencies in the making. This adds on to the deterrence of criminal law. In the end, if imposed it’s the last stage for the state to re-impose the rigid and stringent values of criminal law vis-à-vis a particular offence.

Secondly, criminal law is the legitimate means to take away even the most vital and significant rights, including life, as in when the circumstances allow. This stands in proportion to the purpose of criminal law, primarily to secure the most significant rights.

Thirdly, the onus is on the state to use criminal law constructively. Since it is unanimous that crimes are social enemies and the state needs to protect the society. In addition, the whole set of machinery the state arranges (police, administrators, prosecution etc) are expertise to work out the criminal system. The people have the right to approach the state to support the

¹³ *Supra* note 1 at 20

¹⁴ Inclusive of crimes, which have always been prohibited by criminal law, which the society as a whole would not tolerate or permit under any circumstances.

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cause of better criminal administration. If it were not for the state to deal with crimes, no other mechanism¹⁵ not inclusive of this machinery can really work.

In case of *public welfare offences*, many reasons would justify criminalization.

Firstly, it's not apt to say that public welfare or regulatory offences are absolutely new¹⁶ to the system. Yes, maybe in terms of their nomenclature as criminal offences. But otherwise the premise on which they stand, prevention of 'social' or 'public' harm is not new to criminal jurisprudence. Many of the ancient practices, like severe punishment for poisoning wells, which provided water to the entire village etc, were in the nature of *public welfare offences*. Gradually society became individual centric and the developments¹⁷ then did not warrant creation of such offences. To add on, such offences highlight “the shift of emphasis from the protection of individual interests which marked 19th century criminal administration to the protection of public and social interests”.¹⁸

Secondly, criminal law should not really be obsessed with protecting individuals from pain or injury. How appropriate would it be to decriminalize acts of adulterating daily food products, of circulating drugs dangerous to human life, of enhancing harmful chemical composition cosmetics and related products, of wide scale the stock frauds, of persistent tax evasions etc. It should not be difficult to accept the seriousness of damage in cases of public offences. Even the society would not wish to exclude operation of criminal law to these cases, and “criminal law should not significantly be out of touch with the expectations of members of society”¹⁹ Illustrating further, if at all we advocate for decriminalization of the public offences, it brings absurdity to the legal system. For instance, our Constitution requires the state to ensure distribution of wealth and avoid concentration in a few hands. Can we only rigidly regulate the activities of black-marketing, hoarding, and corruption without the authority of criminal sanctions?

Thirdly, the ambit of criminal law seems to be expanded by introduction of certain positive duties, which on failure entail sanctions. For instance, the settled position is that an owner will be punished for causing death of workers in a factory. This is more so the traditional role of criminal law. Now most of the statutes go a step further and expand the horizon of criminal law. There are positive duties, e.g. providing safe machinery and equipment. There seems to be a link drawn between the traditional damage and the duties imposed. The

¹⁵ More in reference to civil law, which is devoid of the idea of vigorous prevention and detection of wrongs.

¹⁶ Newness not necessarily in reference to the time/year of creation. Rather in terms of a positive act of the state to expand criminal law and to add these offences to the ambit of criminal law.

¹⁷ With limited sphere of economic or social interaction, the idea of public harm got lost for sometime. And when economic and social activity expanded, it gradually enabled the people to reach out to a larger section in business dealings or manage great deal of responsibility in terms of public funds etc.

¹⁸ Sayre, *Public Welfare Offences*, 33Col.L.Rev, 55,67(1993)

¹⁹ *Supra* note 1 at 28.

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whole idea being, leniency at a stage before the actual damage, would lead to frequent loss and damage to people.

Imposition of duty (the act of providing safe machinery) is likely to hit on the easiness or casual attitude of the people, whose disinterest or negligence may cause grave consequences to many. “The mere existence of criminal prohibitions might have some indirect effect on the incidence of the behavior defined as criminal and thus, even more indirectly, on any more remote harm to be prevented. The labeling of behavior as criminal represents a social judgment that such behavior is morally wrong or at least undesirable, and this judgment may serve to reinforce similar feelings among members of the public that such behaviour is morally wrong or at least undesirable”.²⁰ This feature of imposing positive obligations on people and making them punishable on violation is what is really expanding the ambit of criminal law. The justification can be that, sticking rigidly to provision of preventing or repairing loss or damage would weaken the morality²¹ behind criminal law, trying to promote sense of responsibility towards other members of the society by not doing harmful or negligent acts.

Substantiating further, the IPC also makes certain provisions wherein the act of adulterating food or poisoning water for public consumption is punishable. This is deterrence by way of punishment, of acts already done. In the Food Adulteration Act, in addition to this, there is a responsibility²² on the person who is in the position to prevent or control the ‘harm’ for which punishment is granted. Another e.g. could be, criminalizing the act of drinking and driving. The settled position was punishment for killing or causing damage caused because of drunken driving. To strengthen the regime of sanctions, minimize violations and promote social responsibility, there is a positive duty to not drink and drive. Criminal law expands to attach sanctions to such positive obligations. The obligations curtail the power/discretion of the persons concerned, to make a ‘choice’ suiting their requirements or conditions of life. It’s that “many of the enactments apply not to the general public but only to certain traders, particularly of food or drugs and vendors of alcoholic beverages”.²³ Mere moral considerations of social responsibility were not working out well for the system as a whole.

Fourthly, most of the public welfare offences are silent operators. They involve continuous acts and occurrences that may go undetected if happening behind closed doors. If there is minimum detection, the nation is also suffering in silence. It only means that most of the damage caused or continues to be caused, to health or wealth, is beyond the reach of the state to rectify. This brings out another feature of public welfare legislations. Each statute

²⁰ *Supra* note 11 at 356.

²¹ The lesson of promoting a sense of belongingness towards the society as a whole.

²² Responsibility which in the absence of a positive obligation is merely moral.

²³ *Supra* note 10 at 332.

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provides expertise machinery, inspectors/officers etc to promote the purpose of the law. The machinery operates for the purposes of prevention, detection, prosecution etc. The state is heavily responsible to regulate these persistent violations.

Another feature peculiar to such offences is the absence particular individual victims. “These are the so-called ‘victimless crimes-like drug offences, some drunken driving, etc. - where no individual will take action if the state does not. It might therefore be justified to impose criminal liability in order to ensure that a certain form of antisocial activity is controlled, even though its impact on fundamental social values is rather remote”.²⁴ This is not a ground to question the desire of the society to condemn such acts. Their failure to acknowledge/notice such offences is a resultant of the manner or conditions in which they are done. Even if the state is not too keen on educating the people on dangers of public welfare offences, it’s a policy failure, not substantial to the character of such offences.

Legal dynamism comes to the rescue of criminalization. Dynamism has to be of both law and crimes²⁵. We cannot support and challenge expansion of criminal law, as in when circumstances warrant. It has to flow either way, and treating *public welfare offences* outside realm of criminal can be very damaging.

IV. Overcriminalization *vis-à-vis* Public Welfare Offences

Overcriminalization is the “abuse of the supreme force of a criminal justice system-the implementation of crimes or imposition of offences without justification”.²⁶ One ground of challenge on the ground of traditional nature of criminal law, that it should only be used for the most serious of offences. The desire to promote accountability or better administration should not authorize the state to use criminal law for activities that need to be regulated than condemned.

Firstly, there is a need to question the state policy, to ascertain as to what it is that criminal law seeks to achieve. Many of the acts penalized as *public welfare offences* do not reasonably fit in, for e.g., furnishing of false particulars, accounts, delayed payments, bouncing of cheques etc, and even justifications on grounds of social or public purpose are not acceptable. To penalize the act, there should be culpability of a higher degree, than that of mere errors in the course of business. Adding to the plight, the complications in laws unnecessarily rope in loyal victims of overcriminalization

²⁴ *Supra* note 1 at 30.

²⁵ Crimes also evolve and take expand in dimensions with time. The offence of cheating individuals expanded to cheating institutions/enterprises or the state etc.

²⁶ Erik Luna, *Overcriminalization-The Politics of Crime*, 54 Am.U.L.Rev.703, (2005)

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Secondly, *public welfare legislations* do not entail the culpability/wickedness that the society as whole would want to completely eliminate. This cruel positivism is stretched further by imposition of strict liability²⁷. The problem lies in the basic premise itself, i.e. law is penalizing certain acts, which can never trigger culpability, serious enough to be dealt with under criminal law. “The end result has been the proliferation of an entire body of morally neutral criminal law as including certain business and regulatory offences that lack harmful wrongdoing as well as well the doctrines of vicarious and strict liability, which dispense with individual culpability altogether.”²⁸

Thirdly, by completely condemning certain acts which may require regulation, the state is simply shifting the burden of regulation on the people. On failure to adequately administer certain activities, the only last resort is to penalize them. It’s an implied acceptance on the part of the state that it is failing to act adequately; so the people should ensure better administration or be penalized.

The so-called *mala prohibitum* or *public welfare offences* are not really supported by the moral convictions of a society. The people have still not given up their understanding of criminal law in its traditional nature. A state policy distinct from the convictions of the society, imposing values that the society does not share, will dampen the exclusivity in criminal law.

V. Conclusion

The trend of overcriminalization can be well analyzed in light of a genuine concern; there must be some parameters to regulate the act of overcriminalization. Even though criminalization is a necessity, justified and acceptable, it becomes unacceptable if rightfully scrutinized. If overcriminalization is established, it’s only indicative of an express manipulation of criminal law by the state. Much of the so called *public welfare offences* can be left out of the ambit of criminal law, which is being run solely on administrative or policy considerations, than on the principles and norms of criminal law.

²⁷ Strict liability means that regardless of the lack of intent, negligence etc, penal liability must be imposed.

²⁸ *Supra* note 25.