Judicial Limitations on Interpretation of Criminal Statutes
(With Reference to Selected Reported Criminal Cases of Nepal)

A LITERATURE REVIEW

Submitted to

Faculty of Law, Tribhuvan University, Kathmandu

In Partial Fulfilment of the Requirements for the Degree of Doctor of Philosophy (PhD) in Law

By

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To

The Dean's Office

Faculty of Law

Tribhuvan University

Subject: Submission of Literature Review Report

Respected Sir,

As per the requirements of the Dean Office, Faculty of Law for the partial fulfilment of the degree of Doctor of Philosophy (PhD) in Law, I would like to submit my Literature Review Report under the proposed title *Judicial Limitations on Interpretation of Criminal Statutes (With Reference to Selected Reported Criminal Cases of Nepal)* along with this application.

Particulars

Task	Literature Review Report
Title	*Judicial Limitations on Interpretation of Criminal Statutes (With Reference to Selected Reported Criminal Cases of Nepal)*
Literature Reviewed	Books, Peer Articles, Journals, Cases, Testimony and Reports
No. of Literatures Reviewed	45
University Requirement	At least 30
No. of Words	21597

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LIST OF ABBREVIATIONS

Adv.	:	Advocate
&	:	And
AG	:	Attorney General
Amer.	:	American
App.	:	Appeal
Art.	:	Article
Aug.	:	August
BS	:	Bikram Sambat
CeLRRd	:	Center for Legal Research and Resource Development
CJ	:	Chief Justice
CJS	:	Criminal Justice System
CR.	:	Criminology
CRIM.	:	Criminal
DN.	:	Decision Number
DPP	:	Director of Public Prosecutions
ECtHR	:	European Court of Human Rights
ed.	:	edition
ed.,	:	editor

eds.	:	editors
e.g.	:	exempli gratia, meaning ‘for example’
EHRR	:	European Human Rights Reports
et al.	:	et alia, meaning ‘and others’
etc.	:	et cet. era, meaning ‘and other similar things’.
GoN	:	Government of Nepal
HARV.	:	Harvard
HMG	:	His Majesty’s Government
ICCPR	:	International Covenant on Civil and Political Rights
Id.	:	Idem, meaning ‘the same’
i.e.	:	That is
IPC	:	Indian Penal Code
J	:	Journal
J.	:	Justice
Jan.	:	January
KSL	:	Kathmandu School of Law
MCC	:	Muluki Criminal Code
MCPC	:	Muluki Criminal Procedural Code
N.K.P.	:	Nepal Kanoon Patrika, meaning ‘Nepal Law Report’

NLC	:	Nepal Law Campus
no.	:	Number
Oct.	:	October
p.	:	page
para.	:	paragraph
paras.	:	paragraphs
PhD	:	Doctor of Philosophy
pp.	:	pages
PUB.	:	Public
Q.	:	Quarterly
Sec.	:	Section
Sr.	:	Senior
supra	:	Above
UDHR	:	Universal Declaration of Human Rights
UK	:	United Kingdom
UKHL	:	United Kingdom House of Lords
U.S.A	:	United States of America
v.	:	versus
Vol.	:	Volume, meaning ‘Issue number’.

1. INTRODUCTION

1.1 Introducing Topic

The three organs of State- legislature, executive and judiciary- exist in separation of powers and function in checks and balances.[1] The term 'checks and balances' does not textually appear in the Constitution of Nepal, but they are articulated in different Chapters with their particular functions. Of them, Article 111 allocates the power to pass the bill to the Legislature, and Article 128 empowers the Supreme Court with the right to final interpretation of Statutes, but 'in line of recognized principles of justices.'[2]

Among the recognized principles of justice, one of the basic one in criminal law is the principle of legality, based on Latin Maxim: *nullum crimen sine lege, nulla poena sine lege*.[3] The connotations of principle of legality are so wide-ranging that it at least includes three distinct principles- the principle of non-retroactivity, the principle of maximum certainty, and the principle of strict construction of penal statutes.[4]

"The criminal law does not accept the notion of what may be called *de facto* crime."[5] This is the situation of 'crime in fact though not in law.'[6] It would be an unhealthy exaggeration to say that court manufactures law and criminalizes.[7] However, there are instances of cases in Nepal, for instance, Supreme Court quashed the charge sheet in *Shiva Narayan Chaurasiya* (January 2012)[8] merely after three months when the full bench of the Supreme Court had convicted the defendant in *Pramila Rai Shrestha* (October 2011).[9] The fact of both of the cases were the same, submission

[1] 4 P RAMANATHA AIYAR, ADVANCED LAW LEXICON 5121 (6th ed. 2019).
[2] Art. 126.
[3] The principle of legality is expressly legislated in Sec. 6 and Sec. 7, Muluki Criminal Code, 2017 (2074 BS), and is constitutionally guaranteed in Art. 20 (4) of Constitution of Nepal. Art. 11(2) of the Universal Declaration of Human Rights (UDHR), 1948, and Art. 15(1) of the International Covenant on Civil and Political Rights (ICCPR), 1966 also sets out legality principle.
[4] JEREMY HORDER, ASHWORTH'S PRINCIPLES OF CRIMINAL LAW 79 (9th ed. 2019).
[5] GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 71 (2nd ed. Fourth Indian Reprint 2012) (1983).
[6] For example, the union of Oedipus and Jocasta, in fact, was, incestuous. But, in law, Oedipus did not commit incest because the crime of incest requires a mental component, which was lacking in it. It may be immoral, not illegal. *Id.* at 70, 71.
[7] *Id*.
[8] *Government of Nepal v. Shiva Narayan Chaurasiya*, Crim. App. No. 067-CR-0512 (Jan. 17, 2012) (2068.10.03 BS).
[9] *Pramila Rai (Shrestha) v. Government of Nepal*, Crim. App. No. 067-CF-0029 (Oct. 25, 2011) (2068.07.8 BS).

of duplicate certificate being in position of public service. And, the issue was also the same: 'time limit' of registering the charge sheet. In another case named *Tara Raj Bhandari* (2008)[10], Supreme Court of Nepal delivered a decision without giving any effect to the legislative intention construed as 'with the purpose' in Sec. 16 of the Corruption Act, 2002.[11]

Thus, there is a problem: whether the court has interpretational limitations in criminal cases or not. This research will be based on studying criminal law practices of the Supreme Court of Nepal from the perspectives of interpretational limitations.[12] It will explore, describe and explain the various principles and their applications by Supreme Court of Nepal in its decisions so as to draw the finding on two questions:

a) Does interpretational principle limit the Judges' discretion while delivering judgement?
b) Does criminalization by expansion of enacted legislation violate legality of judicial construction?

1.2 Scope

As this study aims at exploring interpretational principles and the rules of their application, focusing on criminal law, and analysing interpretational limits of Court in criminal cases with reference to the practices of Supreme Court of Nepal, the review will include case studies as well. Thus, the related literatures reviewed will be basically on the following two spaces:

c) Relevant cases in the issue. The relevant cases will be of two categories: (i) Cases decided by Supreme Court of Nepal, and (ii) Related cases of other countries.
d) Books, peer articles, and research reports written in subject of philosophy, jurisprudence, criminal law and interpretation of statutes, focusing on the theme of interpretational limits.

[10] *Tara Raj Bhandari v. Government of Nepal* (N.K.P 2065, Vol. 6, DN. 7974).
[11] 2059 BS.
[12] Interpretation of statutes is not the same for all types off statutes. Constitution requires liberal interpretation, general law requires with various principles, but criminal law applies strict rule of construction.

1.3 Exclusions

The review will not explore the overall principles of interpretation of statutes. It will also not review the capacity of court in advancing judicial activism for the fulfilment of fundamental rights. The review will be limited within the scope of research studies in reviewing provisions, principles and practices that talk about the limitation or no limitation of the court in interpreting the criminal cases.

1.4 Availability of Sources

The books and journals available in Central Law Library, NLC Library, Supreme Court's Library, Nepal Bar's Library, researcher's personal library and related materials published in official websites will be studied. For cases, the bound volumes of Nepal Law Report (Nepal) and Supreme Court Cases (India) will be studied. And, for other foreign cases, the particular court's official web will be visited, downloaded and studied.

As a primary sources of authority, Court's decisions and relevant laws will be reviewed. And, as a secondary sources of information, contents from international laws, books, journals, reports, articles etc. will be reviewed.

The literatures reviewed will be presented in thematic approach; rather than in chronological order.

1.5 Endnote

For the fulfilment of university requirements (review of at least 30 literatures), the total of **45 literatures** have been reviewed, and are kept in parenthetical numerical order from (1) to (45). Of which-

- 14 literatures are of cases, comprising of 9 cases of Nepal, 2 British cases, 2 Indian cases and 1 ECtHR case, and
- 31 literatures are of different books, journals and research reports.

2. REVIEW OF LITERATURES

2.1 Setting the Issue of Subject

Interpretational limits of court in criminal cases ask to draw the boundary of courts in criminalizing the suspect. It is based on the question: how far a court can criminalize? Or, does court criminalize or it is the law that criminalizes? For example, the subject of sexual intercourse between husband and wife was not contrary to the criminal law, but following the 2006[13] amendment of Muluki Ain, the sexual relation without the consent of his wife is an offence of marital rape. This might be due to the public's changing attitudes towards domestic violence. However, the court did not criminalize for the same before the amendment, i.e. before it was codified into law.

(1) ***Adv. Meera Dhungana v. His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs, Singhdurbar et al. (2002)***:[14]

In this case, the petitioner has requested that No. 1 of the Chapter on Rape is inconsistent with the right to equality guaranteed under the Constitution of the Kingdom of Nepal, 1990 and also with the Convention on the Elimination of All Forms of Discrimination against Women, 1997 and other international human rights instruments, the impugned provision is void pursuant to Art. 1(1) of the Constitution of the Kingdom of Nepal, 1990, therefore, the impugned provision be declared ultra vires under Art. 88(1) of the Constitution.

Supreme Court Special Bench decided:[15]

> Now, therefore, as marital rape found to have been immune by No. 1 of the Chapter on Rape, it cannot be regarded, as contended by the writ petitioner, that the impugned definition of rape is inconsistent to the Constitution. Thus, the writ petition is hereby quashed. It is also hereby decided that as a punishable offence, there is a difference in the consequences of the rape committed by a third person

[13] 2063 BS.
[14] Writ No. 55 of 2058 BS.
[15] The bench consisted of Justice Laxman Prasad Aryal, Justice Kedarnath Upadhyaya and Justice Krishna Kumar Barma, https://www.globalhealthrights.org/wp-content/uploads/2013/10/The-Forum-for-Women-Law-and-Development-Nepal-2002.pdf (last visited July 21, 2021).

> and by a husband and No. 8 of the Chapter on Rape has kept in mind only the consequences of rape committed by a third person, there is a situation of gap of legal provisions following the rape of one's own wife - such as providing immediate relief by allowing to live separate from or to divorce the relationship with the rapist husband; prescribing the degree of offence in rape committed in the circumstance of child marriage; therefore, a directive order has been issued in the name of one of the respondents, the Ministry of Law, Justice and Parliamentary Affairs, to introduce a Bill for bringing necessary amendments with regard to the said gaps and for making complete legal provisions for justifiable and appropriate solution in an integrated manner with regard to marital rape taking into account the special situation of marital relationship and position of the husband. Do pass the information of this order to the respondents through the Attorney General and handover the case-file as per Rules.[16]

It raises some questions. Why the Court quashed the petition, but issued the directive order? It is simply because the Court cannot create new offence. In words of Prof Ashworth, "The proper procedure is for a democratically elected legislature to create new offences."[17]

Then, what about the cases in which the evidence does not amount the crime, but the public says it is that culprit who did it? Or, there is no law criminalizing the particular conduct which is in fact hatred, abhorrence and disgust to the mass? Can't the court move a step ahead in criminalizing them? How the common law have been developed if the court cannot construct? In fact, these questions exist in conflict with non-retroactivity principle.

2.2 Court's Perusal on the Subject with to Reference to Cases of other Countries

The conflict between non-retroactivity principle and the functioning of the criminal law as a means of social defence reached its modern apotheosis in a UK case of *Shaw v. Director of Public Prosecutions* (1962).[18]

[16] *Id.* at 12.
[17] ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 59 (6th ed. 2009).
[18] *Shaw v. DPP* (1962) AC 220.

(2) *Shaw v. Director of Public Prosecutions* (1962):[19]

In this case, the defendant created magazines, which contained personal adverts for prostitutes. This included their personal contact details, photographs and descriptions of their services.

The prosecution had indicted Shaw with conspiracy to corrupt public morals, in addition to two charges under the Sexual Offences Act 1956 and the Obscene Publications Act 1959.

The House of Lords upheld:

> The validity of the indictment, despite the absence of any clear precedents, on the broad ground that conduct intended and calculated to corrupt public morals is indictable at common law.[20]

The decision led to an outcry from lawyers and others.[21] An objection to *Shaw* is that it fails to respect citizen as rational, autonomous individuals: "a citizen cannot be sure of avoiding the criminal sanction by refraining from prohibited conduct if it is open to the courts to invent new crimes without warning."[22] What happened in *Shaw* was that a majority of the House of Lords felt a strong pull towards criminalization because they were convinced of the immoral and anti-social nature of the conduct- thus regarding their particular conceptions of social defence (relationship between law and morality) as more powerful than "the liberty of citizens to plan their lives under the rule of law."[23] *Shaw* presupposes possibility that police and prosecution might press an unknown charge, and the courts may uphold its validity at common law.

However, the criminal law "embodies the height of social censure, and its extent should be determined in advance by accountable democratic processes rather than *ex post facto* by judicial pronouncement."[24] David Ormerod writes, “In *Jones et al,*[25] the House of Lords made clear that statute law was the sole source of new criminal offences and it was for those elected representatives

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[19] *Id.*
[20] *Shaw v. Director of Public Prosecutions* (1962) AC 220, *supra* note 17, at 58.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] A.T.H. Smith, *Judicial Law Making in the Criminal Law*, 100 LQR 46, 69 (1984), https://acharyalegal.com/wp-content/uploads/2020/10/How-Far-The-Court-Can-Decide-In-Criminal-Cases.pdf (last visited July 27, 2021).
[25] (2006) UKHL 16.

of the country in Parliament, not the executive and not the judge, to decide what conduct should be treated as criminal."[26] He further states that "This echoes their lordships recent statements in *Rimmington and Goldstein,*[27] where it was observed that just as the courts had no power to create new offences so they had no power to abolish offences."[28]

(3) *Regina v. Rimmington* (2005):[29]

The fact of Mr Rimmington was that- he was charged in an indictment containing a single count of public nuisance, contrary to common law. The particulars were that he, between the 25th day of May 1992 and the 13th day of June 2001, caused a nuisance to the public, namely by sending 538 separate postal packages, containing racially offensive material to members of the public selected by reason of their perceived ethnicity or for their support for such a group or randomly selected in an attempt to gain support for his views, the effect of which was to cause annoyance, harassment, alarm and/or distress.[30]

The fact of Mr Goldstein was that- he was charged in an indictment containing one count of public nuisance contrary to common law. The particulars were that he between the 16th day of October 2001 and the 20th day of October 2001 caused a nuisance to the public by posting or causing to be posted, an envelope containing salt to Unit 36, Northend Road, Wembley.[31]

They were convicted by the Crown Court with community service, compensation and costs of the prosecution.[32] On their appeal, the Lords of Appeal (Criminal Division) allowed their appeals and quashed the convictions.

Writing the leading judgment, Lord Bingham of Cornhill stated:

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[26] DAVID ORMEROD, SMITH AND HOGAN CRIMINAL LAW 19 (12th ed. 2008).
[27] (2005) UKHL 63.
[28] Ormerod, *supra* note 26, at 19.
[29] *Regina v. Rimmington, Regina v. Goldstein* (2005) UKHL 63 [hereinafter also named as *Rimmington and Goldstein* (2005)].
[30] *Id.* at para. 2.
[31] *Id.* at para. 4.
[32] Sentenced to a Community Punishment Order of 140 hours, and ordered to pay £500 compensation and £1850 towards the costs of the prosecution.

That the circumstances in which, in future, there can properly be resort to the common law crime of public nuisance will be relatively rare. It may very well be, as suggested by JR Spencer in his article cited in para 6 above, at p 83, that "There is surely a strong case for abolishing the crime of public nuisance." But as the courts have no power to create new offences, so they have no power to abolish existing offences. That is a task for Parliament, following careful consideration (perhaps undertaken, in the first instance, by the Law Commission) whether there are aspects of the public interest which the crime of public nuisance has a continuing role to protect. It is not in my view open to the House in resolving these appeals to conclude that the common law crime of causing a public nuisance no longer exists.[33]

The appellants submitted that the crime of causing a public nuisance, as currently interpreted and applied, lacks the precision and clarity of definition, the certainty and the predictability necessary to meet the requirements of either the common law itself or article 7 of the European Convention. This submission calls for some consideration of principle.[34]

In his famous polemic *Truth versus Ashurst*, written in 1792 and published in 1823, Jeremy Bentham made a searing criticism of judgemade criminal law, which he called 'dog-law'. 'It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he should not do – they won't so much as allow of his being told: they lie by till he has done something which they say he should not have done, and then they hang him for it.'[35]

[33] *Id.* at para. 31.
[34] *Id.* at para. 32.
[35] *Id.* at para. 33.

(4) *R. v. Jones et al.* (2006):[36]

On the night of 13 March 2003 the appellants Margaret Jones and Paul Milling broke into the Royal Air Force base at Fairford in Gloucestershire and caused damage to fuel tankers and bomb trailers. They had conspired together to do so. A little later, the appellants Toby Olditch and Philip Pritchard conspired together to cause criminal damage at the base. On 18 March 2003 they had in their possession articles which they intended to use to destroy or damage the runway at the base and aircraft belonging to the United States Air Force. On the same date, 18 March 2003, the appellant Josh Richards attempted to set fire to an aircraft at the base belonging to the United States Air Force. He had with him on that date articles which he intended to use to destroy or damage such aircraft. Also on that date, he caused damage to a perimeter fence at the base. It is convenient to refer to these appellants collectively as "the Fairford appellants."[37]

In indictments preferred against them they were (after the withdrawal of one count) charged with counts of conspiracy to cause criminal damage contrary to Sec. 1(1) of the Criminal Law Act 1977 (Jones, Milling, Olditch, Pritchard), having articles with intent to destroy or damage property contrary to Sec. 3(b) of the Criminal Damage Act 1971 (Olditch, Pritchard, Richards) and criminal damage contrary to Sec. 1(1) of the 1971 Act and attempted arson contrary to Sec. 1(1) of the Criminal Attempts Act 1981 (Richards).[38]

A preparatory hearing was held under Sec. 29 of the Criminal Procedure and Investigations Act 1996 to seek rulings on some questions of law arising from the proposed defences of the Fairford appellants. Relevantly, the question was raised whether the defence of using reasonable force under Sec. 3 of the 1967 Act was available to them. Sitting at Bristol, Grigson J ruled on 12 May 2004 (1) that foreign policy and the deployment of the armed services involved the exercise of prerogative power and could not raise justiciable issues, and (2) that the citizen could not plead lawful justification for interfering with the exercise of that power (including the power to make war). The judge accepted, as the Crown had accepted in argument, that the appellants were entitled to contend that they had been acting to prevent the commission of war crimes within the scope of

[36] (2006) UKHL 16.
[37] *Id.* at para. 3.
[38] *Id.*

the International Criminal Court Act 2001, so the argument was directed to the crime of aggression. The appellants challenged the judge's ruling in the Court of Appeal (Criminal Division) (Latham LJ, Gibbs J and His Honour Judge Brown). It ruled ((2004) EWCA Crim 1981, (2005) QB 259) that the crime of aggression which the appellants claimed they were seeking to prevent was not a 'crime' for the purposes of Sec. 3 of the 1967 Act, and that accordingly the issue of justiciability did not call for decision. It certified as a question of general public importance:

> Is the crime against peace and/or crime of aggression capable of being a 'crime' within the meaning of section 3 of the Criminal Law Act 1967 and, if so, is the issue justiciable in a criminal trial? [39]

The trials on charged facts have not yet taken place, but the question of whether there was such a crime under international and English law, and the question of its justifiability, went through the hierarchy of the English courts as a preliminary question, to be settled before the trial proper could commence.

Writing the leading judgment, Lord Bingham of Cornhill stated:

> The lack of any statutory incorporation is not, however, a neutral factor, for two main reasons. The first is that there now exists no power in the courts to create new criminal offences, as decided by a unanimous House in *Knuller (Publishing, Printing and Promotions) Ltd v. Director of Public Prosecutions* (1973)[40]. While old common law offences survive until abolished or superseded by statute, new ones are not created. Statute is now the sole source of new criminal offences. The second reason is that when it is sought to give domestic effect to crimes established in customary international law, the practice is to legislate. Examples may be found in the Geneva Conventions Act 1957 and the Geneva Conventions (Amendment) Act 1995, dealing with breaches of the Geneva Conventions of 1949 and the Additional Protocols of 1977; the Genocide Act 1969, giving effect to the Genocide Convention of 1948; the Criminal Justice Act 1988, s 134, giving effect to the

[39] *Id.* at para. 4.
[40] (1973) AC 435.

> Torture Convention of 1984; the War Crimes Act 1991, giving jurisdiction to try war crimes committed abroad by foreign nationals; the Merchant Shipping and Maritime Security Act 1997, s 26, giving effect to provisions of the United Nations Convention on the Law of the Sea 1982 relating to piracy; and sections 51 and 52 of the International Criminal Court Act 2001, giving effect to the Rome Statute by providing for the trial here of persons accused of genocide, crimes against humanity and war crimes, but not, significantly, the crime of aggression. It would be anomalous if the crime of aggression, excluded (obviously deliberately) from the 2001 Act, were to be treated as a domestic crime, since it would not be subject to the constraints (as to the need for the Attorney General's consent, the mode of trial, the requisite mens rea, the liability of secondary parties and maximum penalties) applicable to the crimes which were included.[41]
>
> These reasons, taken together, are very strong grounds for rejecting the appellants' contention, since they reflect what has become an important democratic principle in this country: that it is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties. One would need very compelling reasons for departing from that principle.[42]

Ashworth also opines that "It is not an argument about evidence and procedure at all but an argument about the proper preconditions of criminal liability."[43]

2.3 Varying Practices of Supreme Court of Nepal

The time when House of Lords (Criminal Division) was delivering the decisions on *Rimmington and Goldstein* (2005) and *R. v. Jones et al.* (2006) as dealt just above; the Supreme Court of Nepal

[41] *Id.* at para. 28.
[42] *Id.* at para. 29.
[43] WILLIAM ASHWORTH, *Four Threats to the Presumption of Innocence, in* PRINCIPLES OF CRIMINAL LAW, *supra* note 17, at 155.

was coincidently delivering its decision in almost the same question of judicial power to create new offence or to expand the criminal liability in *Ratna Bahadur Wagchand et al.* (2005).

(5) *Ratna Bahadur Bagchand et al. v. Prime Minister and Office of Council of Ministers et al.* (2005):[44]

In this case the petitioner's claimed that Art. 11(4) of the Constitution ensures that no person shall be discriminated on the basis of caste, ethnicity. Such acts shall be punishable by law. The petitioner pleaded before the Court to issue a directive that criminalizes such acts including untouchability until the law is passed by the parliament.

Writing the leading judgement from the Special Bench of Supreme Court of Nepal, Justice Min Bahadur Rayemajhi pronounced:[45]

> What form of human behaviors be criminalized and how much punishment to be imposed for it, is the issue of legislative domain, and they do it based on the need of time and social facts. Hence, an act which was not defined as a crime at one point of time may be defined as a grave offence at another point of time. Fewer penalties at one point of time may be changed bearing heavier penalties at another point of time. Crime and punishment are purely related with penal policy of a particular society, and the law-makers legislate the law accordingly by using their legislative wisdom. The court sentences an offender in accordance with the provisions of prevailing law. If the court starts declaring an offence or increasing or decreasing the punishment through interpretation then it results in the legislative functioning and this is not proper and appropriate from jurisprudential perspectives. Court cannot create new offence through its interpretation nor can it decide whether the quantum of punishment provided in law is lesser or heavier. Court can only apply the existing law to criminalize and impose penalty as per the existing criminal law. The function of court is to interpret laws; not to legislate them. Law making is the matter of special right of the legislature. The act of declaring new offences through

[44] N.K.P. 2062, Vol. 2, DN. 7491.
[45] The bench consisted of Justice Min Bahadur Rayemajhi, Justice Khilaraj Regmi and Justice Balram KC.

> interpretation of laws by the court and deciding if the punishment provided for is adequate or not contradicts with the principle of separation of power and check and balance.[46]
>
> Setting quantum of punishment for an offence is a matter of legislation. Court does not enter in argument that how much punishment be proportionate for an offence, and even does not issue a directive for guiding to legislate this quantum of punishment for that offence and like that.[47]

However, the line of Supreme Court of Nepal is not in uniformity. Supreme Court's division bench[48] in *Padma Sundar Malla et al.* (1958)[49] postulated that if the act in question does not seem against the legal premises, the defendant cannot be made liable for the same.[50] But, the decision on *Mishrilal Sahu Kalwar* (1959)[51] came just opposite.

(6) *Mishrilal Sahu Kalwar v. Kailasati Kalwarini* (1959):[52]

It was a case of attempt to abortion, in which the Division Bench of Supreme Court consisting of Acting Chief Justice Bhagwati Prasad Singh and Justice Pashupati Prasad Upadhayay mentioned that even though the punishment for the doer who attempts to commit abortion is not stated in law, but is still liable extending it to derivative section.

> Although no punishment has been prescribed in Chapter on Punishment, of Homicide and Abortion for attempt to abort, however, it can be matched with the act as defined by Sec. 61 of the same chapter, the accused is liable for the 2 years of imprisonment.
>
> Though there is no provision of the punishment to attempt to abort in Chapter on Homicide. But, the last phrase of the Sec. 61 has mentioned that, half of the punishment shall be fixed if the child did not get abort even after the completion of such acts. As this last phrase of

[46] *Id.* at para. 17.
[47] *Id.* at para. 20.
[48] Of Justice Shidhi Bahadur Malla, and Justice Tilak Shamsher Thapa Kshetri.
[49] *Padma Sundar Malla et al. v. Government of Nepal* (N.K.P. 2015, Vol. 2 (Chaitra), DN. 10).
[50] *Id.* at para. 21.
[51] *Mishrilal Sahu Kalwar v. Kailasati Kalwarini* (N.K.P. 2016, Vol. 8, DN. 69).
[52] *Id.*

> the Sec. 61 matches with attempt to abortion, the accused is liable for punishment of 2 years of imprisonment. The punishment was reduced to 1 year by application of Sec. 68.[53]

The decision contradicts with *nulla poena sine lege.* It was repeated in *Sovawai Patel et al. (*1998).[54]

(7) *HMG v. Sovawai Patel et al.* (1998):[55]

It was case of death by road accident, decided by the Divison Bench of Supreme Court,[56] in which the Court has overcriminalized the defendant Sovawai Patel for the offence of second degree murder into first degree one. Writing the leading judgement, CJ Dhanendra Bahadur Singh wrote:

> There is confession by the accused that the accident occurred due to failure of brake, also as confessed that there was a cycle passing ahead of the bus, and the accused tried to overtake the cycle when the accident happened. As per the statement of the witness the accused was driving the bus recklessly. By this the accused could not be considered innocent. Hence it was considered reasonable to make the accused liable for lifetime imprisonment with confiscation of entire property as per no. 13(3) of the Chapter on Homicide.[57]

The decision contradicts with the then existing Muluki Ain, Chapter on Homicide, no. 6 and 13(3). The no. 6 is for negligence and recklessness which the court ignored, whereas no 13(3) requires malice aforethought into the *actus reus*- which the court applied, knowing the fact that there was no *mens rea*.

One year after that of *Sovawai Patel (1998),* the Supreme Court in the same fact of 'recklessly driving and failure of brake' followed the same, however applied no. 188 of Court Proceedings to

[53] *Id.* at para. 9.
[54] *HMG v. Sovawai Patel et al.* (N.K.P. 2045, Vol. 3, DN. 3387).
[55] *Id.*
[56] Chief Justice Dhanendra Bahadur Singh and Justice Babber Prasad Singh.
[57] *Id.* at para. 15.

reduce the imprisonment for 10 years in *Budhuram Chaudhary* (1999)[58]. The decision too came contrary to the Muluki Ain, Chapter on Homicide, no. 6 and 13(3).

Further two cases are much notable. It is much notable not only because it has penalized in different quantum for the same offence, but also because the decision has been delivered by the same judge.

(8) *Bishnu Adhikari v. Government of Nepal* (2006)[59] and *Government of Nepal v. Tek Bahadur Kshetri* (2009):[60]

In *Bishnu Adhikari* (2006), the Division Bench of Supreme Court[61] expanded the constituent element of *actus reus* of rape in case of minor, aged eight years. Muluki Ain, Chapter on Rape, no. 10(c) required 'at least minimum penetration' as an *actus reus* for the offence of rape, for which the court explained as not necessary in case of minor.[62] Thus, the defendant was convicted guilty of rape with the sentence of imprisonment for 10 years

As in *Bishnu Adhikari* (2006), in the case of *Tek Bahadur Kshetri* (2009) also the victim was minor, aged eight years. And, the fact was more or less same. And, again the issue was of 'at least minimum penetration' as an *actus reus* required for the offence of rape. The Division Bench of Supreme Court[63] quoted *Bishnu Adhikari* (2006) and convicted guilty of rape, explaining the same ratio that the requirement of 'at least minimum penetration' does not apply in all instances, particularly when the victim is minor. And, the Court convicted the defendant guilty of rape with the sentence of imprisonment for 15 years.

In these both cases, the leading judgement was pronounced by Justice Anup Raj Sharma. Not only that, *Tek Bahadur Kshetri* (2009) even quoted *Bishnu Adhikari* (2006) in its decision. But, he pronounced varying punishment without any justification.

[58] *Budhuram Chaudhary v. HMG* (N.K.P. 2046, Vol. 7, DN. 3886).
[59] N.K.P. 2063, Vol. 2, DN. 7652.
[60] N.K.P. 2066, Vol. 5, DN. 8142.
[61] Justice Anup Raj Sharma and Justice Sharada Prasad Pandit.
[62] *Id.* at para. 17.
[63] Acting Chief Justice Anup Raj Sharma and Justice Kalyan Shrestha.

(9) *Government of Nepal v. Tasi B.K. et al.* (2016):[64]

In this case, the Full Bench of Supreme Court[65] continued the popularism by expanding the constituent element of *actus reus* of rape in the case of minor. The then Muluki Ain, Chapter on Rape, no.1 requires 'at least minimum penetration' as an *actus reus* for the offence of rape. The legislature considers the age of the victim as well, but for the quantum of punishment only. The *actus reus* is not differentiated on the ground of age of victim. However, the Court again nullified this constituent element of 'at least minimum penetration' as the requirement of *actus reus* when the victim is minor.[66]

The above dealt cases of *Bishnu Adhikari* (2006), *Tek Bahadur Kshetri* (2009), *and Tasi B.K. et al.* (2016) continuingly explained that there is no point of 'at least minimum penetration' in the case of minor. One year after, the legislature passed a comprehensive code law, named Muluki Criminal Code, 2017.[67] The Code, however, again did not recognize Court's explanation and made no change in the requirement of 'at least minimum penetration' as *actus reus* of rape, as provisioned in Sec. 219 (2) (c) like that of earlier Muluki Ain. Only the quantum of punishment is accelerated if the victim is minor.

P. St. J. Langan writes: "It is presumed that the legislature does not intend to make any change in the existing law beyond that which is expressly stated in."[68] Notwithstanding with the principle of 'presumption against changes in the common law'[69] and the principle of 'strict construction of penal laws'[70], the Supreme Court applied authoritarian principle in criminal law, though the decision does not say so, to set progressive development of the *actus reus*. Here is the question of research issue. Can court interpret the criminal law as it does with constitutional law? This requires interpretational distinction between constitution and criminal law.

[64] N.K.P. 2073, Vol. 1, DN. 9519.
[65] Chief Justice Kayan Shrestha, Justice Om Prakash Mishra, and Justice Jagadish Sharma Poudel.
[66] N.K.P. 2073, Vol. 1, DN. 9519, *Id.* at para. 6.
[67] 2074 BS.
[68] P. ST. J. LANGAN, MAXWELL ON THE INTERPRETATION OF STATUTES 116 (12th ed. 2011).
[69] *Id*.
[70] *Id.* at p. 238.

(10) ***Adv. Bishnu Prasad Ghimire v. Federal Parliament, Kathmandu et al.*** **(2021)**:[71]

Currently, the Constitutional Bench of Supreme Court[72] has restricted even to the legislation of overcriminalization.

Commission for the Investigation of Abuse of Authority Rules 2002,[73] Rule 30 had the following provision:

> Rule 30. Amount may be made available for Bribe:
>
> (1) In connection with Investigation of a complaint filed at the Commission that any person assuming public office has asked for bribe, the Commission may make available amount as bribe to such person assuming public office through its own employees or through the complainant or any other person.
> (2) No action shall be taken against and no punishment shall be imposed on, any employee or person making available bribe amount pursuant to sub-rule (1).

CIAA had construed the above mentioned Rule under the scope of Commission for the Investigation of Abuse of Authority Act, 1991[74], in fact by enlarging the provision of 'preliminary investigation' as provided in its Sec. 12.

Based on Rule 30, CIAA was in practice of doing sting operation by providing the money form CIAA itself, which would entrap the individual with red-hand, and sue the case against the charge of bribe. The Applicant challenged not only this procedure but also the whole construction of Rule 30. And, submitted a writ petition demanding to declare Rule 30 as ultra vires.

Writing the leading judgement, Justice Ishwor Prasad Khatiwada pronounced:

> The power to declare which act is criminal and which is not, and whether to enact the law to criminalize the particular act or not, rest on law-makers. And, even the

[71] 074-WO-0020.
[72] The bench comprising of Chief Justice Cholendra Samsher Ja.Ba.Ra., Justice Dipak Kumar Karki, Justice Meera Khadka, Justice Harikrishna Karki and Justice Ishor Prasad Khatiwada.
[73] 2059 BS.
[74] 2048 BS.

> law-makers while legislating so has to ensure it within the scope of constitutional provisions. The act not expressed in Law and Constitution cannot be construed as crime, and legislated into Rule. Such construction violates the system of law making process by the parliament and crosses the scope of delegated legislation.[75]
>
> The provision of the Act cannot be nullified, extended, limited or construed in a way to create an exception. Doing so amounts as 'colourable legislation'.[76] Thus, Rule 30 is declared ultra-vires.[77]

The interpretation applied by the Constitutional Bench of Supreme Court in this case can be notably distinguished from the interpretation of the Constitutional Bench of Supreme Court in parliament dissolution case *Sher Bahadur Deuba et al. v. Office of the President of Nepal et al.* (2021).[78] In *Sher Bahadur Dueba* (2021), the Supreme Court has modified the language of Art. 76(5) which limited the candidate for the Prime Minister referring to Art. 76(2), and enlarged Art. 76(5) independently outside the requirement of Art. 76(2).[79] It is possible because the interpretation of constitution considers the constitution as living organism, and applies liberal construction, rather than strict construction.

2.4 Criminal Law and Constitution: Interpretational Perspectives

Criminal law concerns now as expressed in Muluki Criminal Code, 2017, under the following two Sections:

> Sec. 6: Lawful act not to be an offence: No act required by law to be done or excused by law shall be considered to be an offence.
>
> Sec. 7: Not punishment except in accordance with law: No person shall be liable to punishment for doing an act not punished by law nor shall a person be subjected to

[75] 074-WO-0020, *Id.* at para. 29.
[76] *Id.* at para. 30.
[77] *Id.* at para. 33.
[78] 077-WC-0071.
[79] *Id.* at 149-158.

> a punishment which is heavier than the one prescribed by law in force when the offence was committed.

It is constitutionally guaranteed in Art. 20 (4) of Constitution of Nepal:

> No person shall be punished for an act which was not punishable by law when the act was committed, nor shall any person be subjected to a punishment greater than that prescribed by the law in force at the time of the commission of the offence.

Whereas, constitution is regarded as living organism and applies liberal interpretation because "constitution was not merely concerned with the present and the past; but also built for the future."[80] Thus, constitutional law does not limit the court in setting progressive development of legislation. Amita Dhanda in her *Interpretation of Statutes* says, "the language of the constitution should be interpreted as if it were a living organism capable of growth and development."[81]

(11) *Moinuddin v. State of Uttar Pradesh* (1960):[82]

In 1948 a committee appointed by the State of Uttar Pradesh to suggested revision of pay of the State employees in different Departments. It is generally known as the U. P. Pay Committee'. It made certain recommendations for raising the scales of pay for the Auditors of the Cooperative Department. These were partially accepted by the Government. The petitioners contend that the auditors in the Cane Department, who at one time formed part of the Auditors of the Cooperative Department, were prescribed to enjoy the revised scale without qualifying test. The same grade of pay was sanctioned for the General Auditors including the petitioners. But in their case a qualification test was prescribed by the Department.

Thus, the petitioners sued under Art. 126 of the Constitution impugning the decision of the State Government to impose a qualification test on them before granting them the new scales of pay; and, praying for an order directing the State to place the petitioners in to enjoy the revised scale of pay unconditionally.

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[80] AMITA DHANDA, N S BINDRA'S INTERPRETATION OF STATUTES 652 (12th ed. 2017).
[81] *Id*.
[82] AIR 1960 All 484.

Writing the leading judgement, Justice S.S. Dhavan argued the well-recognised canons of constitutional interpretation as below:

> Firstly, if two constructions are possible the court must adopt the one which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or gives rise to practical inconvenience or make well-established provisions of existing law nugatory.
>
> Secondly, constitutional provisions are not to be interpreted and applied, by narrow technicalities but as embodying the working principles for practical government.
>
> Thirdly, the provisions of Constitution are not to be regarded as mathematical formulae and that their significance is not formal but vital. Hence practical considerations rather than formal logic must govern the interpretation of those parts of a Constitution which are obscure.
>
> Fourthly, in choice between two alternative meanings, the court must read the Constitution as a whole, take into considerations its different parts and try to harmonize them.
>
> Fifthly, before making its choice between two alternative meanings, the Court must read the Constitution as a whole, take into consideration its different parts and try to harmonise them.
>
> Sixthly, above all court should proceed on the assumption that no conflict or repugnancy between different parts was intended by framers of the Constitution.[83]

(12) *Union of India v. SH Sheth* (1997):[84]

On May 27, 1976, the President of India issued a notification to the effect 'In exercise of the powers conferred by clause (1) of Art. 222 of the Constitution of India, the President after consultation with the Chief Justice of India is pleased to transfer Shri Justice Sankalchand

[83] *Id.* at para. 35.
[84] *Union of India v. Sankal Chand Himatlal Sheth* (1978 SCR (1) 423).

Himatlal Sheth, Judge of High Court of Gujarat as judge of High Court of Andhra Pradesh with effect from the date he assumes charge of his office.' The notification was issued by the Government of India in its Ministry of Law, Justice and Company Affairs, Department of Justice. Mr. Justice Sheth complied with the order of transfer and assumed charge of his office as a judge of Andhra Pradesh High Court, but before doing so, he filed a Writ Petition No. 911 of 1977 in the Gujarat High Court challenging the constitutional validity of the notification.

The Writ Petition was heard by a special Bench of three Judges. They unanimously rejected the challenge to the order of transfer on the promissory estoppel. As regards the ground of consent J. B. Mehta Desai JJ. held that the order was not void for want of Mr. Sheth's his transfer. A. D. Desai J. however, took the view that the judge Court cannot be transferred without his consent. As to the ground of consultation with the Chief Justice ofIndia, they unanimously held that no effective consultation with the Chief Justice of India, though they this conclusion by different processes of reasoning. A preliminary objection raised by the Union of India to the three particular Judges hearing the matter on the ground of bias was overruled. The High Court has granted to the Union of India a certificate under Art. 132 and 133(1) of the Constitution of India to appeal the Supreme Court.

In this case, the Supreme Court of India has delivered some core concepts in interpretation of constitution. Writing the leading judgement, Justice Y Chandrachud pronounced:

> What is true of the interpretation of an ordinary statute is not any the less true in the case of a constitutional provision, and the same rule applies equally to both. But if the words of an instrument are ambiguous in the sense that they can reasonably bear more than one meaning, that is to say, if the words are semantically ambiguous, or if a provision, if read literally, is patently incompatible with the other provisions of that instrument, the court would be justified in construing the words in a manner which will make the particular provision purposeful. That, in essence is the rule of harmonious construction. In *M. Pentiah v. Veeramallappa* this Court observed:
>
> > 'Where the language of a statute, in its ordinary meaning and grammatical construction leads to, a manifest contradiction of the apparent purpose of

> the enactment, or to some inconvenience or absurdity, hardship or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence…'
>
> But, if the provision is clear and explicit, it cannot be reduced to a nullity by reading into it a meaning which it does not carry and, therefore, 'Courts are very reluctant to substitute words in a statute or to add words to it, and it has been said that they will only do so where there is a repugnancy to good sense.'[85]

However, criminal law limits the court within 'the constituent element of an offence' under individual autonomy principle.[86]

(13) *Indra Bahadur Gurung v. Revenue Tribunal, Kathmandu* (1993):[87]

In this writ of *heabus corpus*, the Division Bench of Supreme Court, of Justice Gajendra Keshari Bastola and Justice Mohan Prasad Sharma, opined:

> Judiciary does not legislate, does not amend, and does not repeal the law. The function of Court is also not to defunct the existing law; Court's function is to apply the law. There are a few principles of interpretation while applying the law. The first of them is the principle of *Literalogis*, which means to interpret the law naturally as it is.[88]

The gap assumed in the legislation- casus omissum- cannot be supplied by construction nor can it be remedied, which is not the function of judiciary. This concept is also accepted in Hindu investigative method.[89]

[85] *Id.* at paras. 6-9.
[86] Horder, *supra* note 4, at 81.
[87] N.K.P. 2050, Vol. 2, DN. 4697.
[88] *Id.* at para. 1.
[89] *Id.* at para. 2.

(14) *Kokkinakis v. Greece* (1994):[90]

The Applicant, Mr Kokkinakis, with his wife, called at the home of a Mrs Kyriakaka, the wife of a cantor of the local Orthodox Church. Mr and Mrs Kokkinakis entered into a discussion with Mrs Kyriakaka about religion with a view to converting her to their religious beliefs. Mr Kyriakaka on hearing of the visit contacted the local police and Mr and Mrs Kokkinakis were arrested and charged for proselytism.[91]

Lasithi Criminal Court found Mr and Mrs Kokkinakis guilty of proselytism and sentenced each of them to four months' imprisonment, convertible into a pecuniary penalty of 400 drachmas per day's imprisonment, and a fine of 10,000 drachmas.[92]

Mr and Mrs Kokkinakis appealed against this judgment to the Crete Court of Appeal. The Court of Appeal quashed Mrs Kokkinakis's conviction and upheld her husband's but reduced his prison sentence to three months and converted it into a pecuniary penalty of 400 drachmas per day.[93] And then, Mr Kokkinakis appealed on the Court of Cassation, which dismissed the appeal on 22 April 1988.[94]

Finally, Mr. Kokkinakis appealed to the ECtHR under Articles 7, 9, 10 and 14 of the European Convention on Human Rights, 1950. Kokkinakis submitted that the provisions of Greek law relating to the offence of proselytism were too vague to give rise to a properly defined criminal act. In particular the wording that set out the actus reus of the offence, beginning with the word ‘notably’ produced an incomplete and therefore undefined list of possible actions that give rise to the offence. Furthermore, the provision, in the use of the words ‘attempt’ and ‘indirect’, created a criminal act where no activity in line with the actus reus definition had occurred.[95]

[90] *Kokkinakis v. Greece*, (1994) 17 EHRR 397.
[91] *Id.* at paras. 6-6.
[92] *Id.* at para. 9.
[93] *Id.* at para. 10.
[94] *Id.* at para. 12.
[95] *Id.* at paras. 25-26.

The court's Commission unanimously held that there had been a violation of Kokkinakis' rights under Art. 9.[96] Art. 9 of the European Convention on Human Rights, 1950 provides that-

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The Commission wrote:

> The Court points out that Article 7 para. 1 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege)* and the principle that the criminal law must not be extensively construed to an accused's determent, for instance by analogy: it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable.[97]

[96] *Id.* at para. 26(b).
[97] *Id.* at para. 52.

2.5 Books and Peer Articles

A. Literatures Setting Theoretical Backup to the Issue

(15) Charles Van Doren's *A History of Knowledge*:[98]

Charles Van Doren was an American writer. His *A History of Knowledge* is 'a compendium of everything that humankind has thought, invented, created, considered, and perfected from the beginning of civilization into the twenty-first century. Massive in its scope, and yet totally accessible, *A History of Knowledge* covers not only all the great theories and discoveries of the human race, but also explores the social conditions, political climates, and individual men and women of genius that brought ideas to fruition throughout history.'[99] San Francisco Chronicle has commented about this book as a 'Fascinating… No less than the summation of the entire experience of the human race from the bird's-eye view of tremendous, encyclopaedic intelligence.'[100] Similarly, Clifton Fadiman remarked it as 'Crystal clear and concise... Explains how humankind got to know what it knows.'[101]

In Chapter 3, entitled "What the Romans Knew" he writes about how the Romans practiced Greek and Stoic philosophy wherever they expanded there empire. As Roman deserves as the root of civil law system in the world, they were pioneer in seeding codified law system instead of subjective order of the ruler. Hence the necessity of legality is found to have expressed some two thousand years ago during the golden age of Roman Empire. Expressing the contribution of Cicero, Doren writes:

> For two millennia the demise of the Roman republic has been regretted by those who have loved liberty. But freedom did not really have a chance there. Too few men believed it could survive, or perhaps even wanted it to survive, since a republican form of government makes demands upon the citizens that a tyranny

[98] CHARLES VAN DOREN, A HISTORY OF KNOWLEDGE: PAST, PRESENT AND FUTURE (1991).
[99] *Id.* at Cover Back of the Book.
[100] *Id.*
[101] *Id*.

> does not (a tyranny makes other kinds of demands). Perhaps no one believe in a republic so deeply as Cicero.
>
> He saw a third solution to the great political problem. If everyone was master over himself, then there would be no need to have a single master over all the others. If everyone did what he knew was right, peace would be secure, and freedom, too, could be preserved. In other words, he believed in a government of laws and not of men.[102]

The term 'government of laws not of men' sets background against the unlimited discretionary power of any authority including judges.

(16) William McKay & Charles W. Johnson's *Parliament & Congress*:[103]

William McKay is Former Clerk of the House of Commons, and Charles W. Johnson is Consultant to the Parliamentarian of the US House of Representatives and Former Parliamentarian.[104] Describing about this book, it is mentioned that *Parliament and Congress* describes and compares the constitutional background and procedures of these two legislative bodies. Currently unsolved problems often have much in common, in vexed areas such as ethics requirements or how procedural rules permit minorities fair access to legislative time before majorities prevail. British successes include the enhanced authority and effectiveness of select committees and the acquisition of more debating time by the creation of a parallel Chamber. Unsolved problems at Westminster begin with the powers and status of the Lords, and go on through the search for more effective review of EU activities, adapting parliamentary scrutiny to more sophisticated government financial information, and making better use of legislative time without diminishing back-bench rights.[105]

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[102] Doren, *supra* note 98, at 76.
[103] WILLIAM MCKAY & CHARLES W. JOHNSON, PARLIAMENT & CONGRESS: REPRESENTATION & SECURITY IN THE TWENTY-FIRST CENTURY (2010).
[104] *Id. at* Front-Back Cover of the Book.
[105] *Id.* at Cover Back of the Book.

In this book, the concept of checks and balances, and separation of powers among the three organs of State is vitalized in Chapter 1, under "Introduction". McKay & Johnson writes:

> In the United States the relative constitutional 'looseness' between the Legislative, Executive, and Judicial branches is assured not only by the textual separate conferrals of power in Articles I, II, and III of the Constitution, but further by the prohibition against the simultaneous holding of incompatible offices in more than one of the three branches contained in Article I, section 6, clause 2 of the Constitution. This restriction is explicitly applicable to Members of both Houses of Congress, and is coupled with a prohibition against Members of Congress holding any office created by law or emoluments of which are increased during their terms.[106]

The concept of separation of powers requires check and balance, but not the floor cross of judiciary into the legislation.

(17) Susan Child's *Parliament*:[107]

This book was originally published in Great Britain in 1999. It includes an 'analysis of the role of Parliament in the constitution; the legislative process, from first reading though to Royal Assent; the varieties of delegated legislation' the system of Select Committees in both Houses; the use of oral and written questions; the political parties in Parliament and the role of the back-bench MP.'[108] McKay & Johnson's *Parliament & Congress* is written about United States of America, this book is about British system.

In Chapter 3, entitled "Parliament and the Constitution", Child writes realistically from the very ground level about the separation of powers in UK:

> It is, of course, a myth that there is any real separation of powers between the executive (government), legislature (Parliament) and judiciary in the UK. The Lord

[106] *Id.* at 2, 3.
[107] SUSAN CHILD, POLITICO'S GUIDE TO PARLIAMENT (1st Indian Reprint 2000) (1999).
[108] *Id.* at Front-Back Cover of the Book.

> Chancellor is a member of all three, being head of the judiciary, a member of the House of Lords and a senior member of the Cabinet (its highest paid, in fact). The Attorney General and Solicitor General are members of the Government and of the House of Commons and may act as legal advisers both to the Government and to Parliament as a whole. The Attorney General is head of the English Bar, represents the Crown in civil matters and prosecutes in important criminal cases. In the UK, the Prime Minister is only Prime Minister by virtue of the fact that he or she is Leader of the party which commands a majority in the House of Commons. The last Prime Minister to be a Member of the House of Lords was Lord Roseberry in 1894. However, it gradually became the practice for the Prime Minister to sit in the House of Commons and when Earl Home became Leader of the Conservative Party in 1963, he had to renounce his peerage in order to seek election to the House of Commons as plain Alec Douglas-Home.
>
> Theoretically, the Sovereign appoints members of the Government (they are technically the 'Queen's Ministers') but in practice, they are chosen by and appointed on the advice of the Prime Minister. As Ministers are required to be accountable to Parliament, they are all required to be Members of either the House of Commons or the House of Lords.[109]

In this way, Child writes from very practical perspectives of intermingle nature of organs of State in United Kingdom. This somehow lets space for the query on issue of judicial expansion of the legislation or judicial restraint on the legislation.

(18) Richard A. Posner's *How Judges Think*:[110]

Richard A. Posner retired as a judge of the United States Court of Appeals for the Seventh Circuit in 2017. He is a senior lecturer at the University of Chicago Law School.[111]

[109] *Id.* at 83.
[110] RICHARD A. POSNER, HOW JUDGES THINK (2019).
[111] *Id.* at Cover Back of the Book.

In chapter 7: "Judicial Method: Internal Constraints on Judging", Posner examines about the internal limitations that the judges bear while delivering a judgement. He presents two practical concepts of law as below:

> In one, which can actually span the considerable distance between the philosophies of adjudication of Antonin Scalia and Ronald Dworkin, law is distinct from politics and policy; it is the realm of rules, rights, and principles. In the other, law, at least insofar as the study of judges is concerned, is whatever judges do in their official capacity unless they go wild and court impeachment for being usurpative. I shall continue to call the first concept of law legalism and the second pragmatism, though it is a stretch to call Dworkin a legalist, for really what he has done is relabel his preferred policies 'principles' and urged judges to decide cases in accordance with those 'principles' and ignore (other) 'policies', which are consigned to the legislature. We shall see Scalia's commitment to legalism is also in doubt.
>
> Legalism consists of techniques for evaluating evidence; interpreting legally operative texts such as statutory and contractual provisions; applying rules to the facts of a case (which may mean applying a rule in a new, unforeseen situation); choosing between governing an area of law by a broad rule, which lawyers call 'standard', or by a narrow or specific rule (a 'rule' in contrast to a standard); and drawing analogies and distinctions between precedents and the case at hand (following or distinguishing precedents).[112]

In this way, Posner, though, argues that in the whole process of this technique of evaluation, there are internal constrains in a judge. But, what are those constraints? And, are they subject one? He again leaves the room vacant about the issue of interpretational limitations of the court in criminal cases.

[112] P. 175.

(19) Fali S. Nariman's *God Save the Hon'ble Supreme Court*:[113]

The author of *Before Memory Fades…an autobiography, The State of the Nation,* and *India's Legal System: can it be Saved,* Fali S. Nariman's *God Save the Hon'ble Supreme Court* is one of the best-selling legal genre book in oriental continent. In its first essay- entitled "God Save the Hon'ble Supreme Court: Have the Best Times Disappeared?"- Nariman presents some decisions of Supreme Court of India to show the clash of judicial civilization, and ironically recites:

> I suggest that in desperate times like these when public confidence in the highest court of India is at an all-time low, it would not be inappropriate to amend the last sentence of the traditional chant in the US into a single impassioned *prayer* on the lips of all Indian citizens:
>
> God Save the Hon'ble Supreme Court.[114]

Nariman recites that the only real source of power that judges can tap is the respect of the people.[115] However, it turned into the worst of times with two events:

> In *May 2017,* in a decision of a Bench of seven judges,[116] the Supreme Court of India, invoking its inherent jurisdiction under Article 129, felt compelled to punish a sitting judge- Justice C.S. Karnan of one of India's oldest superior courts, the High Court of Madras- holding him guilty of contempt of court! It had never happened before (and one can only express the hope that it never happens again!).[117]
>
> *On 12 January 2018,* four (of the then senior most) judges of the Supreme Court- Justice Jasti Chelameswar, along with Justices Ranjan Gogoi, Madan B. Lokur, and

[113] FALI S. NARIMAN, GOD SAFE THE HON'BLE SUPREME COURT (2018).
[114] P. 72.
[115] P. 21.
[116] 2017 (7) SCC 1.
[117] P. 31.

> Kurian Joseph- went public with their grievances against the Chief Justice of India, Justice Dipak Misra.[118]

With these two instances, Nariman illustrates the combat in courts as an academic diversion which recalls the Combat in Supreme Court of Nepal in Nov-Dec, 2021. And, his argument is that this combat has been reflected in their decision with no uniformity in precedent and with 'unfortunate precedent'[119] crossing all limitations in all cases including criminal one.

B. Literatures in Criminal Law Related to the Issue

(20) Andrew Ashworth's *Principles of Criminal Law*:[120]

Andrew Ashworth is Professor of English Law at University of Oxford, his *Principles of Criminal Law* 'provides a refined analysis of the theoretical foundations which shape the statutory provisions and case law. Stimulating discussion of the topics crucial to criminal courses ensures that you are treated to sophisticated insight into the core of the subject- essential for anyone wanting an in-depth and engaging exploration of criminal law.'[121] In the sixth edition cover back of the book, some reviews of previous editions have been mentioned, which qualifies the standard of the book as 'A valuable addition to the libraries of all criminal lawyers…a comprehensive, eloquent work on criminal law principles and their application'- The Criminal Law Quarterly.

In Chapter 2, entitled "Criminalization", Ashworth deals about various principles including the principle of individual autonomy, principle of welfare, the harm principle and public wrongs, the minimalist approach, and remote harms- all alarming the risk of overcriminalization.[122] Referring D. Husak's *Overcriminalization* (2008), Ashworth writes:

> To criminalize a certain kind of conduct is to declare that it is a public wrong that should not be done, to institute a threat of punishment in order to supply a pragmatic reason for not doing it, and to censure those who nevertheless do it. This use of

[118] P. 35.
[119] P. 32.
[120] Ashworth, *supra* note 17.
[121] *Id.* at Cover Back of the Book.
[122] *Id.* at 22-43.

> state power calls for justification- justification by reference to democratic principles, and justification in terms of sufficient reasons for invoking this coercive and censuring machinery against individual subjects. So serious are the potential consequences, and so significant the public censure, that the decision to criminalize conduct should not simply be made 'on balance'. It will be argued here, following Doug Husak,that in a liberal state there is something equivalent to a right not to be punished, which should place the burden of proof firmly on those who would wish to turn non-criminal activity into an offence.[123]

And, in Chapter 3, Ashworth presents a comparative studies of human rights and criminal law,[124] where he connects the right against overcriminalization with respect to fundamental rights and freedoms. He says:

> If one constitutional principle is that the reach of the criminal law should be declared by the legislature, leaving the courts to apply and to interpret the legislation, another is that the criminal law should respect fundamental rights and freedoms. There are two sources of fundamental rights relevant to English criminal law- European Community law, and the European Convention on Human Rights.[125]

Ashworth then writes about the non-retroactivity principle stating the maxim *nullum crimen sine lelge* that:

> A person should never be convicted or punished except in accordance with a previously declared offence governing the conduct in question. The principle is to be found in the European Convention on Human Rights, Article 7: 'no one shall be held guilty of any offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.' This principle, also enunciated in Article 1 of the United States Constitution, forbids a legislature to create a criminal offence which applies to behaviour prior to its enactment. The rationale links back to the autonomy principle

[123] *Id.* at 22.
[124] *Id.* at 48-52.
[125] *Id.* at 48.

> and to the concept of reliance inherent in the 'rule of law' ideal: 'respect for autonomy involves respect for the ability to plan, which requires respect for the ability to rely on the law', which in turn generates the principle of non-retroactivity. How does it apply to the courts? It may seem obvious to state that they should not invent crimes and then punish people for conduct which falls within the new definition…[126]

Ashworth further clarifies that "The proper procedure is for a democratically elected legislature to create new offences."[127] And, he emphasizes that "It appears that the English courts no longer claim the power to create new criminal offences."[128] He also argues that "criminal law must not be extensively construed to an accused's determent, for instance by analogy"[129] because criminal law does accept the concept of fair labelling.[130] In this way, Ashworth is straightforwardly clear about the legislation of new criminal offence, but, the issue of interpretational limits has not been dealt by him.

(21) David Ormerod's *Smith and Hogan Criminal Law*:[131]

David Ormerod is Professor of Criminal Justice, Queen Mary University of London, Barrister of the Middle Temple and Door Tenant at 18 Red Lion Court, and has acted as a consultant to the Law Commission, Home Office, and the Commonwealth Secretariat.[132] Writing about the reputation of this book, Hon. Mr. Justice Pitchford says, "The reputation of this excellent work for scholarship and clarity is in safe hands. Professor Ormerod elucidates the criminal law for judges, practitioners and undergraduates alike."[133] Similarly, Simon Mckay, Solicitor Advocate, McKay Solicitors, Leeds writes, "Before this book was published it would have been difficult to have predicted *Smith and Hogan Criminal Law* could have got any better it has."[134]

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[126] *Id.* at 58.
[127] *Id.* at 59.
[128] *Id*.
[129] *Id.* at 68.
[130] *Id.* at 78, 79.
[131] Ormerod, *supra* note 26.
[132] *Id.* at Front-Back Cover of the Book.
[133] *Id.* at Cover Back of the Book.
[134] *Id*.

In Chapter 4 of this book, Prof. Ormerod justifies the Latin maxim *actus non facit reum nisi mens sit rea:*

> It is a fundamental principle of criminal law that a person may not be convicted of a crime unless the prosecution have proved beyond reasonable doubt both (a) that responsibility is to be attributed to D for certain behaviour or the existence of a certain state of affairs (in a conduct crime), which is forbidden by criminal law and that D has caused a certain event (in a result crime) and (b) that D had a defined state of mind in relation to the behaviour, existence of the state of affair or causing of the event. The event, behaviour or state of affairs, is called the *actus reus*, or the external element, and the state of mind the *mens rea*, or mental element, of the crime. The principle that a person is not criminally liable for his conduct unless the prescribed state of mind coincides with the prohibited *actus reus* also being present is frequently stated in the form of a Latin Maxim: *actus non facit reum nisi mens sit rea.*[135]

Prof. Ormerod further clarifies that 'no *actus reus* no crime':

> It is possible for the courts to dispense with *mens rea* in whole or in part with offences of strict or absolute liability, but, except in the anomalous case of an intoxicated offender, they can never dispense with the *actus reus*. There are no 'thought crimes'. The if an offence consists in 'possessing' or 'permitting', that offence cannot be proved if D cannot be shown to have 'possessed' or 'permitted'.[136]

However, unlike Prof. Ashworth, Prof. Ormerod argues that criminal law is not to reduce in its absolute minimum:

> This degree of coercion is qualitatively different from the outcome in a dispute in civil law. For the liberal at least, criminalization should be a matter of last resort because of this stigmatization and the most intrusive forms of State intervention it

[135] *Id.* at 42.
[136] *Id.* at 44.

> entails. As Husak has stated, 'a criminal statute cannot be necessary to accomplish a purpose if other means could do so more easily'. Readers will be able to judge for themselves whether English law really respects this principle of what Ashworth calls 'minimal criminalization'. The point is not so much to reduce criminal law to its absolute minimum, as to ensure that resort is only had to the criminalization in order to protect individual autonomy, or to protect those social arrangements necessary to ensure that individuals have the capacity and facilities to exercise their autonomy.[137]

Does it mean court can flourish the dynamics of elements of particular offence? If so, how far? Ormerod is silent on this issue.

(22) Glanville Williams's *Textbook of Criminal Law*:[138]

Glanville Williams is formerly Professor of Public Law and Professor of Jurisprudence in the University of London, and Rouse Ball Professor of English Law in the University of Cambridge.[139] This book was originally published by Sweet & Maxwell Ltd. UK, and is peculiarly popular for its writing style in the solitaire mystery form, like that of *Sophie's World* in philosophy.[140]

In Chapter 1 of the book, Williams writes about "Crime and Criminal Law". On the issue of limiting the judge in criminal law, he opines:

> Although the courts do not generally use to the full the Draconian powers that Parliament may give them, it is accepted that judges ought not be set completely free from statutory fetters. Imprisonment for 'life,' i.e. for an indeterminate period, is acceptable as a possible sentence for multiple rapists, but it would not be acceptable as a possible sentence for indecent assault (which includes such comparatively minor- though strongly resented- interferences as touching the breasts of a woman in a crowd).

[137] *Id.* at 12.
[138] Williams, *supra* note 5.
[139] *Id.* at Inner Cover of the Book.
[140] JOSTEIN GAARDER, SOPHIE'S WORLD (1996).

> The judge is limited not only by the legal maximum set by Parliament but by the generally lower scales known as the 'tariff' devised by the appellate courts. The theory is that the maximum sentence was intended only for the worst offence of its kind, and the judge must award less than that for other cases.[141]

Sometimes it is also argued that 'what the law is are in reality only statements of what the law is going to be after the decision. But, that is not the regular rule'.[142] This concerns the issue of interpretation. Williams says,

> The courts cannot manufacture statutes as they manufacture precedents, but they can 'interpret' them. They can cut them down, or expand them. Courts still pay lip-service to the ancient principle that in case of doubt a criminal statute is to be 'strictly construed' in favour of the defendant; but the principle is rarely applied in practice, if there are social reasons for convicting. Indeed, we may make bold to say that the looser the defendant's conduct, the more loosely the judges construe the statute short of the most powerful reasoning based on the wording of the statute is likely to dissuade the judges from holding that the statute applies to him.[143]

For this, he takes the case of *Smith v. Hughes* (1960)[144] for reference; that a statute makes it an offence for a prostitute to solicit 'in a street'. The court hold that if a prostitute solicits by gestures when standing at the window of a room fronting the street, her gestures being directed at men in the street, she solicits in a street. Then, there comes the question- the judges concoct the law as they go along? He answers: "That is an exaggeration, even though it has a considerable measure of truth."[145] He further cites the opinion of Francis Bacon (Lord Chancellor Bacon): "Judges ought to remember that their office is *Jus dicere,* and not *Jus dare*; to interpret law, and not to make or give law."[146]

[141] *Id.* at 10.
[142] *Id.* at 12.
[143] *Id.*
[144] (1960) 1 WLR 830.
[145] *Id.* at 14.
[146] *Id.* at 15.

In this way, on one hand Williams highlights on judges task of boldly construing the defendants conduct; however, other hand he also terms it as 'an exaggeration' to say that judges make criminal offence. His focus on practicality reflects on thing, and parameters of principle another thing. Thus, Williams sits in dilemma to declare whether practical endeavour is correct or principle's spectrum is correct.

(23) Jonathan Herring's *Criminal Law*:[147]

Jonathan Herring is a Fellow in Law at Exeter College, Oxford, UK, and is a qualified solicitor and has also taught at New Hall, Cambridge; Selwyn College, Cambridge; and Christ Church, Oxford.[148] This series was edited by Marise Cremona, Professor of European Commercial Law, Queen Mary Centre for Commercial Law Studies, University of London.[149]

Writing the first sentence in Chapter 1: "Introduction to Criminal Law" of the book, Herring says, "This book is about the basic principles of criminal liability."[150] Then, he simplifies about the criminal law's statutory nature: "It should be noted that conduct that is contrary to criminal law at one point in time may not be seen as criminal at another time or in another country."[151] To the question, what conduct is criminal, Herring opines:

> There are two aspects to the definition of most serious crimes. The first, and most important, is that the defendant has done an act which has caused a prohibited kind of harm. The second is that the defendant is culpable, worthy of censure, for having caused that harm.[152]

His focus on 'prohibited harm' avoids retroactivity, and requires criminal law as statutorily defined. But, he also does not go on arguing principally that how far the court can criminalize or not.

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[147] JONATHAN HERRING, CRIMINAL LAW (4th ed. 2005).
[148] *Id.* at Cover Back of the Book.
[149] *Id.* at Inner Cover of the Book
[150] *Id.* at 3.
[151] *Id.* at 4.
[152] *Id.* at 5.

(24) Michael T Molan's *Criminal Law*:[153]

Michael T Molan is a Barrister, Head of the Division of Law at South Bank University, his *Criminal Law* is a textbook "which covers all recent statutory developments and case law."[154]

Molan believes that the source of criminal law in a modern society is invariably referred to as 'the Statute'.[155] He also defines in strict term. To him, "An activity is a crime because the state has labelled it as a crime. On this basis, if the state decreed that it was an offence for men to grow beards, or for women to appear in public on Thursdays, those actions would become crimes."[156]

Molan mentions three key principles guiding to the question 'what principles should underpin the development of the criminal law?' in his very first chapter "Introduction to Criminal Law" as below:

> The first is that, in drafting criminal offences, the state should strive to strike the right balance between the principle of minimum criminalisation and social defence. The principle of minimum criminalisation is that there should be no more criminal prohibition than are strictly necessary for society to function fairly and effectively.
>
> Second, the criminal law should be, and should be perceived to be, essentially fair in its content and operation. Hence, for example, the prohibition on retrospective criminal law, as enshrined in Article 7 of the European Convention on Human Rights. The principle of maximum (note not absolute) certainty (sometimes referred to as 'fair warning') suggests that the law should be clear, concise and intelligible. Given that ignorance of law is n excuse citizens should be provided with as clear a statement of what is prohibited as is possible.
>
> Third, where criminal offences are created the principle of 'fair labelling' provides that they should distinguish properly between the types of harm prohibited and the elements to be established. For example an offence of homicide would be regarded

[153] MICHAEL T MOLAN, CRIMINAL LAW (3d ed. 2001).
[154] *Id.* at Cover Back of the Book.
[155] *Id.* at 1.
[156] *Id.* at 2.

> as too broad. The law should set out separate offences of deliberate and non-deliberate killing and assign appropriate fault elements and punishments to both. Similarly, the fair labelling doctrine would require offences to make clear the distinction between activities such as theft and burglary, or rape and indecent assault. A fair and efficient system of criminal law provides for offences that distinguish between major and minor wrongdoings.[157]

Molan connects the issue of *nulla poena sine lege* with Art. 7 of the European Convention. He says,

> Article 7 is designed to ensure that the imposition of criminal, liability and punishment should be in accordance with accepted norms of the rule of law. In particular it outlaws retrospective criminal offences and the imposition of heavier penalties that those that were applicable at the time the criminal offence was committed.[158]

However, in assessing when it would be proper for the courts to intervene by way of judicial law-making, he cites Lord Lowry's suggestions in the following five points:

1. Judges should be slow to impose their own remedies where the solution was doubtful.
2. Judges should be slow to act where Parliament had clearly declined to do so, or had legislated in the area without touching upon the difficulty raised in the instant case.
3. Fundamental legal doctrines should not be lightly overturned.
4. Issues of social policies should be left for determination by the legislature.
5. Judicial solutions should not be imposed unless finality was likely to result.[159]

(25) Jeremy Horder's *Ashworth's Principles of Criminal Law*:[160]

Jeremy Horder is Professor of Criminal Law, London School of Economics and Political Sciences. This book is evaluated in the Criminal Law Quarterly as "a valuable addition to the libraries of all

[157] *Id.* at 2, 3.
[158] *Id.* at 16.
[159] *Id.* at 8.
[160] Horder, *supra* note 4.

criminal lawyers…a comprehensive, eloquent work on criminal law principles and their application."[161]

In Chapter 4, entitled "Criminal Law Fabric" of his book, Horder writes that "The essence of the non-retroactivity principle is that a person should never be convicted or punished except in accordance with a previously declared offence governing the conduct in question."[162] He opines:

> Some years ago, the English courts did exercise the power, in effect, to create a new criminal offence. In *Shaw v. DPP* (1962), the prosecution had indicted Shaw with a 'conspiracy to corrupt public morals' at common law, in addition to two charges under the Sexual Offences Act 1956 and the Obscene Publications Act 1959. The House of Lords upheld the validity of the indictment, despite the absence of any clear precedents, on the broad ground that conduct intended and calculated to corrupt public morals is indictable at common law. The decision let to an outcry from lawyers and others. One objection to *Shaw* is that it fails to respect citizens as rational, autonomous individuals: a citizen cannot be sure of avoiding the criminal sanction by refraining from prohibited conduct if it is open to the courts to invent new crimes without warning. What happened in *Shaw* was that a majority of the House of Lords felt a strong pull nature of the conduct, and regarded their authority to criminalize the conduct as more important than the liberty of citizens to plan their lives according to the rule of law. However, it appears that the English courts no longer claim the power to create new criminal offences...[163]

Then, what about the extension of existing offences to new circumstances? He distinguishes between 'constituent elements of an offence' (that may not be changed, and 'progressive development of those elements (that may involve legitimate change).[164] For this he cites *S.W and C.R v. UK* (1995)[165] in which European Court said:

[161] *Id.* at Cover Back of the Book.
[162] *Id.* at 79.
[163] *Id.* at 80.
[164] *Id.* at 81.
[165] 21 EHRR 363.

> The constituent elements of an offence may not however be essentially changed to the detriment of an accused any progressive development by way of interpretation must be reasonably foreseeable to him with the assistance of appropriate legal advice if necessary.[166]

But, his arguments of 'progressive development of elements' does not stand in line of the 'strict rule of construction' applied in criminal law. He bases his idea on a decision of European Court, which is accustomed much with the interpretation of rights that applies 'liberal construction'.

(26) K I Vibhute's *PSA Pillai's Criminal Law*:[167]

K I Vibhute is Emeritus Professor of Law, Department of Law, University of Pune. His book has been described as "a classic text on the Indian Penal Code, 1860, ever since the publication of its first edition in 1956. It systematically and clearly provides an in-depth analysis of all the categories of offences incorporated in the Code."[168] In this book, Vibhute looks criminal law from the oriental perspectives too. He compares 'criminal law and the Hindu system', 'Mohammedan criminal law', and also writes about development of criminal law in India under the British rule.

Being the book written as commentaries in Indian Penal Code, its first chapter entitled "Nature of Crime" has to be considered for his perspectives about the crime. He writes:

> A pattern of human behaviour prohibited by criminal law at a given time in a given society, thus, depends upon the specific features of its organisation. Developments in science, especially in biology and medicine, and changes in the predominant moral and social philosophy also influence the making of penal law. A human conduct that is believed to be inimical to the social interest is labelled as a crime.[169]

However, Vibhute does not investigate into the theoretical question of judicial limitation in interpreting the criminal law.

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[166] *Id.* at 390.
[167] K I VIBHUTE, P S A PILLAI'S CRIMINAL LAW (11th ed. 2012).
[168] *Id.* at Cover Back of the Book.
[169] *Id.* at 3, 4.

(27) CMV Clarkson, HM Keating & SR Cunningham's *Clarkson and Keating Criminal Law: Text and Materials*:[170]

CMV Clarkson is Professor of Law at University of Leicester, HM Keating is Senior Lecturer in Law at University of Sussex, and SR Cunningham is Lecturer in Law at University of Leicester. Their *Criminal Law* examines the main principles and rules of criminal law and explores the theoretical bases upon which they are founded.[171]

In its Chapter II, entitled "What Conduct ought to be Criminal?" they have tried to respond 'Is it permissible to criminalise the conduct?' They argue that the power to criminalize rest on criminal law, and the criminal law also not contravene the European Convention on Human Rights:

> First, any new Bill proposing to criminalise conduct must be compatible with the Convention.
>
> Secondly, it is possible that existing criminal offences are structured in such a way as to offend the provisions of the ECHR.[172]

They opine that 'Courts are mandated to interpret legislation.., but they are not permitted to legislate.'[173] In this way, they also somehow disregard criminalization by means of interpretational endeavours, no matter they do not focus on what are those interpretational limitations.

(28) Michael J. Allen and Ian Edwards' *Criminal Law:*[174]

Michael J. Allen is a former Commissioner at the Criminal Cases Review Commission and a former Professor of Law at Newcastle Law School, and Ian Edwards is a Senior Lecturer in Law at the University of East Anglia.[175]

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[170] CMV CLARKSON ET AL., CLARKSON AND KEATING CRIMINAL LAW: TEXT AND MATERIALS (6th ed. 2007).
[171] *Id.* at Cover Back of the Book.
[172] *Id.* at 23.
[173] *Id.*
[174] MICHAEL J. ALLEN & IAN EDWARDS, CRIMINAL LAW (15th ed. 2019).
[175] *Id.* at Cover Back of the Book.

The first chapter of this book talks about 'Criminal law in context', where the authors do accept the common law offences rather than statutory offences:

> There are thousands of criminal offences, the vast majority being of statutory creation and of a regulatory nature. Our concern is generally with the major offences (e.g. murder, manslaughter, rape, assault, theft, robbery, burglary, criminal damage, deception) and the general principles underlying criminal liability. While most offences are now of statutory creation, the criminal law originally was laid down in judges' decisions. Some offences, such as murder and manslaughter, are still common law offences lacking a statutory definition.[176]

However, these acceptance of common law offence is only for the study of historical evolution of offences, how they were evolved, and what their elements were. The precedent that set the elements are later codified, and today it does not exist as such any offence created by court or criminalized by interpretation as discussed just before in *Clarkson and Keating Criminal Law.*

(29) Douglas Husak's *Overcriminalization*:[177]

Douglas N. Husak is an American legal philosopher, academic and author. He is a distinguished Professor of Philosophy and co-directs the Institute for Law and Philosophy at Rutgers University. In this book, he writes how the United States suffers from too much criminal law and too much punishment. He describes the phenomena in some detail and explores their relation, and why these trends produce massive injustice.[178]

Husak cites Ronald Gainer, once Associate Deputy Attorney General in the Department of Justice, who describes the current state of federal criminal law as follows:[179]

> Federal statutory law today is set forth in the 50 titles of the United States Code. Those 50 titles encompass roughly 27,000 pages of printed text. Within those 27,000 pages, there appear approximately 3,300 separate provisions that carry

[176] *Id.* At 22.
[177] DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008).
[178] *Id.* at v.
[179] *Id.* at 9.

> criminal sanctions for their violation. Over 1,200 of those provisions are found jumbled together in Title 18, euphemistically referred to as the 'Federal Criminal Code'.
>
> — Ronald Gainer: 'Federal Criminal Code Reform: Past and Future,' 2 *Buffalo Criminal Law Review* 45, 53 (1998)

Husak argues breaks the conceptual apparatus to crime as *mala in se* from *mala prohibita*; and improvises it into three categories: overlapping offenses, crimes of risk prevention, and ancillary offenses:

> The first category overlapping crimes. We overcriminalize partly by re-criminalizing—by criminalizing the same conduct over and over again. As Stuntz observes, 'federal and state codes alike are filled with overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions.'[180]
>
> Offenses of risk prevention (or risk creation) are a second category of statute that has contributed to the phenomenal growth of the criminal law. After all, the state has long proscribed just about every possible means of directly causing harm—even if it resorts to recriminalization—but there is virtually no limit to how far the state might go in protecting persons from novel ways that harm might be risked. Crimes of risk prevention are examples of inchoate offenses. Roughly, an offense is inchoate when not all of its instances cause harm. These offenses do not prohibit harm itself but, rather, the possibility of harm—a possibility that need not (and typically does not) materialize when the offense is committed. New crimes of risk prevention can easily be generated by proscribing conduct more and more remote from the ultimate harm to be prevented.[181]
>
> My third and final category of relatively new kinds of crime might be called ancillary offenses. Roughly, ancillary offenses function as surrogates for the prosecution of primary or core crimes and bear an indirect relation to them. They

[180] *Id.* at 36.
[181] *Id.* at 38.

> are created mostly for situations in which a defendant is believed to have committed a primary or core offense, but prosecution is unlikely to be successful or is otherwise thought to be undesirable. On some occasions, the state cannot prove the commission of the core offense, or its evidence of this offense is inadmissible because it has been obtained illegally. These occasions have led to the enactment of growing numbers of ancillary offenses that surround core crimes. Because most of these statutes have neither common-law analogues nor well-established public meanings, legislators have broad authority to define them as expansively as they wish. As a result, many of these laws venture into the 'gray zone of socially acceptable and economically justifiable business conduct.' The features of many of these offenses—the absence of culpability requirements, the shifting of burdens of proof, the imposition of liability for omissions, and the implicit trust in prosecutorial discretion to prevent abuse—compromise fundamental principles long held sacrosanct by criminal theorists. These crimes lie far outside the core of criminal law and seem unlikely to satisfy the criteria in a theory of criminalization.[182]

Husak also talks about internal and external constraints on criminalization, and also some alternative theories of criminalization. However, he does not spend the time to explore the interpretational limitation of court in criminal cases.

(30) Dennis F. Baker's *The Right Not to be Criminalized*:[183]

Dennis F. Baker is Professor at King's College, University of London, UK. In this book, Baker tries to explain the legitimacy of 'just criminalization' over 'crisis of unjust criminalization', and argues that the right not to be criminalized is not merely a cardinal human right found in morality, but is also a constitutional right.[184]

[182] *Id.* at 40, 41.
[183] DENNIS F. BAKER, THE RIGHT NOT TO BE CRIMINALIZED: DEMARCATING CRIMINAL LAW'S AUTHORITY (2011).
[184] *Id.* at x, xi.

Baker opposes unfair criminalization and construing unjust criminalization.[185] He states various such unfair and unjust criminalization in practices; as below:

> Unfair and unjust criminalization flows from a number of practices including the mislabelling of innocuous conduct as criminal; eliminating the *ex post* culpability requirement without moral justification (strict and vicarious liability for crimes that result in conviction and/or imprisonment); eliminating the *ex ante* 'imputability of blame for remote harm' requirement without justification (i.e., criminalizing people for being a mere 'but for' cause of harm caused by the intervening choices of others: remote harms); imposing disproportional punishments; and through the circumvention of human rights and due process protections by, for example blurring the civil and criminal law. From the *ex ante* criminalization perspective the lawmaker has to consider a number of factors including what can be fairly labelled as criminal; the sentences that should be set for various offenses; and the structure that the criminal law will take to ensure that criminal liability will only be visited on those who are deserving of criminal censure.[186]

All these types of practices that allows unfair and unjust criminalization is the violation of right- 'right not to be criminalized' that he deals under the title "Unprincipled Criminalization."[187] He says:

> The right to not to be criminalized is a basic human right that aims to protect individuals from unwarranted state interference of a penal nature. In particular, the right is geared towards protecting individuals from being unjustly criminalized. The right is a basic moral right, but it is also a fundamental legal right. It is formed by a number of specific protections as well as the more general protections found in the Fifth and Eighth Amendments of the U.S. Constitution, and the corresponding rights concerning deprivation of liberty and fair punishment as set out in Articles

[185] *Id.* at 3.
[186] *Id.* at 9.
[187] *Id.* at Chapter One.

> 3, 5 and 8 of the European Convention and Articles 7, 9, and 12 of the Canadian Charter of Rights and Freedoms.[188]

Baker argues that the various courts around the world use different standards of interpretation, but the differences are more formal than substantive. A careful analysis of the personal autonomy and fair punishment type provisions found in the various constitutions demonstrates that these types of rights, however differently worded and however differently interpreted in the past, contain a general right not to be criminalized.[189] He states:

> The 'the margin of appreciation' doctrine allows courts take into account that the ECHR will be interpreted differently in different countries, but it should not permit the Strasbourg Court to endorse interpretations that would result in human rights abuses, such as allowing a person to be criminalized and jailed for engaging in innocuous activities or allowing a person to be sent to prison for 40 years for shoplifting and so forth. Allowing someone to be jailed for 40 years for shoplifting contravenes our deeply held conventional (Western) standards of justice- the very same standards that we ask non-Western states to comply with.[190]

As written in the very first paragraph of this book "In this book my goal is not merely to discuss the moral limits of the criminal law. Instead, the focus is on the legal limits of the criminal law,"[191] this book also does not explore on the interpretational limits of court in criminal cases. It may not be the issue for them because they may not even think to expand the element of crime by interpretation.

[188] *Id.* at 9, 10.
[189] *Id.* at 10.
[190] *Id*.
[191] *Id.* at 1.

C. Literatures in Interpretation of Statutes Related to the Issue

(31) Amita Dhanda's *NS Bindra's Interpretation of Statutes*:[192]

Amita Dhanda is Professor of Law at NALSAR University of Law. She was appointed as a Member National Advisory Council for the implementation of the Right to Education Act in 2010. She is also on the Academic Council of Tamil Nadu National Law School.[193]

In this book, she presents the overall aspects of interpretation of statutes; and in Chapter 17 entitled "Interpretation of Expropriating, Emergency, and Penal Statutes", she deals about the penal statutes. Describing 'strict construction', Dhanda writes:

> A strict construction requires, at least, that no case shall fall within a penal statute which does not comprise all the elements which, whether, morally material or not, are in face made to constitute the offence as defined by the statute. As illustrative of the rule of strict construction, it has been said that while remedial laws may extend to new things not *in esse* at the time of making the statute, penal laws may not. But, this degree of strictness may be regarded as extreme.[194]

By her expression 'extreme', she gives the place for purposive interpretation, and poses two juxtapositions:

> With the flux of time, two contradictory developments have influenced the interpretation of penal statutes. The scaling down of punishments is one development which has lessened the pressure on Courts to strictly interpret a statute in favour of the accused; the other development is the crime control compulsions of modern penal statutes.[195]

[192] Dhanda, *supra* note 80.
[193] https://www.nalsar.ac.in/amita-dhanda (last visited July 20, 2021).
[194] Dhanda, *supra* note 80, at 825.
[195] *Id.* at 846.

(32) P. St. J. Langan's *Maxwell on the Interpretation of Statutes*:[196]

P. St. J. Langan is Barrister-at-Law of Lincoln's Inn, and of King's Inns, Dublin.[197] The book expresses *Maxwell* dicta and illustration, largely by way of examples.[198] Langan regards interpretation of penal statutes as "Exceptional Construction" under Chapter 11, where he gives no place for purposive interpretation:

> The degree of strictness applied in the interpretation of the words of penal laws is illustrated by Hale's mention of the statute 1 Edw. 6, c. 12. This made the stealing of horses (in the plural) a capital offence, and gave rise to a doubt, which it was thought necessary to remove by enactment in the following session of Parliament, whether it included the theft of one horse only. Perhaps the same spirit may be seen in the nineteenth-century decisions that a court was not bound to know that a colt was a horse within the meaning of an Act against horse-stealing, and that an enactment which made it a felony to 'stab, cut or wound' did not reach the case of biting off a nose or finger because the injury thus inflicted was not (as the words seemed to require) caused by an instrument.[199]

The 'purposive interpretation' as expressed by Dhanda and 'degree of strictness' expressed by Lagan lead the issue to review it under the source law of 'constitutional interpretation', refereed just below.

(33) Craig R. Ducat's *Constitutional Interpretation*:[200]

Craig R. Ducat is distinguished teaching Professor at Emeritus Northern Illinois University. This is the book printed for Australia, Brazil, Japan, Korea, Mexico, Singapore, Spain, United Kingdom, United States,[201] shows its wider celebratedness.

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[196] Langan, *supra* note 68.
[197] *Id.* at Inner Cover of the Book.
[198] *Id.* at v.
[199] *Id.* at 238, 239.
[200] 1 CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION (9th ed. 2009).
[201] *Id.* at Inner Cover of the Book.

To the question, how can an objective meaning of constitutional provisions be ascertained? Ducat answers:

> The answer lies in two tools of constitutional interpretation: the 'plain meaning' rule and the 'intention of the Framers.' The former embodies the notion that the words of the Constitution are to be taken at face value and are to be given their 'ordinary,' 'accepted' meaning; the latter requires fidelity to what those who wrote or adopted the Constitution intended its provisions to mean.[202]

(34) P.M. Bakshi's *Interpretation of Statutes*:[203]

P.M. Bakshi, former Member of Law Commission of India[204] prescribes Ducat's aforesaid two tools as two theories: mechanical and the organic theories[205]. He explains:

> The mechanical method requires that while interpreting a Constitutional provision we should try to put ourselves in the shoes of the founding fathers of the Constitution and should seek 'to read their minds and gather their intention'. For this purpose we should read the Constituent Assembly Debate and look into other contemporaneous material to gather the intent of the Constitution makers.
>
> However, it is now universally accepted that the organic method of interpretation is to be preferred to the mechanical method.
>
> The organic method requires us to see the present social conditions and interpret the Constitution in a manner so as to resolve the present difficulties. The social conditions existing at the time when the Constitution was made may be very different from the present conditions, and hence if we interpret the Constitution from the angle of the Constitution-makers, we may arrive at a completely outdated and unrealistic view.[206]

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[202] *Id.* at 77.
[203] P.M. BAKSHI, INTERPRETATION OF STATUTES (2d ed. 2016).
[204] *Id.* at Inner Cover of the Book.
[205] *Id.* at 638.
[206] *Id.*

The recent decision of Constitutional Bench, Supreme Court of Nepal on the issue of Parliament Dissolution, case no. 077-WC-0071, dated 2078-03-28 seems to have adopted the organic method in interpreting Art. 76(5) to reinstate the Parliament. However, the question is, does court applies the same organic method even in criminal cases? Justice G P Singh answers it, dealt just below.

(35) Justice G P Singh's *Principles of Statutory Interpretation*:[207]

Justice G P Singh was Chief Justice of High Court Madhya Pradesh from 1978-1984. He also served as Chairman of Madhya Pradesh Law Commission from 1990-1992. This 14th edition version was revised by Justice A K Patnaik, former Judge of Supreme Court of India.[208]

In chapter 11, entitled "Remedial and Penal Statutes", Justice Singh writes:

> A remedial statute receives a liberal construction, whereas a penal statute is strictly construed. As now understood, the distinction between liberal and strict construction has very much narrowed down and is only important in resolving a doubt which other canons of construction fail to solve when two or more constructions are equally open. In case of remedial statutes the doubt is resolved in favour of the class of persons for whose benefit the statute is enacted; whereas in case of penal statutes the doubt is resolved in favour of the alleged offender.[209]

He further says, "The duty of the court is to give effect to the purpose as expressed in clear and unambiguous language and 'that obligation is not altered because the Act is penal in character."[210] However, this guiding principle contradicts with the decision of *Government of Nepal v. Tasi B.K. et al.* (2016)[211] where the Supreme Court of Nepal has expanded the constituent element of crime in order to criminalize the defendant. Thus, it is required to drag the interpretational limitation of court in criminal cases with reference to the decisions of Supreme Court of Nepal.

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[207] G P SINGH, J., PRINCIPLES OF STATUTORY INTERPRETATION (A K Patnaik, J., reviser., 14th ed. 2016).
[208] *Id.* at Inner Cover of the Book.
[209] *Id.* at 932.
[210] *Id.* at 964.
[211] N.K.P. 2073, Vol. 1, DN. 9519.

D. Peer Reviewed Articles & Testimony Related to the Issue

(36) Kahryn Riley's "The Problem of Overcriminalization":[212]

It was a legislative testimony presented to the Michigan Law Revision Commission by the Mackinac Center's Policy Analyst Kahryn Riley on May 18, 2017.[213] It was presented by Kahryn Riley. She is a Mackinac Center policy analyst, and an attorney and an alumna of Hillsdale College and Regent University School of Law.[214]

The Mackinac Center for Public Policy is dedicated to improving the understanding of economic principles and public policy among private citizens and public officials. A non-profit and nonpartisan research and education institute, the Mackinac Center has grown to be one of the largest state-based think tanks in the country since its founding in 1987.[215]

In this paper, she addresses the problem of overcriminalization in Michigan, based on a testimony: "We discovered this problem after learning about a number of stories of people put into legal jeopardy by Michigan's criminal law. One such individual was Lisa Snyder, whom the state charged with running an illegal daycare after she volunteered to help her neighbor's children board the school bus each morning, free of charge. She was able to obtain counsel and eventually the law was changed, but many defendants might not have the resources to obtain this outcome."[216]

The paper finds that "Michigan repeal outmoded or duplicative laws, and that the state enact a default criminal intent standard to protect citizens who unknowingly violate criminally enforceable statutes or regulations that govern conduct that is not intuitively wrong."[217] And, it presents the reforms for two reasons.

> First, a state's criminal code should protect individual liberty and private property — not be a tool to regulate every aspect of human conduct.

[212] Kathryn Riley, *The Problem of Overcriminalization*, Michigan Law Revision Commission: Mackinac Center for Public Policy (May 18, 2017) mackinac.org/testimony (last visited Aug. 19, 2021).
[213] *Id.* at Front Cover of the Paper.
[214] *Id.* at 4.
[215] *Id.* at Cover Back of the Paper.
[216] *Id.* at 1.
[217] *Id.* at 2.

> Second, a very broad criminal code creates a risk that prosecutions will vary markedly from jurisdiction to jurisdiction and that scarce resources will be diverted from the enforcement of serious violent and property crimes.[218]

(37) Sanford H. Kadish's "The Crisis of Overcriminalization":[219]

Sanford H. Kadish was Professor of Law at University of California, and visiting Professor of Law at Harvard Law School. He also served as general consultant for the President's Commission on Law Enforcement and Administration of Justice.[220]

This article reveals that fact that the problem of overcriminalization had already been an issue of concern in 70s in United States of America. He said:

> American criminal law typically has extended the criminal sanction well beyond these fundamental offenses to include very different kinds of behaviour, kinds which threaten far less serious harms, or else highly intangible ones about which there is no genuine consensus, or even no harms at all. The existence of these and attempts at their eradication raise problems of inestimable importance for the criminal law. Indeed, it is fair to say that until these problems of over-criminalization are systematically examined and effectively dealt with, some of the most besetting problems of criminal law administration are bound to continue.[221]

He argues that the subjects raising the central issue of overcriminalization cut a wide swathe through the laws of most jurisdictions:

> In the process of revising the California criminal law, we encountered a mass of crimes outside the Penal Code, matching the Penal Code itself in volume, and authorizing criminal convictions for such offenses as failure by a school principal to use required textbooks, failure of a teacher to carry first-aid kits on field trips, gambling on the result of an election, giving private commercial performances by

[218] *Id.*
[219] Sanford H. Kadish, *The Crisis of Overcriminalization*, 17 AMER. CRIM. LAW Q. 69, 70 (1968).
[220] *Id.* at 17.
[221] *Id.* at 18.

> a state-supported band, and allowing waste of an artesian will by the landowner. Then there are the criminal laws, enforced by the state police forces, which have been the primary means used to deal with the death and injury toll of the automobile. Indications are that this response may ultimately do more harm than good by blocking off politically harder, but more likely, remedial alternatives. Problematic also has been the use of criminal sanctions to enforce economic regulatory measures, a matter which I have dealt with elsewhere. And there are other instances as well.[222]

One of the drafters of the American Model Penal Code[223] accepts the problem of overcriminalization in America in this article. But, he looks into the issue

> In this piece I want to comment on the problems of overcriminalization in just three kinds of situations, in each of which costs paid primarily affect the day-to-day business of law is used: (1) to declare or enforce public standards of private morality, (2) as a means of providing social services in default of other public agencies, and (3) as a disingenuous means of permitting police to do indirectly what the law forbids them to do directly.[224]

(38) Paul J. Larkin's "Public Choice Theory and Overcriminalization":[225]

Paul J. Larkin is Senior Legal Fellow & Manager, Overcriminalization Project, the Heritage Foundation; M.P.P., George Washington University.[226] This article also presents the problem of overcriminalization in America.

In this article, Larkin writes how public choice theory is influencing legislature to legislate new offences every day without any fair labelling, and that is alarming problem of overcriminalization in Unites States of America. For this, he question on the system itself that

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[222] *Id.* at 18, 19.
[223] https://en.wikipedia.org/wiki/Model_Penal_Code (last visited July 20, 2021).
[224] *Id.*
[225] Paul J. Larkin, *Public Choice Theory and Overcriminalization*, 36 HARV. J OF LAW & PUB. POLICY. 1, 13 (2013).
[226] *Id.* at 715.

> The system seems beset by core defects that should have been fixed long ago: prosecutors withholding or concealing obviously exculpatory evidence, the government's refusal to fund forensic examination- DNA- tests in particular- that could establish with near certainty whether a given individual committed a particular crime, the conviction of innocent defendants represented by appointed defence counsel too swamped with cases and too severely underfunded to properly investigate the charges against their clients, and the sight of prisoners stacked like cordwood in the nation's prisons.[227]

Larkin states that "Overcriminalization is becoming an increasingly important issue in modern-day criminal law."[228] He says it has been realized by various stakeholders including American Bar Association, Justice Department officials, the House Judiciary Committee, and even the Media have picked up on it.[229] According to Larkin, it is happening because of "the public's demand for more and more criminal laws, along with harsher and harsher treatment of criminals."[230]

To him, "overcriminalization is less a problem with the substantive criminal law than it is with the law making process."[231] He accuses, as far as overcriminalization goes, "legislatures are the biggest offenders. Over the last fifty years, legislatures have become 'offense factories' that churn out new statutes each week."[232] His point is that such passing numerous legislation week by week lack fair labelling and fair warning that turns into the overcriminalization of an individual. In this way, Larkin surprise legislation of criminalization of human behaviour, as a problem in USA.

To avoid such problem of overcriminalization, he expects form judges to dust off the principles of criminal law:

> If judges are persuaded that overcriminalization is a problem, they are in a position to change this situation without becoming 'activist'. Several criminal law doctrines can be dusted off and used by courts that would protect morally blameless parties

[227] *Id.* at 718, 719.
[228] *Id.* at 720.
[229] *Id.* at 721.
[230] *Id.*
[231] *Id.* at 722.
[232] *Id.* at 724, 725.

> from winding up in prison due to the rent-seeking conduct of private parties and the vote-seeking behaviour of political actors. At a minimum, judges can use their prestige to tell the public the true effect of the overexpansion of criminal laws and why it is harmful.[233]

(39) Stephen F. Smith's "Overcoming Overcriminalization":[234]

Stephen F. Smith is a Professor of Law, University of Notre Dame. In this article, Smith treats overcriminalization as a quantitative problem. Legislatures has simply enacted too many crimes, and those crimes are far too broad in scope.[235]

Smith first illustrates the fact:

> Federal criminal law has been growing at a breakneck pace for generations. According to a 1998 American Bar Association report, an incredible 40% of the thousands of federal criminal laws passed since the Civil War were enacted after 1970. The relentless pace at which new federal crimes are passed has continued despite significant recent declines in crime rates. On average, Congress created fifty-seven new crimes every year between 2000 and 2007, roughly the same rate of criminalization from the two prior decades, resulting today in some 4,500 federal laws that carry criminal penalties. Thus, whether crime rates are rising or falling, the one constant—as predictable as death and taxes—is that scores of new federal criminal statutes are being enacted.[236]

Then he goes to explain the qualitative problem explaining the rule of lenity. To him, such overcriminalization of human behaviours by the legislature leads courts to interrupt the rule of lenity- resulting into quantitative problem, which he writes under the sub-title 'judicial crime creation' as below:

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[233] *Id.* at 793.
[234] Stephen F. Smith, *Overcoming Overcriminalization*, 102 J OF CRIM. LAW & CR. 85, 100 (2012).
[235] *Id.* at 537.
[236] *Id.* at 538.

Another major problem with federal criminal law is that it allows courts essentially to create new crimes. The root of the problem here is that the courts are notoriously inconsistent in their adherence to the venerable rule of lenity. The rule of lenity—one of the few Marshall Court doctrines that has not achieved canonical status—requires courts to construe ambiguous criminal laws narrowly, in favor of the defendant. It does so not to show lenience to lawbreakers, but to protect important societal interests against the many adverse consequences that judicial expansion of crimes can produce—consequences such as the usurpation of the legislative crime-definition function, not to mention potential frustration of legislative purpose and unfair surprise to persons convicted under unclear statutes. The rule of lenity therefore reflects, as Judge Henry Friendly once put it, a democratic society's instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.

More to the point here, faithful adherence to the rule of lenity would require courts to counteract overcriminalization. The rule of lenity requires courts to narrow, rather than broaden, the scope of ambiguous criminal laws. This would prevent prosecutors from exploiting the ambiguities of poorly defined federal crimes to criminalize conduct Congress has not specifically declared a crime. The rule of lenity would thus make poor crime definition an obstacle to—not an occasion or excuse for—more expansive applications of federal criminal law.

Unfortunately, the federal courts treat the rule of lenity with suspicion and, at times, outright hostility. Although it sometimes faithfully applies the rule of lenity, the Court has on many other occasions either ignored lenity or dismissed it as a principle that applies only when legislative history and other interpretive principles cannot give meaning to an ambiguous statute.

The result of the judiciary's haphazard adherence to the rule of lenity is as predictable as its results have been misguided. As previously explained, federal judges have repeatedly used ambiguous statutes as a basis for creating new federal crimes and have expanded the reach of overlapping federal crimes to drive up the

> punishment Congress prescribed for less serious federal crimes.114 The end result of such assaults on the rule of lenity is necessarily a broader and more punitive federal criminal law.[237]

In this way, this article focuses on two variables: legislative overcriminalization as quantitative problem and judicial crime creation as quantitative problem. And, concludes this scenario simply as an 'assault on rule of lenity'.[238]

(40) Laxmi Bakhadyo's "Female Criminality in Nepal: Prevalence and Causes":[239]

Laxmi Bakhado is a lecturer at Kathmandu School of Law, and pursuing a PhD studies at Tribhuvan University, Faculty of Law. In this Article, Bakhadyo explores the issue of female criminality, describes various theories of criminology, presents data of female prisoners (2072-2076), data of Supreme Court cases on the issue, and examines causes of female criminality in context of Nepal.

Bakhado argues that females' relationship with the criminal justice system as victims of crime has arguably received more attention though the numbers of female victims of crime in comparison to male victims are lesser.[240] She justifies it in the following words:

> …if a woman commits the offence of infanticide then she is regarded to be the victim of social stigma when she commits an offense of homicide against her husband she is regarded to be a victim of family and with the excuse of battered women syndrome she is provided with mitigated punishment. Here, the matter of fact is society has always perceived women as sufferers rather than the perpetrators of crime.[241]

Her argument is that involvement of male in crime has been accepted by the society but female in crime as a perpetrator is still a matter of second thoughts, as female's gender role created by society

[237] *Id.* at 567, 568.
[238] *Id.* at 568.
[239] Laxmi Bakhadyo, *Female Criminality in Nepal: Prevalence and Causes,* XVIII NEPAL BAR COUNCIL LAW JOURNAL 324, 324 (2019).
[240] *Id.* at 325. (Here, the author states that males have always engaged in crime at higher rates than females).
[241] *Id.*

is not likely to expose them to an offense.[242] But, she presents the data (number of prisoners in prisons of Nepal) to represent the changing scenario, as below:[243]

Table No. (40) 1

S.no	Year	Male	Female	Total	Female inmates in Percentage
1	2072	16410	1303	17713	7.35%
2	2073	17348	1278	18626	6.86%
3	2074	18082	1323	19405	6.81%
4	2075	20206	1387	22007	6.30%
5	2076 till Falgun	22564	1505	24069	6.25%
Source: Department of Prison Management, Nepal					

In pretexts of mentioned data, she concludes that women are more likely to be victims of sexual offense but they are also found engaged more in modern natured organized crime than in traditional nature of crimes.[244] This finding also require to review in crime policy so as to change into the mentality of criminal law stakeholders. Correctly, the author nonetheless recommend to respond these changing scenario by any means of interpretational construction.

(41) Arts and Humanities Research Council's "The Boundaries of the Criminal Law":[245]

Arts and Humanities Research Council is a British research council. It funded a four-year project on study of criminalization.[246] The project published *The Boundaries of Criminal Law* in 2010 with the articles of various contributors.[247]

[242] *Id.*
[243] *Id.* at 328.
[244] *Id.* at 336.
[245] ARTS AND HUMANITIES RESEARCH COUNCIL, INTRODUCTION: THE BOUNDARIES OF THE CRIMINAL LAW (2010).
[246] Grant no. 128737.
[247] *Id.* at vi.

The project was begun with an apparently simple question: what should be criminalized?[248] They write,

> This question about the proper scope of criminal is given urgency by two contemporary phenomena. On the one hand, it is often argued that we face a crisis of over criminalization: far too much is criminalized that ought not to be criminal; our criminal law far exceeds its proper boundaries. On the other hand, it is often argued (and governments often seem very ready to believe) that the criminal law should be extended to provide an adequate response to new, or newly disturbing, threats of various kinds.[249]

The volume contains of ten articles written by Andrew Ashworth, Markus Dubber, RA Duff, Lindsay Farmer, Mireille Hildebrandt, SE Marshall, Kimmo Nuotio, Massimo Renzo, John Stanton-Ife, Carol Steiker, Victor Tadros, and Lucia Zedner. And, the focus of the volume is, as title suggests, on the boundaries of the criminal law. However, it "deals in a sense with what can be considered a central question of the project- the question of what normative limits there ought to be on the creation of criminal offences. As we have seen, work on the limits of the criminal law has been dominated by the harm principle."[250]

Thus, it ends with the concept that "the principle that criminalization should a last resort, and hence be governed by a principle "*ultima ratio*,"[251] not "*prima ratio* or *solo ratio.*"[252] Nuotio writes:

> A theoretical model of criminalization that does not recognize the role of *ultima ratio* as a powerful limiting principle could be accused of not understanding the fundamental character of criminal law and its distinguishing feature. The moral nature of the enterprise is also expressed in that blaming people for what they have done, which is a crucial general component of criminal liability, requires that the sphere of criminal law be limited and restricted in order to safeguard the weight of

[248] *Id.* at 2.
[249] *Id*.
[250] *Id.* at 24.
[251] Kimmo Nuotio, *Theories of Criminalization and the Limits of Criminal Law: A Legal Culture Approach*, in THE BOUNDARIES OF THE CRIMINAL LAW (2010).
[252] *Id.* at 257.

> blame against inflationary routine use. The *ultima ratio* principle has been stressed in normative criminalization theories, and it goes nicely together with limiting constitutional principles, such as the protection of human dignity. Indirectly it further underlines the point that people should not be treated as objects but rather as subjects, and that criminal law must be constructed according to principles sharing this view.[253]

(42) Supreme Court Bar Association's "The Study Committee's Report, 2064" (2008):[254]

Supreme Court Bar Association of Nepal formed a four member's study committee under coordination of Shreehari Aryal to study the problems, complains of stakeholders on the activities of judiciary in Nepal, and to suggest the findings in order to enhance the faith of people on judiciary. The Committee submitted a comprehensive report, which was published by the publication committee of Supreme Court Bar.[255]

Chapter 3 of the Report, entitled "Pitfalls in the Laws", explains the weaknesses practiced in judicial practices along with pitfalls in laws itself. Among them, the problem of derailing from the principles in hearing system is also enlisted as one of the major problem in judicial practices.[256] According to this report, there are five basis reasons, based on the opinions of the stakeholders, of declining public faith on judiciary, enlisted as below in its Table 9:[257]

Table No. (42) 1

a	Reason of excessive discretionary power in law	28.89 %
b	Reason of interpreting the law to invoke the self-bias	24.87 %
c	Reason of ambiguous and plural meaning generating legislation	21.60 %
d	Reason of not applying the scientific drafting system	12.81 %
e	Reason of not implementing the whatsoever existing law	11.80 %

[253] *Id.* at 257.
[254] SUPREME COURT BAR ASSOCIATION, THE STUDY COMMITTEE'S REPORT, 2064 (2008).
[255] *Id.* at 2-9.
[256] *Id.* at 47, 48 (under sub title 3.2.1).
[257] *Id.* at 50 (under sub title 3.3.1.1, Table 9).

Of these, the use of 'excessive discretion' and problem in 'interpretation of laws' promoting self-bias reflect the need of following restrictive construction of the court including in criminal cases.

(43) Office of Attorney General & Center for Legal Research and Resource Development (CeLRRd)*'s* "Baseline Survey on Criminal Justice System of Nepal, 2069" (2013):[258]

It was a baseline survey conducted jointly by the Associate Professors Mr. Ganesh Bdr. Bhattarai, Mr. Suraj Basnet and Ms. Sushila Karki of Kathmandu School of Law (KSL), and published by Office of Attorney General & Center for Legal Research and Resource Development (CeLRRd).

The baseline survey was conducted in 15 sample Districts, and was generalized to overall criminal justice system of Nepal. The Districts were selected based on geographical representation including Terai Region, Hilly Region, and Terai-Hilly Region:[259]

Table No. (43) 1

Terai:	Kanchanpur, Rupandehi, Chitwan, Parsa, Siraha, Morang, Banke (7 Districts)
Hilly:	Taplejung, Kathmandu, Lalitpur, Mustang, Rasuwa, Baglung, Jumla, Doti (8 Districtss)
Terai-Hilly:	Chitwan, Rupandehi, Banke, Kanchanpur.

The baseline survey collected the registered criminal cases of two fiscal years from 2067/068 to 2068/069 in District Prosecutor Office, District Police Office, District Court, and had studied the overall scenario of functioning of the system components of criminal justice system and their weaknesses.

In its subtitle under 7.5.2 'Average Time Used for Judicial Duty', the report has presented the average time used for judicial service, which is surprisingly only 4.5 hours per working day.[260]

[258] OFFICE OF ATTORNEY GENERAL & CENTER FOR LEGAL RESEARCH AND RESOURCE DEVELOPMENT (CeLRRd), BASELINE SURVEY ON CRIMINAL JUSTICE SYSTEM OF NEPAL, 2069 (2013).
[259] *Id.* at 10.
[260] *Id.* at 156.

The report has also illustrated the physical condition of Court, Jain and Prosecution Office, and the condition of persons in Custody and Jail.

However, the report does not evaluate about the judicial decisions, and the issue of interpretational limitations while delivering the decisions. Nonetheless, the report draws some conclusions relating to the principles of criminal justice system, as below:

a. The personnel working in various agencies of criminal law did not have proper sensibility towards the values of the principles of fair and impartial justice system.
b. Lack of realization towards weakness and mistakes in their duty performance
c. The tendency of perceiving criminal justice as administrative departmental phenomenon is found massive.[261]

In this way, the baseline survey illustrates general problem found in criminal justice system but does not particularly evaluate on issue of interpretational limitation of court in criminal cases.

(44) Ministry of Law, Justice and Parliamentary Affairs' "Baseline Survey on Crime Report, 2072" (2015):[262]

It was the first ever baseline survey on crime done by Government of Nepal.[263] The High Level Task Force formed under the Chairmanship of the then Justice Kalyan Shrestha, Supreme Court recommended the Government of Nepal to conduct a baseline survey on crime. The Council of Ministers endorsed it, and order the Ministry of Law, Justice and Parliamentary Affairs to pursue the survey. The Ministry did survey in ten districts for the fact findings on numbers of crime, their types, causes, and the modus consulting the stakeholders and the parties of the crime.[264] However, the study did not consult Nepal Bar Association in its thorough process.

The Report, in its first page itself, cites the fact that altogether "84 Acts grant the power to Extra-judicial Authorities to adjudicate criminal cases, and sentence to imprisonment and impose

[261] *Id.* at 167.
[262] MINISTRY OF LAW, JUSTICE AND PARLIAMENTARY AFFAIRS, BASELINE SURVEY ON CRIME REPORT, 2072 (2015).
[263] *Id.* at *Statement,* Agni Prasad Kharel, Minister, Ministry of Law, Justice and Parliamentary Affairs.
[264] *Id.* at *Statement,* Tek Prasad Dhungana, Secretary, Ministry of Law, Justice and Parliamentary Affairs.

fine."[265] This illustration is an eye opening to see the situation of criminal justice system in Nepal. On the other hand, Nepal does not have specialized criminal courts at any tier of judiciary, with an exception to the Special Court. The judges who interpret the general laws, do interpret constitutional, and penal laws as well. This fact also indicates the chance of inconsistencies in interpretation of penal statutes.

In Chapter 5, entitled "Effectiveness of Criminal Justice System", the Report presents the data on 'effectiveness of court's functioning' under its Table 5.7, as below:[266]

Table No. (44) 1

District	Effective	Moderate	Not effective	Don't Know	No Answer	Total
Taplejung	11.5	36.4	22.9	28.5	0.7	100
Morang	10.2	47.7	5.6	36.3	0.2	100
Saptari	16.2	40.3	24.1	18.5	0.9	100
Sindhupalchock	2.9	33.4	5.1	58.1	0.4	100
Kathmandu	11.1	32.7	11.1	44.5	0.4	100
Parsa	25.6	35.8	27.1	11.1	0.4	100
Kaski	4.2	40.4	5.8	48.9	0.7	100
Banke	6.9	41.8	20.2	30.7	0.4	100
Jumla	12.2	49.7	4.5	33.4	0.2	100
Bajhang	7.6	45.8	4.3	42.0	0.2	100
Total	**10.8**	**40.4**	**13.1**	**35.2**	**0.5**	**100**

It shows that only 10.8 per cent of the participants in the survey accepted the effectiveness of the court's functioning; whereas 40.4 per cent said that it is moderate, and 13.1 per cent said that it is not effective. Comparing the same with Extra-judicial Authorities' decision, it's 8.5 per cent accepting the effectiveness, and 16.5 per cent denied the effectiveness; whereas, 37.6 per cent said it's moderate.[267]

[265] NATIONAL JUDICIAL COUNCIL, A STUDY REPORT ON ADJUDICATION OF EXTRA-JUDICIAL AUTHORITIES, 2065 (2008). *Id.* at 1.
[266] *Id.* at 130.
[267] *Id.* at 132 (under Table 5.9).

In another question on 'court's effectiveness in imposing the sentence', 11.9 per cent affirmed its effectiveness which is three times less than who said it is just moderate (38.0 per cent), and 14.9 per cent participants denied court's effectiveness. This empirical data certainly indicates that there is a problem, as presented in its Table 5.8:[268]

Table No. (44) 2

District	Effective	Moderate	Not effective	Don't Know	No Answer	Total
Taplejung	10.6	34.6	24.4	29.9	0.5	100
Morang	11.8	47.9	5.8	34.1	0.4	100
Saptari	18.2	36.9	27.5	16.4	0.9	100
Sindhupalchock	2.4	32.7	6.7	57.5	0.7	100
Kathmandu	11.1	31.0	12.2	45.0	0.7	100
Parsa	23.1	37.6	28.7	10.4	0.2	100
Kaski	7.4	36.4	7.8	47.8	0.7	100
Banke	9.3	35.3	23.8	31.3	0.2	100
Jumla	15.8	43.4	7.1	33.4	0.2	100
Bajhang	9.1	44.4	5.6	40.0	0.9	100
Total	**11.9**	**38.0**	**14.9**	**34.6**	**0.5**	**100**

It shows that only 11.9 per cent of the participants in the survey accepted the court's effectiveness in imposing the sentence; whereas 38.0 per cent said that it is moderate, and 14.9 per cent said that it is not effective.

And, the Report also presents data on the overall effectiveness and impartiality of criminal justice system; of which, only 6.7 per cent participants were 'fully confident' with the effectiveness and impartiality, and 20.2 per cent participants stated that they don't believe on effectiveness and impartiality of criminal justice system in Nepal.[269] Such questioning on the effectiveness of judiciary alarms the questions into the decision of courts, and the decisions of courts attracts the

[268] *Id.* at 130, 131.
[269] *Id.* at 134 (under Table 5.11).

issue of judges discretionary and limitations. If, it would have been self-restrained and applied equally in all cases, the findings might have been different.

(45) Supreme Court Bar Association's "Decision Review Committee's Report, 2077" (2020):[270]

Supreme Court Bar Association of Nepal formed a ten member's Decision Review Committee under coordination of Sr. Adv. Mahadev Prasad Yadav. The Committee reviewed Corruption Cases decided by Supreme Court, and presented the differences in ratio and violation of the doctrine of precedent. The report was edited by an editorial team of Adv. Raju Khadka, Adv. Shuvan Raj Acharya and Adv. Saroj Krishna Ghimire.

This report describes the history of Court in Nepal, explains the concept of precedent, and presents the essence of precedent as mandatory obligation for Courts in cases of similar facts. In this context, the report analyses the differences in ratio of the decisions, particularly in Corruption Cases, as decided by Supreme Court of Nepal from 2065 to 2075. It presents around 270 pages data of cases having variability in the ratio of their decisions, under various themes of corruption including bribery, illegal property, forged report, duplicate certificate etc.

The report concludes with very alarming remarks:

> Supreme Court's decisions have unnatural variability. Supreme Court is the source of judicial guidelines. It is the creator of judicial culture. However, the fact that the decisions are not in uniformity indicates that the Supreme Court is derailing from judicial values and principles. The unnatural variability in its decisions indicates the arbitraries and loses faith of the people. And, it is very serious problem.[271]

The report repeatedly questions on the judicial discipline and accountability, basically resulting out of violation of the principle of precedent. However, the report again does not focus on studying the violation of interpretational limitations and overcriminalization.

[270] SUPREME COURT BAR ASSOCIATION, SUPREME COURT BAR ASSOCIATION'S DECISION REVIEW COMMITTEE'S REPORT, 2077 (2020).
[271] *Id.* at 283, 284.

3. CONCLUSION

In criminal law, judicial construction holds somewhat different credence in common law and civil law systems. In civil law system, law is expressly codified leaving a little leeway for the discretion; whereas, in common law system, the judges do have space for explanation, developing *ratio* and setting precedents mandatory in other cases of similar fact. Strict compliance of limitation principle, therefore, generates a conflict between legality principle and the functioning of the criminal law as a means of social defence.

Therefore, there are cases, for example, *Bishnu Adhikari v. Government of Nepal* (2006)[272] *Government of Nepal v. Tek Bahadur Kshetri* (2009)[273] and *Government of Nepal v. Tasi B.K. et al.* (2016)[274] as dealt above in which the Supreme Court, to some extent, has expanded the constituent element of crime in order to criminalize the defendant; and which at the same time do contradict principally with *Ratna Bahadur Wagchand et al.* (2005)[275] and *Adv. Bishnu Prasad Ghimire v. Federal Parliament, Kathmandu et al.* (2021)[276]cases decided by Special Bench and Constitutional Bench of Supreme Court of Nepal. These facts as practiced by the judiciary of Nepal not only create confusion regarding of Art. 128(4) but also require to light with 'the blue pencil rule'[277] that how far the court can criminalize or not.

The advocates of judicial activism try to promote judicial function and role of judiciary in solving the problems. That may sometimes call for judicial construction. However, the same thing in criminal law alarms retroactivity principle. The distinction can be materialized by drawing the interpretational peculiarity applied by Constitutional Court in *Adv. Bishnu Prasad Ghimire (2021)*[278] and *Sher Bahadur Deuba et al. (2021)*[279]. The prior case relating to interpretation of criminal law, and later relating to interpretation of constitutional law. The prior case limiting even the retrospective legislation, and the latter modifying legislative construction. This variability

[272] N.K.P. 2063, Vol. 2, DN. 7652.
[273] N.K.P. 2066, Vol. 5, DN. 8142.
[274] N.K.P. 2073, Vol. 1, DN. 9519.
[275] N.K.P. 2062, Vol. 2, DN. 7491.
[276] 074-WO-0020.
[277] J. BEATSON ET AL., ANSON'S LAW OF CONTRACT 435 (29th ed. 2010).
[278] 074-WO-0020.
[279] 077-WC-0071.

demands to quest the facets of interpretation of criminal law by the Court, and the limitations on it; contrary to constitutional law. And, which has not been studied yet.

The widely read literatures in criminal law reviewed here, including David Ormerod's *Smith and Hogan Criminal Law* (2008), Glanville Williams's *Textbook of Criminal Law* (2012), Jonathan Herring's *Criminal Law* (2005), and Jeremy Horder's *Ashworth's Principles of Criminal Law* (2019) also have not responded to this issue. Nor the discourse forming articles like Stephen F. Smith's "Overcoming Overcriminalization" (2012), Paul J. Larkin's "Public Choice Theory and Overcriminalization" (2013), and Kahryn Riley's "The Problem of Overcriminalization" (2017) have been able to answer it. Even the extensive reports of Office of Attorney General & Center for Legal Research and Resource Development (CeLRRd)'s "Baseline Survey on Criminal Justice System of Nepal, 2069" (2013), Ministry of Law, Justice and Parliamentary Affairs' "Baseline Survey on Crime Report, 2072" (2015), and Supreme Court Bar Association's "Decision Review Committee's Report, 2077" (2020) have not tried to dig on this issue. Thus, the problems are unanswered yet: (a) Does interpretational principle limit the Judges' discretion while delivering judgement? Does criminalization by expansion of enacted legislation violate legality of judicial construction?

The quandary on interpretational limitation of court in criminal cases is still prevailing because the 'interpretational limits of court in criminal cases' has not been studied yet, and boundary of courts in criminalizing an accused is yet to be drawn. Thus, this study will help to draw the boundary that 'how far the court can criminalize' and will effort set the 'limitation principle'.

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