Drug legalisation and its impact on criminal law

A Global and Indian Comparative Perspective

Drug policy has always been one of the most contested areas of criminal law across jurisdictions. The question of whether drugs should remain criminalised, regulated, or decriminalised brings to the forefront issues of morality, public health, crime control, and individual liberty. The very definition of drug legalisation refers to a system where the production, distribution, and consumption of certain substances are no longer treated as criminal offences but regulated by the state under strict frameworks similar to alcohol or tobacco. This stands in contrast to criminalisation, where possession, trafficking, and consumption are penalised with imprisonment or fines, and decriminalisation, which falls between the two, removing criminal penalties for personal use while continuing to punish trafficking. The impact of drug legalisation on criminal law is profound, because it reshapes the scope of state intervention, reduces the criminal docket, challenges habitual offender laws and mandatory punishments, and forces societies to reconsider what constitutes justifiable state control over private conduct.

Globally, the evolution of drug laws reveals stark contrasts in approach. The United States, for decades the flagbearer of the "war on drugs," introduced harsh mandatory minimum sentences under the Anti-Drug Abuse Act of 1986. These laws resulted in mass incarceration, disproportionately targeting minority communities. The three strikes laws also intersected with drug offences, locking people away for life sentences on relatively minor but repeated drug violations. Over time, however, the unintended consequences of these rigid punishments became clear: prisons filled with non-violent offenders, racial disparities widened, and the fiscal burden of mass incarceration grew unsustainable. Beginning with states like Colorado and Washington in the early 2010s, the U.S. started experimenting with cannabis legalisation, allowing regulated sales while simultaneously expunging records of low-level offenders. Legal scholars such as Douglas Berman have observed that cannabis legalisation in the U.S. forced a reevaluation of sentencing policy, showing that criminal law had been wielded too bluntly for decades.

European jurisdictions took a different path. Portugal famously decriminalised all drugs in 2001, replacing criminal penalties with administrative sanctions and public health interventions. This bold move was initially controversial, but empirical data shows significant success: drug-related deaths fell, HIV infection rates dropped, and the burden on courts and prisons decreased. The Netherlands adopted a "tolerance" model for cannabis decades ago, separating soft drugs from hard drugs and reducing the risk of users being drawn into organised crime networks. Canada fully legalised cannabis in 2018, emphasising harm reduction and regulated markets. In these countries, criminal law shifted from punitive enforcement to a model of regulation and health, reconfiguring how police, courts, and

correctional systems dealt with drug-related cases. Yet loopholes persist. Even in tolerant regimes, unregulated black markets continue to exist, and critics argue that legalisation may increase consumption, particularly among youth. Moreover, transnational trafficking of harder drugs remains a major problem, meaning criminal law continues to play a role against organised syndicates even in liberal jurisdictions.

The Indian scenario offers a sharp contrast. India's approach to drugs is governed primarily by the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), which is one of the harshest drug control laws in the world. The NDPS Act criminalises possession, consumption, trafficking, and cultivation, prescribing mandatory minimum punishments for offences. For instance, possession of commercial quantities of certain drugs attracts a minimum sentence of 10 years and a maximum of 20 years, with little judicial discretion to reduce penalties. This rigidity was justified by lawmakers on grounds of deterrence, but has been widely criticised by legal experts for disproportionately punishing low-level offenders, addicts, and first-time carriers. The law also criminalises consumption, making India one of the few countries where even drug users face imprisonment. This contrasts sharply with harm reduction models like Portugal, where users are diverted to treatment instead of prison.

The intersection of India's NDPS Act with habitual offender laws raises further challenges. Section 31A of the NDPS Act originally prescribed the mandatory death penalty for repeat drug offences, though this was later diluted by judicial intervention. Habitual offender provisions under the Indian Penal Code and state-specific laws allow enhanced surveillance and punishment of individuals previously convicted, leading to cycles of criminalisation that critics argue target marginalised groups disproportionately. These mandatory punishments mirror the rigidity of the U.S. war on drugs era, but unlike the U.S., India has not yet shifted toward reform. Landmark cases such as *E. Micheal Raj v. Narcotic Control Bureau (2008)* attempted to introduce proportionality by holding that only the weight of the pure drug content, not the neutral substance mixed with it, should determine punishment. Yet, the Supreme Court later diluted this principle in *Hira Singh v. Union of India (2020)*, reinstating harsher measures by considering the total weight, thereby reaffirming the rigidity of the NDPS Act.

The advantages claimed by proponents of strict drug laws are rooted in deterrence, incapacitation, and international treaty obligations. India, as a signatory to the UN Single Convention on Narcotic Drugs, 1961, is bound by global commitments to maintain strict prohibition. Policymakers argue that in a country with significant socio-economic vulnerabilities, widespread drug legalisation could lead to social instability, addiction crises, and an overburdened healthcare system. Proponents also point to India's role as a transit hub in the South Asian drug trade, where proximity to the Golden Crescent and Golden Triangle necessitates strict border control and harsh punishments to prevent trafficking.

However, the disadvantages and loopholes of India's approach far outweigh its benefits. First, the NDPS Act fails to distinguish adequately between users, petty peddlers, and kingpins,

often punishing the lowest rungs of the chain with the same severity as hardened traffickers. Second, the mandatory minimum framework erodes judicial discretion, contradicting the constitutional principle of proportionality enshrined in Article 21. Third, the law contributes significantly to overcrowding in prisons, where a large percentage of undertrial prisoners are booked under NDPS provisions for minor possession. Fourth, habitual offender provisions and repeat punishment clauses risk perpetuating cycles of incarceration rather than enabling rehabilitation. Critics like Senior Advocate Anand Grover have repeatedly argued that the law disproportionately punishes the poor, who are often coerced into petty trafficking, while major cartels remain insulated.

In terms of effectiveness, the strict criminalisation model has shown limited success. Despite harsh punishments, India continues to face rising drug abuse cases, especially among youth in Punjab, Himachal Pradesh, and Northeast India. Reports indicate that law enforcement focuses disproportionately on users and carriers, while large-scale trafficking networks thrive. In contrast, countries that embraced decriminalisation or legalisation have shown measurable success in reducing health harms, lowering incarceration rates, and reallocating law enforcement resources to serious organised crime.

Globally, the evolution of drug law suggests a gradual shift from punitive prohibition to regulated legalisation, at least for cannabis and certain psychedelics. In the U.S., more than 20 states now allow recreational cannabis, while psychedelics like psilocybin are being decriminalised in Oregon and Colorado. In Europe, public health models continue to dominate. Latin American countries such as Uruguay and Mexico have also moved towards regulation in response to the violence of drug cartels. This evolution reflects a recognition that criminal law, while necessary to combat organised trafficking, is ill-suited for addressing addiction and personal use. India, however, has resisted this trend, maintaining rigid adherence to prohibitionist models despite mounting evidence of their ineffectiveness.

The way forward requires reimagining drug law in India while drawing lessons from global experiences. First, India could move towards decriminalising personal consumption and possession of small quantities, thereby reducing the burden on courts and prisons while shifting focus to treatment and rehabilitation. Second, judicial discretion must be restored by reviewing mandatory minimum provisions, allowing courts to impose proportionate punishments based on circumstances. Third, surveillance-oriented habitual offender frameworks should be re-evaluated to ensure they do not criminalise identity or perpetuate caste and class biases. Fourth, India must strengthen harm reduction infrastructure—rehabilitation centers, mental health support, and community-based programs—so that decriminalisation does not leave users unsupported. Globally, the way forward lies in striking a balance between regulation and control. Countries experimenting with legalisation must continue to monitor public health outcomes, restrict underage access, and prevent corporate monopolisation of drug markets. International drug control treaties also need reform to allow greater flexibility for domestic experimentation.

Legalisation, whether partial or complete, represents not an abdication of state responsibility but a reallocation of state resources from punishment to regulation and health. For criminal law, the shift means narrowing the scope of penal enforcement while expanding administrative and regulatory tools. India's rigidity contrasts with the global move towards moderation, but pressures of rising prison populations, judicial critiques of disproportionate punishments, and international evidence of harm reduction may eventually force a rethinking. As Justice Krishna Iyer once observed, law must be a "social engineer" responsive to human needs; clinging to punitive rigidity in the face of changing realities only undermines justice.

Thus, drug legalisation and its impact on criminal law is not merely a question of policy but of philosophy: whether the state should criminalise personal choices or guide them through regulation. Globally, the tide is shifting toward the latter. India remains anchored in prohibition but must consider whether its current trajectory serves justice, efficiency, and human rights, or whether it perpetuates cycles of incarceration and marginalisation that criminal law was never meant to sustain.

Legal Experts' Opinions on Drug Legalisation and Criminal Law

Legal experts across jurisdictions have weighed in on the question of drug legalisation, with opinions reflecting a mix of caution, pragmatism, and human rights concerns. Their views highlight the tension between criminal law's traditional punitive role and the emerging recognition of drugs as primarily a public health challenge.

Globally, scholars such as Douglas Berman (Ohio State University) and David Garland (NYU) have argued that mandatory minimum drug sentences in the United States represent a failure of proportionality and undermine judicial discretion. They note that drug legalisation, particularly cannabis, has allowed for recalibration of sentencing law, reduced mass incarceration, and corrected systemic racial biases in drug enforcement. Similarly, Richard Branson and the Global Commission on Drug Policy, which includes former heads of state, argue that legalisation is essential to end the violence and futility of the "war on drugs." Legal philosopher Douglas Husak has framed drug criminalisation as unjustifiable paternalism, asserting that the state has no moral legitimacy to imprison individuals for personal consumption choices that primarily harm themselves.

In Europe, experts like Alex Stevens (University of Kent) have shown through empirical research that Portugal's decriminalisation has reduced harm without increasing use, suggesting that criminal law need not play the central role in managing drug problems. Legal scholars in Canada, such as Steven Hoffman, have emphasised that cannabis legalisation demonstrates how regulatory approaches can generate tax revenue, protect public health, and reduce the disproportionate burden on criminal justice systems.

In India, the picture is more complex. Senior Advocate Anand Grover, known for his human rights work, has criticised the NDPS Act for conflating users and traffickers, arguing that harsh mandatory punishments criminalise poverty rather than curbing organised crime. Former

Supreme Court Justice Madan B. Lokur has spoken on the need to review rigid sentencing frameworks, suggesting that addiction should be treated as a medical issue, not a crime. Justice Lokur has also highlighted the dangers of undertrial overcrowding caused by NDPS prosecutions, which undermine Article 21 rights to speedy trial and liberty. Legal scholars like Dr. Usha Ramanathan have pointed out that habitual offender provisions and mandatory punishments create structural injustices by denying judges the flexibility to account for individual circumstances.

Other Indian legal experts, however, remain cautious. Former Solicitor General Harish Salve has argued that India's geographical vulnerability as a transit hub between the Golden Crescent and Golden Triangle requires tough laws to deter trafficking. Some policymakers and jurists emphasise India's international obligations under the UN drug conventions, suggesting that large-scale legalisation could expose the country to diplomatic tensions and public health risks.

The consensus among progressive legal voices, both globally and in India, is that the current punitive framework disproportionately harms the marginalised while failing to achieve its intended goals. They call for decriminalisation of personal use, restoration of judicial discretion, and adoption of harm reduction strategies. At the same time, they acknowledge that drug legalisation must be carefully designed to avoid exploitation by corporate interests or exacerbation of health harms. Ultimately, legal experts converge on the view that criminal law must evolve from being a blunt punitive instrument to a nuanced regulatory tool, balancing public health, individual liberty, and international obligations.

The debate on drug legalisation and its impact on criminal law underscores a fundamental tension between punitive approaches rooted in deterrence and modern frameworks that prioritize public health, proportionality, and human rights. Globally, the shift from prohibition to regulation, exemplified by cannabis legalisation in Canada and parts of the United States, and decriminalisation in Portugal, reflects a growing recognition that criminalisation alone cannot resolve the complex challenges of drug use. These reforms have demonstrated tangible benefits: reduced incarceration rates, improved public health outcomes, and a dismantling of racial and socio-economic disparities that have long shaped drug enforcement. Yet, they also highlight the importance of carefully balancing legalisation with regulatory safeguards to avoid unintended harms.

In India, the scenario remains deeply shaped by the stringent provisions of the Narcotic Drugs and Psychotropic Substances Act, which imposes mandatory punishments and equates users with traffickers. While designed to deter abuse and protect India from its position as a global transit hub, the Act has led to overcrowded prisons, systemic injustices against the poor, and the erosion of judicial discretion. Indian legal experts have consistently argued that drug abuse is primarily a health issue rather than a crime, calling for reforms that decriminalise personal use and allow judges to tailor punishments in line with constitutional guarantees of

proportionality and fairness. At the same time, the need to address trafficking networks and India's international treaty obligations adds complexity to the path of reform.

The way forward lies in adopting a calibrated model that decriminalises consumption while maintaining strong frameworks against organised trafficking. India must learn from global best practices, balancing law enforcement with public health strategies, and embedding human rights at the core of its legal response. Drug policy cannot remain frozen in punitive paradigms; it must evolve toward justice, rehabilitation, and dignity.