CHAPTER 3
CONNECTED CONCEPTS

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3.1 Concepts connected with the subject

The full range of decriminalisation cannot be understood unless one keeps in mind certain concepts which are relevant to the topic under consideration. These concepts either act as the opposite of decriminalisation, or operate as reducing or increasing the impact of decriminalisation. A brief mention will therefore be made, in this Chapter, of -

(a) over-criminalisation,

(b) double criminalisation,

(c) repeated criminalisation,

and similar concepts.

3.2 Over-criminalisation

It may sometimes happen that a particular conduct, while it can be legitimately placed in the category of "offence", may not deserve the nature or degree of punishment laid down by the law for that particular offence. This is the situation, for example, when an offence is made punishable by imprisonment, although it does not deserve imprisonment and could be well visited by fine. Similarly, there may be cases where the offence may deserve imprisonment, but not for the term of years prescribed by law for the offence. Here, the criminalisation of the conduct in the abstract may be proper, but the degree thereof is not. The situation can, therefore, be aptly described as "over-criminalisation". One can describe it as the use of the weapon of criminal law to an excessive degree.

3.3 Double criminalisation

Occasionally, one may also come across the situation where the same conduct comes to be punishable under two or more provisions contained in the law. This amounts to "doubt criminalisation". These provisions may be contained either in the same enactment, or in different enactments. For example, for a long time, section 5 of the Prevention of Corruption Act, 1947 (which was then in force) and sections 161 to 165 of the Indian Penal Code (which were also then in force), continued on the statute book together. The result was, that any number of cases arose in which the question at issue was, whether it was permissible to prosecute an offender under either of the two provisions or whether the enactment of the Act of 1947 had the effect of repealing, *protanto,* the relevant provisions of the Indian Penal Code relating

to bribery. The same kind of problem arose in regard to section 409 of the Indian Penal Code and section 5 of the Prevention of Corruption Act, 1947, at a time when both the provisions were operative together.

It is true that, in theory, such a situation is taken care of by a rule of interpretation, contained in our general statute relating to interpretation. It is also subject to the constitutional protection against double jeopardy. These provisions are considered in the next two paragraphs, but the situation would still remain unsatisfactory.

3.4 Section 26, General Clauses Act, 1897

As regards the rule of interpretation, section 26 of General Clauses Act, 1897, reads as under:-

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

If the acts of omissions are not identical but distinct from each other, section 26 does not apply.[1]

Such provisions in the Interpretation Act have the effect of avoiding the harassment and oppression that may be caused to the accused person, by being punished for the same offence more than once.

3.5 Constitutional Protection

There is also available constitutional protection against double jeopardy, substantially achieving the same object.

Nevertheless, every situation of double criminalisation deserves scrutiny because, in such situations, the statute book presents a spectacle representing an overuse of criminal sanctions. Moreover, even where there is a statutory or constitutional ban against double punishment, the possibility of double prosecution is agonising enough.

3.6 Repeated criminalisation

A situation analogous to the one described above may be called "recriminalisation". This is illustrated by the co-existence of the Indian Penal Code and legislation relating to Sati. For all practical purposes, there was adequate provision in the Indian Penal Code to punish conduct in the nature of abetment of suicide, including abetment of suicide committed by a woman

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1 *State of M.P.* v. *Veereshwar Rao,* A.I.R. 1957 S.C. 592.

immediately after the death of her husband. However, for reasons which need not be gone into for the present purpose, it was considered necessary to enact a special law on the subject, in the wake of certain ghastly incidents of suicide by women. Abetment of suicide committed by a "Sati" was, if one may say so, subjected to repeated criminalisation - one in the general law of crimes and the other in a special enactment. Thus, conduct which was already made punishable under the general law, was made punishable again. On the statute book, there did exist the genus, already containing species. Still, the species was *again* made punishable.

It may be stated that there the theoretical and practical objections to such a course. Theoretically, it makes the statute book complex and clutters it with unnecessary verbiage. From the practical point of view, it tends to create confusion and hardship.

3.7 Procedural implications

It is also worth pointing out, that punishing the same conduct under more than one enactment, even though it may be unavoidable in some cases, can create serious procedural problems and may lead to great hardship. Where the same conduct becomes punishable by a multiplicity of different substantive enactments, the respective procedural laws also have to carry the burden of such multiplicity. The procedural laws must deal, *inter alia,* with cognizability of offences, bailabillty, compoundability of the offences, mode of trial and so on. If one offence is bailable and the other is not bailable, then a controversy must arise. Apart from that, the existence of two or more substantive provisions, under which criminal liability is imposed on citizens may cause hardship to the accused - particularly if he is innocent of some or all of the charges levelled against him. The prospect of facing one criminal charge is bad enough; the prospect of facing more charges than one, for substantially the same conduct could be much more unpleasant.

3.8. Over-punishment.

Notice must also be taken of "over-punishment". Whenever a certain type of malpractice becomes rampant in society, or is found to be widespread in the country, there is usually a tendency to start a move for punishing that conduct more severely than is possible in the existing law. The most familiar example is that of rape. Whenever ghastly incidents of rape increase in number, or whenever shocking cases of sexual violence are reported in the newspapers, a demand is made for laying down the death penalty for rape, or for otherwise increasing the punishment prescribed by the existing law for such offences. Such demands are, of course, natural. It is an ordinary human tendency to react with indignation to shocking incidents and also to express that reaction through a demand for stronger criminal sanctions for the conduct

exemplified by such incidents. This reaction may often assume the shape of over-reaction. However, the fact that such a tendency is natural, does not necessarily mean, that it would be legitimate in every situation. Good legislation has to base itself on certain principles, and on the practical experience gained by all concerned in the formulation and administration of criminal law. Care has to be taken to ensure that the reaction to (supposed or real) "under-criminalisation" does not find excessive expression in over-criminalisation. It is necessary to advert to this aspect, because the over-use of criminal sanctions violates the basic principles of good legislation and may as much constitute an evil, as under- criminalisation.