CHAPTER 4
CRITERIA FOR DECRIMINALISATION

CHAPTER 4

CRITERIA FOR DECRIMINALISATION

4.1 The criteria

The factors that should be regarded as relevant while examining the question whether a particular conduct should be criminalised or not, deserve some discussion. No doubt, it is true that these factors cannot be catalogued exhaustively, infinite and do not lend themselves easily to the decision may depend on a balancing of several factors and on a consideration of the sum total thereof, rather than on the isolated consideration of one the sum total thereof, rather than on the isolated consideration of one single factor. Nevertheless,it may be useful to bear in mind that such important factors are usually regarded as relevant in this sphere.

4.2 Some broad considerations

At the outset, it is worth pointing out that at least three elements appear to be relevant when considering such questions, namely, the criminal, the crime and the punishment.

(i) The criminal is important because he is at the centre. Criminal law is primarily intended to act on the criminal by the employment of criminal sanctions against him in order to deter him from repetition of the conduct in question. No doubt, the threat of criminal sanctions is also meant to deter other persons who are likely to cause harm by reason of their criminal inclinations. However, principally it is the present offender that the law has in mind. For this reason, the criminal and his mental element are important in the context of the formulation and application of criminal sanctions.

(ii) Secondly, attention has to be paid to the crime. In so far as the criminal law chooses particular conduct for punishment and singles it out separately from other conduct which continues to be not punishable, the nature of the conduct has to be taken into account. Basically, a certain type of conduct is regarded as criminal, because the conduct is supposed to cause harm to others. This does not, of course, mean that anything which is harmful, must necessarily be treated as deserving of punishment with the sanctions of the criminal law. Such an approach may, *inter alia,* efface the boundaries between "offences" on the one hand, and illegal (but not criminal) acts on the other hand. Therefore, in selecting supposedly harmful conduct for punishment, the law will have to take into account the magnitude of the harm likely to be caused by the particular conduct and the nature of the harm likely to be caused (apart from several other factors that may be relevant).

(iii) Thirdly, there is the fundamental question whether punishment is needed. It becomes desirable to go into the question whether the conduct which is proposed to be criminalised, is not already taken care of, by existing legal provisions. Such existing provisions may be found to contain (i) non-criminal sanctions or (ii) criminal sanctions.

If the sanctions provided by the existing law are non- criminal, the legislature must consider the question whether those sanctions are not enough and also the further question, whether the conduct in question causes harm that should attract criminal sanctions. If the existing sanctions are themselves sanctions of the criminal law, then the justification for re-iterating criminal sanctions and duplicating them for the conduct in question obviously becomes still less strong.[1] Such a recourse may be proper if more severe sanctions than those already provided are considered desirable, or if there is some substantial defect in the coverage of the existing law that needs to be remedied.

4.3 Other fundamental questions

All these points are fundamental. Even when the above points have been duly considered, some questions which are equally fundamental to the use of the criminal law in respect of a particular type of conduct may still remain to be considered. These questions arise by reason of certain considerations, which may, for the present, be put briefly, in the form of the following propositions:-

(a) Even where prima facie there is justification for criminal sanctions, economy has to be practised in employing such sanctions.

(b) Criminal sanctions should not be employed where they cannot be expected to be reasonably effective.

(c) If the use of criminal sanctions is likely to result in greater harm than may result from their non-use, against the particular conduct, then resort to criminal sanctions should be avoided. For example, where there are questions of possible encroachment on privacy, the legislature has to tread very carefully.

4.4 Factors enumerated

The factors that should ordinarily be taken into account when considering the question whether a particular conduct should be treated as criminal, can now be conveniently enumerated. These are as under:-

(1) The mental element.

---

1 Compare Chapter 3, *supra*.

(2) Magnitude of the harm likely to be caused by the conduct in question.

(3) Nature of the harm likely to be caused by the conduct in question.

(4) Whether the conduct is already covered by sanctions separately laid down in law.

(5) Need for economy in the use of criminal sanctions.

(6) Effectiveness of criminal sanctions in regard to the conduct in question.

(7) Likelihood of greater harm resulting from the employment of criminal sanctions.

4.5 Mental element

It is well recognised that ordinarily a guilty mind should be essential for punishment. One can write an entire book on the rationale on which this proposition can be justified. However, for the present purpose, it is enough to say, that in the absence of the guilty mind, imposing punishment is pointless A person who does not have an evil design, and who is not reckless either, will not be deterred by punishment, because his mind, when he committed the conduct in question, did not accompany that conduct. It may be that occasionally, the legislature finds it desirable to enact legislation which dilutes this principle. The development of the concept of guilty mind is one of the most complex concept has been much discussed during the last few decades. But really speaking, it is very old. For example, we find the formulation in a very early law book. It appears in one of the laws of Aethelred (Circa 1000): "And if it happens that a man commits a misdeed involuntarily, the case is different from that of one who offends of his own free will voluntarily and intentionally" (VI Aethelred 521).

The main foundation of this doctrine is the assumption that moral responsibility of the offender is important if he is to be visited with punishment.