

XIV Decriminalisation

"Decriminalisation" will be used here in its most limited sense, that is, the legislative process of making acts lawful that were previously sanctioned by the criminal law.² After repeal of the crime, the behaviour in question is left free of legal control and apparently also of any other organised social reaction.³ This contrasts with depenalisation, discussed in the following chapter along with diversion, where the criminal sanction is abandoned, but the conduct in question is then controlled by means of some other legal sanction.

Decriminalisation, being the most radical alternative of the three is also the least widely used.⁴ Where it has been used to a significant extent is in the area of victimless crimes particularly those relating to sexual conduct. The laws against homosexuality, prostitution and abortion have been quite widely relaxed. The English Sexual Offences Act, 1967, provides in section 1 that it no longer shall be an offence for a man to commit buggery or gross indecency with another man provided that:

- (i) the act is done in private;
- (ii) the parties consent and
- (iii) the parties have attained the age of 21.

In Canada, similar amendments to the Criminal Code were enacted in 1968-69 which decriminalised homosexual acts and sodomy between consenting adults over the age of 21 in private.⁵ The law relating to sexual offences in the Australian Capital Territory was amended by the Law Reform (Sexual Behaviour) Ordinance, 1976.⁶ The ordinance provides a general legalisation of all acts of a sexual nature done in private and with the consent of the other party; consent is by definition absent in the case of close relatives and people under the age of 16.

The act of prostitution, in itself, was never a crime at common law. There were peripheral offences such as keeping a common bawdy house or living off the earnings of prostitution. The English Vagrancy Act of 1824 made it an offence punishable with one month's hard labour if a "common prostitute was wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner". This was replaced by the Street Offences Act, 1959, which made it an offence punishable by fine for a "common prostitute to loiter or solicit in a street or public place for the purpose of prostitution".

The Canadian Criminal Code had also sought to control prostitution by the vagrancy laws. A "common prostitute" found in a public place and unable to give a good account of herself was guilty of a form of vagrancy.

This was repealed by section 195.1 of the Code which now makes it a minor offence for "every person who solicits any person in a public place for the purpose of prostitution".⁷ Thus, the scope of the criminal law in regulating sexual conduct has been restricted.

Vagrancy itself is another area where a limited amount of decriminalisation has been taking place. In 1972, the offence of vagrancy where no moral turpitude is involved was removed from the Canadian Criminal Code.⁸ Prior to this amendment the situation was as follows:

- s.175 - (1) Every one commits vagrancy who
- (a) not having any apparent means of support is found wandering abroad or trespassing and does not, when required, justify his presence in the place where he is found;
 - (b) begs from door to door or in a public place;
 - (c) being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself;
 - (d) supports himself in whole or in part by gaming or crime and has no lawful profession or calling by which to maintain himself; or
 - (e) having at any time been convicted of an offence under a provision mentioned in paragraph 689(1)(a) or (b), is found loitering or wandering in or near a school ground, playground, public park or bathing area.
- (2) Every one who commits vagrancy is guilty of an offence punishable on summary conviction.
- (3) No person who is aged or infirm shall be convicted of an offence under paragraph (1)(a).

The 1972 amendment repealed paragraphs (1)(a), (b) and (c) and subsection (3).

In Uganda, the Vagrants Act was repealed in 1977, eliminating the offence of vagrancy. In its place is a comprehensive scheme for the resettlement of vagrants on "community farm settlements".⁹

Vagrancy is a criminal offence in all parts of Australia other than the Northern Territory, where it was abolished in 1973. In 1974 the Territory also repealed the offence of public drunkenness, replacing it with police powers of "apprehension" of certain persons found drunk in public. Other Australian states are looking at the possibility of removing the intervention of the criminal justice process in this area.¹⁰

In England a working party examined vagrancy and street offences with a view to determining what role (if any) remained for the criminal law in this area, issuing its report in 1974.¹¹

We have asked ourselves whether the criminal law should wholly cease to concern itself with those who sleep rough; and, in doing so, we have been fully conscious of the views of those criminologists who believe that society should

show itself to be more tolerant of deviant behaviour, and should seek ways of 'decriminalising' it. There is some force in the argument that sleeping out, as such, is a harmless activity which may, if the person sleeping out looks unkempt and unprepossessing, raise irrational fears and prejudices; and that it is not the business of the criminal law to frustrate the choice of his way of life, still less to visit penal sanctions on those who are driven to it by homelessness, social inadequacy, mental illness and other misfortune.¹²

While the Working Party did agree that the role of the criminal law in controlling vagrancy should be circumscribed, it felt it could not endorse a wholesale withdrawal.¹³ This attitude was endorsed by the Tasmanian Law Reform Commission which felt that it cannot be seriously maintained that the answer to the problem is simply to leave vagrants alone, except perhaps in a minimal number of cases. Rather, something must be done for most of these people, for example, an escort to a voluntary shelter, simply for their own protection.¹⁴

Currently another offence is being canvassed for decriminalisation: simple possession of marijuana. Legislative implementation of such a proposal was on the calendar of the Parliament of Canada before the Government fell in the May, 1979, general election.¹⁵ In Jamaica the Joint Parliamentary Select Committee of the House of Representatives and the Senate was set up in 1977 with the following terms of reference:

To consider the criminality, legislation, uses and abuses and possible medicinal properties of ganga (marijuana) and make appropriate recommendations.

The Joint Committee presented its interim report in which, although it did not recommend the legalisation of marijuana, it expressed the view that there was a substantial case for decriminalising the personal use of the drug. No legislation has, however, been enacted to implement this recommendation.

It is fair to say that decriminalisation as a method of keeping cases out of the criminal courts is, at the present time, producing more proposals than concrete action, though it is to be hoped that these proposals will reach fruition eventually. Nonetheless, the extent to which the catalogue of offending can be pruned is very much dependent on the attitude of public opinion towards these "victimless" offences.¹⁶ The main difficulty in treating these offences differently is that moral discourse has now become almost totally associated with criminal law provisions and solutions. There is, therefore, a strong resistance to decriminalisation because

"legalising" is equated with approval. It must also be realised that if decriminalisation is pursued only within the narrow confines of victimless crimes of morality, the impact on the courts will be a very limited one simply because such offences do not make up a very significant proportion of the criminal caseload. Such crimes are difficult to detect and prove in court which results in relatively few prosecutions being brought. Decriminalising vagrancy offences has slightly more impact as vagrants, once they have appeared in court, tend to get trapped in a "revolving door" coming back into court repeatedly for minor misconduct.

Only if decriminalisation is pursued on a wider basis will it really affect the operation of the courts. In New Zealand, for example, a set of figures was compiled by the Department of Justice dealing with offences which might be handled outside the criminal justice system using 1976 as the model year. It was estimated that 60.23 per cent of the total prosecutions related to offences which could be removed from the court system though, it must be emphasized "decriminalisation" was being used in a wider sense here and thus included depenalisation. The "unnecessary" prosecutions covered certain traffic offences, drunkenness and vagrancy, breach of maintenance orders, sale of liquor offences and failure to pay certain fees such as television licence fees, fishing licence fees and library fees, which, it was felt, could be handled quite effectively by administrative measures.¹⁷

Footnotes

¹"Problems in the Administration of Justice", Memorandum prepared by the Government of New Zealand in Selected Memoranda prepared for the 1977 Meeting of the Commonwealth Law Ministers, Winnipeg (London, 1977), pp. 505-508.

²E.A. Fattah, "New Trends in the Criminal Justice System" in D. Morrison (ed.), New Directions in the Criminal Justice Process: A Report of an Advanced Seminar in Criminology (Vancouver, 1973), pp. 2-31 at p. 4.

³A. Rabie, "The Need for Decriminalisation", (1977), 10 Comparative and International Law Journal of Southern Africa 200 at p. 201.

⁴For an examination of the political implications of pursuing the path of decriminalisation, see D. Brown, "Criminal Justice Reform: a critique. An Examination of Decriminalisation" in D. Chappell and P. Wilson (eds.), The Australian Criminal Justice System, (2d ed.) (Toronto, 1977).

⁵Canadian Criminal Code, R.S.C. 1970, c. C-34, section 158.

⁶No. 55 of 1976.

⁷Criminal Code Amendment Act, 1972, c. 13, section 15.

⁸Id. at section 12(1).

⁹Uganda, Decree No. 5 of 1977.

¹⁰For an overview of the Australian position see Tasmania, Law Reform Commission, Report on Decriminalisation of Drunkenness and Vagrancy (Tasmania, 1977).

¹¹Great Britain, Working Party on Vagrancy and Street Offences, Working Paper (London, 1974).

¹²Id. at para. 30.

¹³The Working Party's proposals have as yet not received any legislative attention.

¹⁴Tasmania. Law Reform Commission, supra footnote 10 at p. 6.

¹⁵Canada, House of Commons Debates, March 22, 1979.

¹⁶New Zealand, Report of the Department of Justice 1976/77 (Wellington, 1977), p. 5.

¹⁷New Zealand Royal Commission on the Courts, Report (Wellington, 1978), para. 199.