Decriminalisation: A principled approach

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Introduction
Decriminalisation is often advanced as a solution for combating crime. It is argued that if criminal law can purge itself from issues which do not belong to it, it would be applied more effectively in respect of serious crimes. Although criminal law will undoubtedly benefit from decriminalisation, this will only be the case if the decriminalisation process is based on a principled approach.

In the course of this article a principled approach towards decriminalisation will be advocated and some areas in need of decriminalisation will be identified.

Concept of decriminalisation
The European Committee on Crime Problems defines decriminalisation as "those processes by which the 'competence' of the penal system to apply sanctions as a reaction to a certain form of conduct is withdrawn in respect of that conduct." Aaronson et al see decriminalisation as a form of legal policy change.

A principled approach towards decriminalisation
The creation of statutory offenses lies at the discretion of the legislature. Little guidance exists for the legislature in deciding when conduct should be made criminal. Consequently, the criminal sanction has often been used to address social problems, for instance squatting, and to serve political agendas which resulted in the over-criminalisation of criminal law.

In this article the author explains what the term "decriminalisation" really means, suggests what principles should apply in deciding what offences should be subjected to decriminalisation in South Africa and proceeds to discuss and analyse the extent to which this process should be invoked in relation to particular offences, namely prostitution, homosexuality and gambling.

It is submitted that over-criminalisation can be avoided if the objectives of the criminal law are used as guidelines to determine whether or not conduct should be made criminal.

The prime function of criminal law is to protect the sanctity of life, property, children and dependents from exploitation. However, criminal law is often found in areas not usually perceived as its domain. When criminal law operates outside its perceived domain, justification for its application has to be found.

Unfortunately the justification offered is seldom underpinned by cogent and logical reasoning. It is my submission that the justification should be found in and restricted to the objectives of criminal law. In addition to the objects already mentioned, it is submitted that the protection of society from public disorder and public nuisance should also be included.

Dias defines values as inter alia "... all those considerations which are viewed as objectives of the legal order ..." The objectives of criminal law can thus be regarded as the values enforced by criminal law. Intervention would, therefore, in my view only be justified if it promotes these values. However, intervention by criminal law will not only be justified if it promotes these values, but also if it is affordable in terms of its effect on criminal law.

Intervention by criminal law is usually perceived to be detrimental to the individual as it constitutes an infringement of his or her rights. Intervention can also be to the criminal law's own detriment. When intervention results in prejudice to the criminal law it is usually a sign of over-criminalisation.

Aaronson et al list a number of consequences of over-criminalisation; the fact that it can bring the law into disrepute and reduce its efficiency is the gravest consequence.
Present day criminal law has to meet extraordinary demands and its efficiency to deal with day to day crimes is already being questioned. In its quest to gain and preserve stability and law and order, criminal law can no longer be fettered by the enforcement of morality or the solution of social problems. Criminal law should only be used to protect affordable values, that is affordable in terms of criminal law itself.

The problem with the proposed approach of affordable values lies in the determination of the extent to which they should be enforced. The extent to which an affordable value is enforced can also result in over-criminalisation.

It is submitted that the criterium to be applied is that the value should be protected to the extent which is reasonably necessary. Legislation supposedly in the interest of the protection of children will have to be tested objectively by applying the suggested norm. The protection afforded will thus only be a reasonably necessary extent – which will probably result in effective protection.

Morality is the area most popularly perceived to be in need of decriminalisation. The reason being, as Mitchell puts it: "... if men are persuaded by threat of punishment to do what is morally right, there is a sense in which what has been enforced is not morality at all. For morality, strictly speaking involves acting from a moral motive. Considered in this light, morality not only ought not to be enforced, it cannot be." Consequently, prostitution, homosexuality and gambling, will be discussed as examples of morality legislation which should be decriminalised.

Prostitution

Although many attempts were made through the ages to prohibit the oldest profession in the world, these had largely been unsuccessful. Only prostitution-related activities were usually criminalised, for instance, incitement. Not to be deterred by these unsuccessful attempts the South African legislature assumed a moral duty to criminalise prostitution.

Section 20(1)(aA) of the Sexual Offences Act 23 of 1957 which criminalised prostitution was inserted by the Immorality Amendment Act 2 of 1988. This proved to be troublesome for criminal law. The fact that prostitution was criminalised did not result in more effective policing. Members of escort agencies are trained in avoiding the police. Once an escort has built up a clientele, she leaves the agency and operates from her flat – which makes policing impossible.

Should the police succeed in arresting a prostitute, a conviction will not necessarily follow. In S v C 1992 (1) SACR 174 (W) the court found on review that a woman who undressed herself at the request of a policeman and handed him a condom performed and indecent act, but did not contravene section 20(1)(aA). She had agreed to have carnal intercourse for reward. The undressing and preparation for intercourse were not for reward and she therefore only attempted to contravene section 20(1)(aA). She should of course have been charged with performing an indecent act for reward.

"Attempt" seems to be the key word – an attempt by the legislature to enforce morality ended in a conviction of attempt to contravene section 20(1) (aA). The question is whether criminal law can really afford the luxury of all these attempts?

An application of the affordable value approach to prostitution, will result in criminal law intervening to the extent reasonably necessary to protect children against exploitation and society against public nuisance. The position with regard to prostitution, which is mainly practised by escorts who are members of escort agencies, should be as follows:

- section 20(1)(aA) should be deleted and prostitution decriminalised;
- soliciting, brothels, pimping and living off the income of a prostitute should remain crimes in order to protect society from the nuisance of being confronted in public by prostitutes;
- all escort agencies should be legalised by deleting section 12(A) of the Sexual Offences Act 23 of 1957. And if such agencies are legalised, society will still be afforded the necessary protection by the imposition of appropriate conditions when a trade licence to operate an escort agency in granted.

The following conditions are suggested:

- a restriction of areas where escort agencies can operate (protection of society and specifically children);
- a ban on advertisements by escorts or escort agencies (protection of society against public nuisance and also children). Parental control is not easily exercised if telephone numbers and addresses of escort agencies are advertised;
- regular medical check-ups of prostitutes (protection of society against AIDS);
- no children under the age of eighteen years to be admitted as guests or employed as escorts;
- no escort agencies in the vicinity of schools or suburbs.

It is possible and affordable to determine whether an escort agency adheres to its licensing conditions – it is nearly impossible to police its sexual activities.

Homosexuality

South Africans appear to tolerate homosexuality to a certain extent. This, however, does not mean that homosexuality falls outside the ambit of criminal law. Sodomy is a common law offence while section 20(A) of the Sexual Offences Act 23 of 1957 prohibits immoral conduct between men. Before 1989 no legislation dealt expressly with homosexuality. This situation was “rectified” during 1967 when the then Minister of Justice launched an investigation into homosexuality and existing legislation, with a statement to the effect that it was a proven fact that homosexuality instincts asserted themselves on society if they are allowed to prevail unbridled. How such instincts will assert themselves was not explained, and neither did he elaborate on why it should not be allowed.

The result of the investigation was that section 20(A) of the Sexual Offences Act was enacted. This section prohibits immoral and unnatural acts between men calculated to stimulate sexual passion or to give sexual gratification, at a party. A party is defined as a gathering consisting of more than two people.

It appears from our case law that our courts are of the opinion that sexual acts in private between consenting men above the age of nineteen do not constitute an offence. (S v C 1983 (4) SA 361 (T) 364 and S v Matsemela & Another 1988 (2) SA 254 (T)).

Sodomy, however, remains a common law crime. In the appeal of Exit Publications (Pty) Ltd v The Committee of Publications (37189; G3/89) the Publications Appeal Board came to the conclusion that society was prepared to tolerate homosexuality as long as it remained within the common law
offence. It is my submission that the person on the street does not know the difference between immoral and improper acts between men and sodomy. It appears as if society is prepared to accept homosexuality, irrespective of which acts are performed. What is of importance is that children should be protected and that such conduct should not be a public nuisance. The Sexual Offences Act 1957 provides the necessary protection.

Sodomy between two consenting adults above the age of nineteen years in private should therefore be decriminalised. The criminalisation of that type of sodomy is a technicality that may be of importance to the legislature but has lost significance for society. This also applies to all the "unnatural deeds" which are, according to Snyman, still punishable.8 (See also Matsemela ( supra) 257-258). Sodomy on any non-consenting person should, however, remain a crime.

Gambling

All gambling activities with the exception of horseracing, are prohibited in South Africa in terms of the Gambling Act 51 of 1965. However, the fervour with which Government has persecuted all gambling activities has dissipated since the battle against pinball machines had been won (Cresto Machines (Edms) Bpk v Die Afdeling Speuroffisier SA Polisie 1675 (1) SA 376 (A); S v Gonclaves 1975 (2) SA 51 (T)).

When schools and churches turned to lotteries to supplement their income they were not prosecuted. These activities were apparently tolerated as they were conducted on a small scale and for a good cause. Yet, when charities conducted lotteries on a large scale to obtain funds for a good cause. Yet, when charities used lotteries on a large scale to obtain funds they were also not prosecuted, presumably because they were conducted in the interest of a good cause.

Emboldened by the inertia of Government to act against lotteries and the apparent willingness of the public to gamble, casinos started to open their doors in South Africa and offered card games where the winner could, technically speaking, be determined by skill rather than chance.

Government was stirred into action. The Gambling Amendment Act 144 of 1992 was enacted which, inter alia, extended the meaning of gambling games to include any game (for money, property, cheques, credit or anything of value) irrespective of whether or not the result thereof is determined by chance. The Howard Commission was also appointed to investigate the position in respect of gambling and to make proposals.

The proposals of the Howard Commission were incorporated into the Lotteries and Gambling Act 210 of 1993 (the Act) which came into operation on 14 January 1994. The Act provides for the establishment of a Lotteries and Gambling Board (the Board) with a view to the implementation of lottery, gambling and fund-raising activities.

In terms of section 9 (1) of the Act gambling activities in territories formerly part of the Republic need not be terminated on reincorporation in the Republic if such activities are registered with the Board. Once registered these activities will be deemed not to be a contravention of existing legislation.

Organisations or persons whose fund-raising activities have been authorised before 30 November 1992 but nevertheless constitute a contravention of the Gambling Act of 1965, can apply for registration with the Board and will consequently receive indemnity against prosecution in terms of section 10 (2). It is envisaged that the abovementioned activities will, on registration, be administered by executive committees appointed by the Board.

Section 14 empowers the Board to make recommendations to the Minister in respect of the permanent measures to be taken with regard to the establishment of a state-regulated national lottery, sports pool and other lotteries, and the establishment of a body to manage such national lottery, sports pool and lotteries.

One of the most important functions of the Board is to determine a national policy in respect of certain gambling activities. Unfortunately the Board is not required to recommend a national policy on gambling, but a policy on those activities specified in the Act only. An ad hoc approach has triumphed over a principled approach.

Decriminalisation of gambling

The following approach in respect of the decriminalisation of gambling is advocated:

- The establishment of an independent gambling board. Members should be appointed in a democratic manner and not only by the Minister of Justice.
- The determination of a national policy with regard to the decriminalisation of gambling. This policy should be applied to all forms of gambling and not only to those approved by Government. All gambling activities should be conducted subject to regulations made on the recommendation of the Board.

Although cognisance should be taken of the nature of the various gambling activities, the regulations should all be based on the same principles, namely the protection of children against exploitation and society against public nuisance. An application of the zoning principle will be a valuable aid in achieving the last-mentioned objective.

Conclusion

It has been pointed out that the overcriminalisation of criminal law can largely be attributed to the fact that crimes are often created to address social problems and to fulfil political promises. If the criminal law is to benefit from decriminalisation, social pressure and political agendas should not once again be applied as criteria. They have already proven themselves to be false yardsticks.

Decriminalisation will only succeed if it is done in a principled manner. It is submitted that a policy of decriminalisation based on the affordable value approach will succeed as a solution to make criminal law more effective. It would also be readily accepted as a principled approach underpinned by logical reasoning, rather than political opportunism.

Footnotes

1 Council of Europe 1980 Report on Decriminalisation.
3 Joubert (Ed) LAWSA (6) para 8.
5 Supra at 118–120. See also Packer, H L. The Limits of the Criminal Sanction 1976 California Stanford University Press.
7 1967, Hansard, Part 20, Column 4894