

An Analysis of the Justification of Adultery Laws

Kunal Agrawal¹

Abstract

This essay examines the justification of adultery laws from the point of legal moralism from the point of view from legal moralism. The researcher shall evaluate it from the point of view Mill, Devlin and Dworkin.

The debate between legal moralism and society's interest in regulating conduct, personal freedom and the idea of consensus is utterly fascinating.

This paper shall first examine the theories of Dworkin, Devlin, Mill and Hart in contrast to each other. The paper shall then apply their theory to adultery laws and evaluate it from their perspective. Then the conclusion shall be presented.

Introduction

This essay examines the justification of adultery laws from the point of legal moralism from the point of view from legal moralism. The researcher shall evaluate it from the point of view Mill, Devlin and Dworkin.

An examination of the justification of adultery laws is relevant today because it examines whether the state is entitled to enforce society's morality on the individual as is happening in numerous cases around the world.

This paper shall first examine the theories of Dworkin, Devlin, Mill and Hart in contrast to each other. The paper shall then apply their theory to adultery laws and evaluate it from their perspective. Then the conclusion shall be presented.

The Debate on Legal Moralism

¹4th Year BALLB (Hons.) National Law University, Delhi

Devlin states his position in the opening lines of his article when he says that we live in a free society, by which he means that there is a balance to be struck between individual freedom and society. When authority is a grant and liberty not a privilege, it is a true mark of a free society.²

Mill believed that the only end in which interference in liberty is warranted is self-protection. Interference for someone's own good is not a sufficient reason. A man should be allowed to pursue his own good in a manner of his choosing. The law should be that society should not interfere with a person's liberty unless he caused harm to another.³

Devlin gives two reasons on why the 'virtuous' should not be compelled to associate with the 'vicious':

1. Association may cause the vice to spread to the virtuous.
2. The object of association is to share burden and the vicious are most likely non-productive members of society.⁴

Since society can no longer expel men, is it permissible to restrain their liberty for reformation or restraint? Mill feels that passive resistance and social sanctions are enough to control vice and that there should be no law prohibiting it unless the vice causes some harm to someone. This is because diversity is a virtue until mankind is better able to recognise all sides of the truth. Diversity in morals will allow men to prove what they thought to be good to be good. He believed that the morality resulting from the discussion will be a better morality and is thus desirable.⁵

Devlin partially agrees with this point insofar as he believes that there shall be those who truly believe that they are practising virtue and not vice and those that practice vice knowing it to be vice. If the law is to suppress the first then it may suppress the new morality which is not desirable. So two questions arise:

1. Can those that believe they are practising virtue be separated from those practising vice turned into something useful for society?

² Devlin, *Mill on Liberty and Mills*, 32 University of Chicago Law Review 215-235 (1965)

³ Devlin, *Mill on Liberty and Mills*, 32 University of Chicago Law Review 215-235 (1965)

⁴ Devlin, *Mill on Liberty and Mills*, 32 University of Chicago Law Review 215-235 (1965)

⁵ Devlin, *Mill on Liberty and Mills*, 32 University of Chicago Law Review 215-235 (1965)

2. If not, then how can the injury caused to society by suppressing a new morality be balanced against the damage done by the toleration of an acknowledged vice?⁶

Mill's disciples argue that tolerating an acknowledged vice, exercised in the private sphere; cause no injury to society at all. Even if it does, the law will be useless in preventing it. Devlin argues that measures like fines and imprisonment will be useful in combating those that engage in vice for profit.⁷

Devlin also says that private immorality is capable of doing both tangible and intangible harm. Tangible harm is that harm which leads to the weakening of society by the weakening of the constituent elements. "A nation of debauchees would not in 1940 have responded satisfactorily to Winston Churchill's call to blood and sweat and tears." Devlin concedes that in a real society and in peace time the damage done by these vices will be very little. He then goes on to say that the nature of the subject matter is what should be determinant. Whether society should exercise its power to restrain activity requires a balance check between foreseeable harm to society and the foreseeable harm to the individual. The aim of such legislation would be to contain vice and not to eliminate it.⁸

Intangible harm is caused when immorality causes disbelief in the moral belief. Devlin considers shared morality to be similar to a web i.e. he asserts that most men take morality as a whole and that if you destroy the belief in part of the shared morality you will weaken belief in the whole morality. He believes that if sufficiently weakened it shall cause a change of the entire morality. The change in morality shall not be a seamless transition but be marked with unrest and will leave the society to open from outside. Would this conception freeze the law? Devlin argues no, as he says that at worst, it will control the rate of change in society and leave change as slow as the law. This may be problematic as it requires a great deal of political will to change a law and one would need to move from actual indignation instead of mere indifference which would be in most acts. H.L.A Hart thinks that this rests on a confused idea of what society is.⁹

The balancing test is that the misery caused due to this law should not outweigh the conceivable harm that these practices could do. Lawmakers are, generally, bound to legislate for the common good. What constitutes common good can only be decided by the society if

⁶ *id* at p. 215-235

⁷ *id* at p. 215-235

⁸ *id* at p. 215-235

⁹ *id* at p. 215-235

there is a conflict in morals. If the society makes that judgement honestly then it cannot be derogated from.¹⁰

Dworkin believes that our interactions are more complex than this simplistic understanding and thus Devlin's assertion that law should be drawn from morality is thus flawed. He uses the idea of a moral position to show this. He says that one can hold a moral position and expect that other people would allow him to hold this moral position and even act on the basis of that moral position. Then the opinion of a person will change on the basis of that moral position i.e. you would judge him to be eccentric or puritanical (a character trait) as opposed to having a character flaw.¹¹

A person holds a moral position when he is able to produce some reasons for it. He must just be able to point out a feature of the subject matter which he finds immoral. Any reason given would point to an underlying philosophy but it is not necessary for the person to be able to articulate it. However, not every reason given is sufficient as certain reasons do not count. Reasons based on prejudice, personal emotional reactions, false propositions of fact, citing beliefs of others are not acceptable reasons for holding a moral position.¹²

The moral position taken by a person shall be based on a general theory. If the belief in that theory which is held is inconsistent with the theory at other points then the person cannot claim to accept that theory. A person can, however, choose to deviate from the general theory due to other moral positions that he can properly claim to hold.¹³

If one is not able to provide valid reasons for his moral position it is called arbitrary and one cannot be said to hold a moral position. It is instead a feeling.¹⁴

Devlin does not make this distinction between a moral position and his theory suffers for it. He finds it enough that enough for a person to hold a feeling as opposed to Dworkin's much more complex understanding of a moral position and Dworkin criticises him for this saying that democracy requires that we should only enforce a consensus which is not based on prejudice, rationalisation, parroting and personal aversions due to the precious nature of

¹⁰ *id* at p. 215-235

¹¹ DWORKIN, TAKING RIGHTS SERIOUSLY 241-258 (2008)

¹² *id* at p. 215-235

¹³ *id* at p. 215-235

¹⁴ *id* at p. 215-235

individual liberty. A legislator will have to deal with public outrage and cannot afford to ignore it, but we should not confuse placating the masses as justice, it is merely a strategy.¹⁵

Mill demands that society tolerate what it knows to be evil and nobody alleges to be good. Mill demands that society should not extend this out of pity but should cede it forever as a right. The reason for this is that human judgement is fallible and that if the world would be poorer for losing those practices which no one denied to be evil but was in fact good.¹⁶

Devlin disagrees with Mill on this point and says that Mill did not distinguish between freedom of thought and freedom of action. One can keep an open mind about what one believes to be wrong but if one has to act he must act in a manner which he believes to be true. What society believes to be evil may indeed be evil and society cannot condemn itself to inaction against evil on the off-chance that it may be good.¹⁷

Justification of adultery laws:

Devlin would justify adultery laws by saying that adultery is, by the society's standards, immoral. There are two arguments to support this.

The first argument is that there exist a variety of moral principles which are of two classes. The first are those principles which men, while adhering to them, don't impose on others. Then there are those moral principles which cannot be derogated from. In this case monogamy and the institution of marriage form that moral standard. Adultery violates this standard. Since some principles must belong to the second class for society to exist, due to the need for moral conformity, society is entitled to preserve its own existence by insisting on some conformity.¹⁸

¹⁵ *id* at p. 215-235

¹⁶ Devlin, *Mill on Liberty and Mills*, 32 *University of Chicago Law Review* 215-235 (1965)

¹⁷ *id* at 215-235

¹⁸ DWORKIN, *TAKING RIGHTS SERIOUSLY* 241-258 (2008)

If such a right is possessed by society then it also has the right to use sanctions to protect such a right i.e. the society can use criminal law to enforce conformity to that moral standards which society believes to tie it together.¹⁹

Society's right to eliminate immorality should be limited to only those cases where public feeling rises to 'intolerance, indignation and disgust'.²⁰ For society to outlaw adultery such public sentiment must exist. When public morality is challenged, our entire society's existence is under threat.²¹

Hart's response to this argument would be that such conception is based on a confused idea of what society is. A conventional idea of society would belie this idea insofar as a society won't be destroyed by the existence of a practice that society considers abhorrent or deeply immoral. Lord Devlin, according to Hart, did not offer anything to substantiate his conception of what society is. Only if one argues on an artificial idea of society in which society consists of complex moral ideas and attitudes which its members hold at a particular time.²²

To Lord Devlin if society hates adultery enough then it is justified in outlawing it, forcing people to between frustration and the chance of prosecution, because of the danger the practice holds to society. However, at no point is any harm necessary to be shown or that the danger to society satisfies more than the requirement of public outrage. He fails to connect the danger to society to any actual danger more than a deviation from shared morality is a threat to society.²³

The second argument is that if those who seek to commit adultery would cause the social environment to change. The change cannot be predicted with any degree of accuracy but it is reasonable to suggest that the family, an institution around which most economic, social and educational arrangements centre would be harmed. The ramifications of which are hard to predict as they would be amplified.²⁴

This by itself would not give society the right to prohibit adultery, but it means that the legislators of a particular society would have to decide some moral issues. They will be tasked with deciding whether some societal institutions are worth protecting at the cost of

¹⁹ *id* at p. 241-258

²⁰ *id* at p. 241-258

²¹ *id* at p. 241-258

²² HLA HART, LAW LIBERTY AND MORALS 51 (1968)

²³ DWORKIN, TAKING RIGHTS SERIOUSLY 241-258 (2008)

²⁴ *id* at p. 241-258

human freedom (which is resulting in an immoral practise i.e. adultery). The claim here is that while immorality is not a sufficient ground to make something criminal, it is sometimes necessary to make conduct criminal in order to protect an institution.²⁵

The question that arises then is that how is a legislator to decide what practice is immoral? The answer lies in the community. If a community decides that an act is immoral then that act is immoral in reference to that community. So it is only the community which can decide that adultery is immoral. This is true and evident in the fact that you can have wildly different moral standards when moving from one society to another. Something as basic as family is not as set in stone as one would think. There exist monogamous families, polygamous families and in some cultures incest is permitted.²⁶

Dworkin's response to this is that of consensus of the community. The consensus must be validly formed and should only be a consensus of moral conviction. If the reason that a person wants to support laws criminalising adultery then the reason should not be that he finds adulterous people to be deceitful (as this is arbitrary). These kinds of reasons are not sufficient to abridge someone of his legal freedoms. If the consensus is said to be validly formed then you must prove that the consensus is validly formed.²⁷

Conclusion

Adultery should not be criminalised. The reason for this is that society will not be weakened by it. The second is that to criminalise it you should have consensus that is validly formed. Support can also be drawn from Mill argument that it is wrong for the State to intervene in the private affairs of men as long as it does not harm others. While Hart and Dworkin do not preclude the interference of the State if it meets the necessary requirements, I do believe that the State's intrusion is not warranted in the private sphere. Legal moralism should not be used to violate the autonomy of an individual. The limits set by legal moralism are difficult to gauge and there should be far more determinate limits to legislature. These limits are useful in denouncing almost any law and cannot constitute a meaningful criticism of any law passed. It would be far more useful to say that the legislature should not make the laws due to the same reasons above.

²⁵ *id* at p. 241-258

²⁶ *id* at p. 241-258

²⁷ *id* at p. 241-258

The question that then arises is that whether there is any threat to the shared morality that can threaten society. The researcher proposes two responses. This hinges on your understanding of the meaning of society. If you understand it in Devlin's sense, then yes, the shared morality being threatened can threaten the society. This is because Devlin has intrinsically tied the idea of society to that of shared morality and the destruction of the shared morality leads to the creation of a new society which shares a new shared morality. This new society can be comprised of the same individuals in the same place with the individuals being unconscious to this change in society.

The second response takes a different and more, in the opinion of the researcher, sensible approach where it would take the actual breakdown in societal order for it to be termed as the destruction of society. People will refuse to obey the old laws and would strive to create a new social order to be followed. An unconscious creation of society is impossible and the change in the manner in which Devlin has theorised would be termed merely as evolution of the society.

The researcher does not think that shared morality possesses the cohesive power that Devlin thinks it does. People who associate develop a shared morality due to the social environment in which they live. A change in the shared morality will not threaten the society due to the fact that any change in social morality will be accepted into the new social morality. If society deems certain changes to morality unacceptable then it has many ways in which it will try to stop the change but once it reaches a certain critical mass, it will be accepted into society. The best example of this is the discrimination the LGBT community faced and still faces in the United States. A section of the community was shunned and discriminated against for a very long time, but eventually they were able to convince society that they should be entitled to the same benefits as everyone else. By Devlin's reasoning the homosexual community should have abstained from sodomy until they were able to overturn any laws banning it. They should have entered into a discourse with the general populace about it and convinced them of their position. This position places an unusually high burden on the members of the LGBT community by which they are forced to abstain from sex. The change in the shared morality to starting to allow same-sex marriage is a momentous change in the shared morality of the community of the United States and this has not threatened the society at all. The United States has been at war constantly during this social change and we cannot say that they have been rendered weaker for the change. So the researcher feels that

the state should abstain from practising legal moralism and should let the individual decide what is best for him as long as he does not affect anyone who is unwilling.