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JUSTIFICATION FOR ADULTERY LAWS: FROM PAST TO PRESENT

By- Anshul Sharma

LLM Student, Manipal University, Jaipur

INTRODUCTION

ADULTERY AS IMMORAL

ADULTERY:

A voluntary sexual intercourse of a conjugal person with a person who is not offender's spouse.¹

WRONGS IN ADULTERY:

It is an act which is consider as morally blameworthy because of involvement of unfaithfulness, fraud, defiance of trust and to give pain through play with emotions.²

The act adultery, itself consist a fact of immorality, reason is clear from the defining terms of the adultery. But the necessity of the criminal sanction for adultery is justified or not – is in the question? It was contended that the sanction cannot implied only on the basis of immorality of an act.³ On the relationship of

the law and morality everyone has their own different concept.

The purpose of impose control over someone is only to prevent harm to others.⁴

The basis should not be only for own well being or own happiness and benefits i.e. immoral can't be an only basis.⁵

Through all these outcomes to reach at conclusive end one has to look at the Morality, Law, and relationship between both, justification for implication of law on the basis of immorality.

ADULTERY: TREATED DIFFERENTLY BY DIFFERENT SOCIETY

Adultery is a sexual relation which is reason to remoteness of the marriage. In all belief it is consider as offence due to morality behind it, just an extra-marital affair or disloyalty.⁶ It is treated differently in

¹ Marvin M. Moore, *Diverse Definitions of Criminal Adultery*, 30 U KAN. CITY L. REV. 219 (1962).

² Kuk Cho, *The Crime of Adultery in Korea Inadequate means for Maintaining Morality and Protecting Women*, 2 J. KOREAN L. 83 (2002).

³ Gerald Dworkin, *Devlin Was Right : Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927

(1999).

⁴ H.L.A HART, *LAW, MORALITY AND LIBERTY*,14 (1st ed. 1963).

⁵ JOHN STUART MILL, *ON LIBERTY*, 6 (1st ed.1859).

⁶Harinder Boparai, *Adultery and Divorce under Canada's Divorce Act and India's Hindu Marriage Act*, 35 U. TORONTO FAC. L .REV. 240 (1977).

nature, in different parts of the world as *in western countries*; Belgium, Finland, Sweden, it is not heinous as consider as was heinous crime *in India*. In Europe adultery in not a crime, they believe, it is a private matter between the people involved. Punishment to it also different, it considers criminality only for male but not to the women which is involved in the adultery reason obscure states that in illicit relationship women is only consider as victim rather than person responsible of the 'crime'.⁷ But in India and US, *Marriage is a sign of the trust which requires special and eternal assurance to each other*.⁸ But it against the social rules if someone breaks it. It is generally consideration for marriage. To protect it law are the weapon which can directly shoot out these problems in the disputes. As according to hart, legal system is an organization of social rules. Reason to rules as social, regulates and control the society.⁹ And derivation of social rules from society only.

The adultery was punishable as it has its own reason to claim in respect of society moral ethics.¹⁰ The work of adultery on morality basis is only due to its outcomes which directly affects the society. Adultery should be considered as cruelty towards spouse or not has a huge debate. The matter will take into new sunshine when these issues generally focus on the matter of law and morality discussion.

The justification to adultery law is just to protect effecting people in future so on that basis no one can be further suffered. To put adultery as criminalizing in the law is sort of protection to the rights which is directly attached to the marriage as property rights.¹¹

**HART- DEVLIN DEBATE ON
ENFORCEMENT OF MORALS
MORAL VALUES BEHIND THE
ADULTERY**

As per our *historical perspective* it is principally positivist the contribution of the family and moral values, as principles of

⁷ Vishwa Mohan, *Soon, Adultery won't be a crime but a social offence*, TOI, Feb. 14, 2007 at A1.

⁸ Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?* 34 HARVARD J L.P.P. 246 (2010).

⁹Candace J. Groudine, *Authority: H. L. A. Hart and the Problem with Legal Positivism*, 4 THE

JOURNAL OF LIBERTARIAN STUDIES 274 (1980).

¹⁰ Maureen A. McTeer, *A Role for Law in Matters of Morality*, 40 MCGILL L.J. 824 (1995).

¹¹Laurence M Vance, *Should Adultery Be Illegal?* WESTERN CENTRE FOR JOURNALISM, June 22, 2013 at A1.



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family life.¹² If family consist of healthy and stable scenario, then government or law wouldn't have to indulge in the support of social support through sanction. As history scenario has changed now from Paternalism to individualism. There was a patriarchal form of family where all the authority was with the male community, but it have been diluted by the increasing freedom of wives and children, turned into affectionate family. This has come out with own outcomes the wives as their own property rights, more liberated and less dependent on their husbands. These senses of liberty have seen in the increasing promiscuity and adultery. In this world of technology things are getting changing for which role of moral values can be taken into consideration for the refurbishment of the family values. As Augustus made adultery as civic crime and states that one can't do away with the reality of legislate with principles. To do so, not pretends to enter the lives of the private people but as the protection on the behalf of the whole community. Because of the serious moral declined in the world. It is not explicitly that law is fully based on the morals only.

¹² Richard Saller, *Family Values in Ancient Home*, available at

Feminist perspective point how much right has been given for her upliftment till now. It is the same as in the past or has changed. As one can seen as the role of the mother in the today scenario as acting of her in household before and after get marriage point is clear the today is withholding the position if the mother, sister at home she is playing the efficient role of the president post also. In such way it shows the development but it is not always with all. Moral basis it is accepted well as her development but on the other hand it is not so. Cruel act, harshness, unfaithfulness all goes together. In this sort of protection, the morality has to be concerning as for part of law.¹³

If someone, not on the basis of Moral basis indulges the matter, one can predict the situation of the today. In short if Morals are not the basis of the society, the world is at another disagreement of the society.

WELFENDON REPORT – HARM PRINCIPLE

In the wake of increasing homosexual offences and Prostitution a committee was formed to discuss and to come with certain

<http://fathom.lib.uchicago.edu/1/77777712190> 8/. (Last Visited Nov. 21, 2013).

¹³ Id.



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solution. The recommendation which are stated by the committee, propounded from the Mill's essay on 'Liberty'. Section 13 of the recommendation states as the main purpose to imply criminal law is to protect and maintain public order so they can be sheltered through injuriousness of the offences, corruption and exploitation.¹⁴ The results that come out by devoted oral interrogations of the witness, these offences are subject to the private consent, in the light of it one cannot be forced to apply the criminal law by taking the name of the society welfare.¹⁵ Only on the religious grounds, such sanction has no place. It should have the dominance of the private ethics and wickedness as it is not a Law's business alone.¹⁶

Through the principle of criminalization Feinberg uttered four principles that can help to apply State coercive control over the person which is affecting the liberty of individual.¹⁷ The four principles include Harm principle, Legal Paternalism, Legal Moralism and harm to oneself. According

to him, the power among them is Harm Principle because it least controversies and reason to criminalize. To criminalize, the offences should have the express link with harm of individual in society, then only purpose of the criminalizing will be favored by the society.¹⁸

DEVLIN-LEGAL MORALISM

Criminal law is for shield of the citizen, as preserve the public order and decorum.¹⁹ It protect against exploitation and corruption of others, etc but for that functioning of law it of law there should not be intrude in the personal lives of the general public.

Morals are considered as bondage which works on the basis of common thought.²⁰

The reason of every citizen's bondage in the society is just because of the morality.²¹

Morality is basic among the society. According to Devlin there is no difference between any public and private morality, to imply it as legal valid. This is how a criminal law, get involved on all matters concerned with the morality basis. The

¹⁴ H.L.A HART, LAW, Supra 4, pg 16.

¹⁵ H. A. Hammelmann, *Committee on Homosexual Offences and Prostitution*, 21 THE MODERN L. REV. 69 (1958).

¹⁶ Marvin M. Moore, Supra 1, pg 15.

¹⁷ Arvind Narain, *Obscenity as defined in Sec. 292, and IPC: Do we need such a concept?* 8 STUDENT ADVOC. 45 (1996).

¹⁸ Id.

¹⁹ Alice Ristroph, *Third Wave Legal Moralism*, 42 ARIZ. ST. L.J. 1151 (2010-2011).

²⁰ Sheela Moorthy *Moral Populism v Paternalism: A Legislator's Dilemma*, 12 SING. L. REV. 219 (1991).

²¹ Richard Francis Galvin, *Limited Legal Moralism*, 7 CRIM. JUST. ETHICS 24 (1988).

motto is to preserve the fragmentation of the society on the basis of morality apply through legislation. Through this Devlin callout three basic responses, basis for morality contains all types not one to pass judgement, society has a right to pass a judgement and enforce to it by law, which is morality basis and otherwise it leads to disintegrate in society because society is in seamless web of morality.²²

Devlin took the help of Jury- box to explain the entire implication. He stated that the judges also human being that lives in the society, on the basis of it they have also to apply the morality principle. It can't be possible that their laws are fully outside the application of the society. Due to which implication of that laws on the society will be ineffective. Devlin depicts law as minimum control not as maximum control²³

HART-PATERNALISM

The action of the state justified in the interference with person liberty due to the welfare, good, happiness, needs and

interests or values of the person being coerced.²⁴ It is well defined by Dworkin, but it is not concise as such the Paternalism has its own meaning as father-child relationship, etc. The concept of it originates from the hart's law, liberty and morality, which states Paternalism and enforcement of morality are two different concepts.²⁵ Here the Paternalism is sort of state stands for its public. Paternalism can have two scenario; negative or positive inference and attributes. It is a sort of huge debate, due its influences and affects on the way law imposed.²⁶

*To stand for citizen as Parents,*²⁷ makes incompetency to society to go with own choices. Road traffic law are one instance, but it is not necessary that all law which protects from their own recklessness are Paternalistic in nature. As safety of people itself as well as of others too, same can be seen in the example of ban on smoking in public place. But here later is consider as negative paternalism as it affects the other in indirectly while in road traffic role it was

²² Bernard E. Harcourt, *The Collapse of The Harm Principle*, 20 J. CRIM. L. & CRIMINOLOGY 115 (1999-2000).

²³ Ronald M. Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 987 (1965-1966).

²⁴ Eileen King, *Paternalism and the Law: Taking a Closer Look*, 4 U.C. DUBLIN L. REV. 135 (2004).

²⁵ Id. pg.136.

²⁶ Id.

²⁷ Dennis J. Baker, *Moral Limits of Consent as a Defence in the Criminal Law*, 12 NEW CRIM. L. REV. 93 (2009).



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welfare as whole. This how one can give his sovereignty to other for the protection but it is no consider as valid when it comes to the hasty to gives as whole to take any decision. (Mill) he justifies only where it requires the proper concerns as for childhood stage. To consider a Law as Paternalism or not it is directly depending on its implication and understanding to each case.²⁸ Mill's also contended that for best result, a decision of one conduct and his lifestyle will be more fruitful than other coercive decision.

Mill states power can only be exercised in case to prevent any hurt to others. His own well either physical or moral, is not a sufficient warrant. The object to it only comes from the harm principle. Morals are basis which he (children) takes from the society; on that basis he put steps by steps in development. So here if on the morality principle application through legal is competent enough to bring changes in the society can be good reason.

HART AGAINST LEGAL MORALISM

Hart contended on devlin moral principle that morality concept is never constant in nature; it has to be changed according to the

nature changes. So he alleges that legislature can't only rely on the morality basis, there is other factor as Paternalism that can also help in the law to put legalise as sanction to the society to follow criminal law²⁹ and a pluralistic society has different and diverse moral basis too.³⁰

JUSTIFICATION OF 'ADULTERY' LAWS THROUGH HART-DEVLIN DEBATE

To explain adultery, Drunkenness can be used to explain, as having liquor could not be interfered by the law, but if intoxication of person exceeds the limits and interfere with the legal duties towards other then it will be considered as appropriate ground to punishment.

Adultery is also considered as same here, to protect the rights of women in this society. She took lots of efforts to some out problem of society. On the Moralism basis it is not only the right infringement of the women community, of others also; child. They have equal rights. Thus, legal Moralism concept prevails here.

²⁸ Id.

²⁹ Richard Francis Galvin, 21 pg.27

³⁰ Id.

From the Paternalism perspective if Parent does bad thing or against moral it will directly affects to the child also. In short, the right to education is concerning to the society but in smoking matters it is fully folly; against the nature and one desire. This is how it emerges into the objection towards Paternalism.

On the basis of harm principle which particular for it individual harm can't be consider as adultery is harm to whole society. As per the Hart, Moralism principle can be justified at that extent where the presence of empirical facts. Here adultery has come out through the process only. Once if the criminal sanction will be removed it will lead to imbalance between the different sections of the society.

John Stuart Mill argues, it is not a justification, if act caused the harm to others, coerciveness of the action is validated at that point. This is how the Mill here rejects the Moralism. For him it is not rightfully to do or hold for the sake of the others.³¹ For him immoral can't be ground for the legitimate coercive restraint.³² But for adultery if one would ignore the

Moralism and follow the Paternalism base it will not comes out as appropriate result that one society need to overall development.

CONCLUSION

Adultery is justified on the basis of the morality in the society. The issue to legalise it on the basis of morality is valid up to what extent. The answer is quite logical if it is infringing the rights of individual a law still considers as violation of law. At present adultery is not justifiable on the ground of break of someone emotion, feeling, and the lessons that gives to the whole society.

The time is changing, historical scenario has changed one can't look it as past only. In the past justification for the adultery law on the basis of morality is fully positive in law and valid but the technology, science, everyone is taking steps towards progressive world. The love towards person is inevitable but to stop it is out of any one. But on the basis of morality if someone is put some legal sanction to stop it is fully against the choice of anyone.

³¹ Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship between the Moral Limits of the Criminal Law and the*

Expressive Function of Punishments, 5 BUFF. CRIM. L. REV. 148(2001-2002).

³²Richard Francis Galvin, *Supra* 21, pg. 26.



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If one would say for a moment the adultery laws are justified today, the question arises it is really working for the morality principle. The answer is No. Some places it is punishing for the wrong of the men only. Here where has the morality from the side of women gone? Whether it is substitute for the wrong has been done by the men in the past? Morality purpose is for the whole society and in society consists both of men and women. One can't protect women here. By commit this she is also equal responsible in the act. This is how a morality principle to legalise is fully against the choice of individual and personal life. If would apply morality to the adultery, it should concern about the both men as well as women rights.

That's the reason today we have landmark judgement on Adultery law in India, that decriminalizes it and make it as only ground of civil action for divorce.³³

BIBLIOGRAPHY

ARTICLES:

1. Alice Ristroph, *Third Wave Legal Moralism*, 42 Ariz. St. L.J. 1151 (2010-2011).
2. Arvind Narain, *Obscenity as defined in Sec. 292, and IPC: Do we need such a concept?* 8 Student Advoc. 45 (1996).
3. Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship between the Moral Limits of the Criminal Law and the Expressive Function of Punishments*, 5 Buff. Crim. L. Rev. 148(2001-2002).
4. Bernard E. Harcourt, *The Collapse of The Harm Principle*, 20 J. Crim. L. & Criminology 115 (1999-2000).
5. Candace J. Groudine, *Authority: H. L. A. Hart and the Problem with Legal Positivism*, 4 The Journal of Libertarian Studies 274 (1980).
6. Dennis J. Baker, *Moral Limits of Consent as a Defence in the Criminal Law*, 12 New Crim. L. Rev. 93 (2009).

³³ *Joseph Shine v Union of India* dated on 27 September 2018.



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7. Eileen King, *Paternalism and the Law: Taking a Closer Look*, 4 U.C. Dublin L. Rev. 135 (2004).
8. Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 Wm. & Mary L. Rev. 927
9. H. A. Hammelmann, *Committee on Homosexual Offences and Prostitution*, 21 The Modern L. Rev. 69 (1958).
10. Harinder Boparai, *Adultery and Divorce under Canada's Divorce Act and India's Hindu Marriage Act*, 35 U. Toronto Fac. L. Rev. 240 (1977).
11. Kuk Cho, *The Crime of Adultery in Korea Inadequate means for Maintaining Morality and Protecting Women*, 2 J. Korean L. 83 (2002).
12. Laurence M Vance, *Should Adultery Be Illegal?* Western Centre for Journalism, June 22, 2013 at A1.
13. Marvin M. Moore, *Diverse Definitions of Criminal Adultery*, 30 U Kan. City L. Rev. 219 (1962).
14. Maureen A. McTeer, *A Role for Law in Matters of Morality*, 40 McGill L.J. 824 (1995).
15. Richard Francis Galvin, *Limited Legal Moralism*, 7 Crim. Just. Ethics 24 (1988).
16. Ronald M. Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 Yale L.J. 987 (1965-1966).
17. Sheela Moorthy *Moral Populism v Paternalism: A Legislator's Dilemma*, 12 Sing. L. Rev. 219 (1991).
18. Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?* 34 Harvard J L. P.P. 246 (2010).
19. Vishwa Mohan, *Soon, Adultery won't be a crime but a social offence*, TOI, Feb. 14, 2007 at A1.

BOOKS:

1. H.L.A Hart, *Law, Morality And Liberty*, 14 (1st Ed. 1963).
2. John Stuart Mill, *On Liberty*, 6 (1st Ed. 1859).

SOURCES AND LINKS:

1. Hart, H. L. A. (1983) 'Social Solidarity and the Enforcement of Morality', in *Essays in Jurisprudence and Philosophy*, Oxford: Oxford University Press, pp. 248-262.



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2. http://hettingern.people.cofc.edu/Intro_Philosophy_SP_2011/Feinberg_Hard_Cases_For_the_Harm_Principle.htm
3. <https://www.heinonline.com>
4. <https://www.jstor.org>
5. Liberty *and* Utilitarianism, by John Stuart Mill, prepared by Jonathan F. Bennett
http://www.earlymoderntexts.com/f_mill.html.
6. Richard Saller, *Family Values in Ancient Home*, available at <http://fathom.lib.uchicago.edu/1/777777121908/>, Last Visited Nov. 21, 2013.
7. The Limits of laws, Stanford Encyclopedia of Philosophy Feb 27, 2006 Stanton-Ife, John, "The Limits of Law", *The Stanford Encyclopedia of Philosophy* (Winter 2008 Edition), Edward N. Salta (ed.), <http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=lawlimits>.



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