
In what extent Interference in the Actions of Individuals in a Civilised Community against their Wills can be justified?

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Abstract

In this research I discussed whether there is any justification of state interference in the actions of individuals in a civilised community against their wills. Here I considered J.S. Mill's liberal and utilitarian nature thinking and also discussed anticipatory stage of his liberty and harm to others principle by which I started writing my research. Then I followed by Mill's famous theory of the limitation of state's interference over any individual's liberty that is best known as harm to others principle. Then I discussed 2nd aspect of A.V Dicey's famous theory of rule of law in contrasting with that of J.S Mill. Therefore I quoted some lines from some famous writers' article and books, likely Victorian writer Sir Fitz James Stephen to justify Mill's so called harm principle. Furthermore, I added recommendation of Wolfenden report on homosexuality by which I tried to support Mill's view upholding his principle. However, therefore added Lord Devlin's view and his objection as to Wolfenden report then I stated broadly H.L.A. Hart's redefined and modern harm principle as well as his views regarding morality and immorality, morality and law to encounter Lord Devlin's arguments by redefining Mill's so called harm to others principle by which Hart stated that the state is justified in interfering in the actions of individuals to protect them from physical harm and that harm cannot include offence caused merely by knowledge that others acting in ways that you think are wrong.

Keywords: Interference, Justification, Actions, Individuals, Community.

Introduction

Normally it is thought that if an individual is punished by the state, it is justified. But it's not justified in every case. From ancient time, a debate has been going on amongst the people over the issue that whether the society or state can interfere over any individual of the community. All

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great philosophers including Plato to modern English philosopher Hart, all had joined in this debate. But for the first time a complete principle on this issue was represented by the most influential liberal and utilitarian English philosopher John Stuart Mill.

Mill's Ideas

However, in his essays *On Liberty*, Mill considered the nature and the limits of the power which can be exercised legitimately by the society over any individual of that society. Mill says that ‘the will of the people practically means the will of those who succeed in making themselves accepted as the majority; the people, consequently, may desire to oppress a part of their number, and precautions are as much need against this as any other abuse of power.’² This was termed by Mill as “the tyranny of the majority” and is included among evil against which society requires to be on its guard.³ Mill also says that there must be “a limit to the legitimate interference of collective opinion with individual interference.”⁴

Mill's ‘Harm to Others’ Principle

Mill also says that there is ‘no recognized principle by which the propriety or impropriety of government interference is tested. People decide according to their personal preferences.’⁵ At this point J. Mill represented his more famous and influential principle of ‘harm to others principle’ stating that “the sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right.”⁶ Furthermore Mill says that “the only part of the conduct of any one for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is

² *On Liberty* p 62 edited by G Himmelfarb, 1974.

³ *Ibid.*

⁴ *Ibid* p 63.

⁵ *Ibid* p 67.

⁶ *Ibid* p 68.

sovereign.”⁷ JS Mill thinks that if there is no harm to other there should not be any interference of the society over the liberty of any individual of a community. The main problem in Mill’s harm to other principle is that Mill ignored the extent of harm. He undermined that harm to himself may also cause to others

Dicey’s View

In the same time of Mill, A.V Dicey expressed a little contrary view of personal liberty of an individual in his book ‘Introduction to the study of law of the Constitution’. He said that no man is punishable or can be lawfully made suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of law.⁸ Therefore, it can be said that the power exercised legitimately by the society is justified on two grounds that is to say; either because a person is accused of some offence or because he has been duly convicted of some offence and must suffer punishment for it. According to Sir AV Dicey an individual can be subject to the punishment only if he commits an offence or be convicted for an offence. On the other hand, JS Mill termed it as ‘harm to others’ which Dicey believed as an offence. Therefore, if a rule or order made by a state or our society is breached then it will be considered as an offence in terms of Dicey whether it harms to other or not.

Analysis of the Principle

Ever since its publication, *On Liberty* has suffered much more criticism.⁹ Mill’s essays actually reflect his liberal and utilitarian nature of his thoughts. Great Victorian Sir Fitz James Stephen challenged the utilitarian nature of Mill’s essay. Good utilitarian grounds, he argued, were wanting in defending the liberty principle. It was what the person was at liberty to do which was of importance. He also objected to the distinction made by Mill of harm to oneself (self-regarding actions) and harm to another (other-regarding actions). Stephen believed that such a distinction was fallacious and nebulous and could not be maintained. He advocated that the legitimate function of legislation lay with punishing, *per se*, “[the] grosser forms of vice.”¹⁰ Furthermore, Stephen C Mavroghenis criticised

⁷ *Ibid* p 69.

⁸ A.V Dicey, Introduction to the Study of the Law of the Constitution (8th edition, Reprinted Liberty Classics Edition, London).

⁹ Stephen C. Mavroghenis, Mill’s concept of harm redefined (UCL Jurisprudence Review, 1994).

¹⁰ Sir J.F. Stephen, *Liberty, Equality, Fraternity* (1865. Reprinted edition, Cambridge University Press, 1967).

Mill's essays of *On Liberty* stating that Mill's liberty principle claims to be "one very simple principle" and at first reading this is indeed what it seems. According to Stephen C Mavroghenis, "the problem lies with Mill's essay itself; Mill formulates the concept of harm differently in the course of *On Liberty*. It has often been maintained that harm should be looked upon and interpreted in the light of self and other-regarding acts, the so called public-private sphere of actions. This has led to many commentators postulating that it is impossible to isolate such actions since as the metaphysical poet John Donne has told us, "*No man is an island*". All actions whether performed in private or public affect society as a whole."¹¹

Long after the J.S. Mill had represented his famous harm to others principle, in 1957 there has been a fantastic debate on the issue whether the law should actually concern with the enforcement of moral soon after the publication of Wolfenden Report.¹² The Committee was established under the chairmanship of Sir John F Wolfenden. The Committee was formed in order to consider the law and practice as to homosexual offences and the persons convicted for such offences by the courts as well as to report what changes if any. After proper investigation, the Committee had reached in a conclusion that "unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality which is, in brief and crude terms, not the law's business."¹³ Therefore, as to homosexuality, the committee recommended that "homosexual practices between consenting adults in private should no longer be a crime."¹⁴ In relation to prostitution the committee said that "we are not attempting to abolish prostitution or to make prostitution in itself illegal. We do not think the law ought to try to do so ... What the law can and should do is to ensure that the streets of London and our big provincial cities should be free from what is offensive or injurious."¹⁵ Mill's liberty and harm theory, in reality, had been reflected in Wolfenden report and this had again resumed the modern debate on harm principle which had ended in Hart versus Devlin debate. Following this debate Hart redefined Mill's harm theory and approached his modern harm principle.

¹¹ *Ibid* p 3.

¹² Cmnd. 247 H.M.S.O London.

¹³ *Ibid* para 257.

¹⁴ *Ibid* chap 5, para 61.

¹⁵ *Ibid* chap 9, para 285.

Hart v. Devlin

After the publication of Wolfenden report, the debate began on whether morals behaviour should be criminalised. Lord Devlin gave his assessment of the issues conducted by the report in his book *The Enforcement of Morals*.¹⁶ He discussed over the topic: between crime and sin and to what extent, if at all, should the law of England concern with the enforcement of morals and punish sin or immorality as such? In response to this answer Devlin expressed his view saying that morality is that which the ordinary man ‘on the Clapham omnibus’ thinks and those moral views that a man has for which he has very strong feelings of indignation are, just for that reason, enforceable by criminal sanction. Lord Devlin opposed to the recommendation of Wolfenden report regarding the decriminalisation of homosexual acts between consenting adults in private on law and morality grounds. He also considered that “the suppression of vice is as much the law’s business as the suppression of subversive activities”¹⁷ In his argument Devlin went beyond Mill’s harm to other’s principle and liberty where Mill believed that no one should be penalised without being responsible to cause harm to others. In the final chapter of his book, Devlin pointed out another additional issue. He opined that as the law takes into account moral turpitude in determining punishment for a crime so it is reasonable for law to be equally concerned with moral turpitude in deciding whether a particular act should be a crime.¹⁸

However, in response to Lord Devlin’s argument Hart accepted Mill’s so called ‘harm to others’ principle by expanding it to his modern Harm principle and uses it to encounter the arguments of Lord Devlin. Hart explains the key difference between two sides in this debate in terms of a practical example that the fact that racial discrimination was held morally acceptable in different societies did not, on the utilitarian analysis, show that it was justifiable to enforce this practice by law.¹⁹

Before setting out his argument Hart points out two issues, the first case to be taken by proponents of the argument for punishing sexual immorality as such in England was *Shaw v. DPP* [1961] 2 All ER 446.²⁰ Shaw composed and procured the publication of a magazine called the Ladies Directory, which gave the names and addresses of prostitutes, in some cases nude photographs and an indication in code of their practices. Shaw was

¹⁶ Patrick Devlin, *The Enforcement of Morals* (Oxford 1965).

¹⁷ *Ibid* p 15.

¹⁸ *Ibid* last chapter.

¹⁹ *The Morality of Criminal Law*, 1959 p 37.

²⁰ Baiili.

convicted at the Central Criminal Court on an indictment containing three counts which alleged the following offences: (1) Conspiracy to corrupt public morals; (2) Living on the earnings of prostitution contrary to section 30 of the Sexual Offences Act, 1956; and (3) Publishing an obscene publication contrary to section 2 of the Obscene Publications Act, 1959.²¹ His appeal to the House of Lords had been dismissed.²² Secondly Hart pointed out the recommendations made by Wolfenden Committee in 1957 relating to changes to the law in the areas of homosexuality and prostitution.

At this stage Hart argues that ‘the controversy as to whether the enforcement of morality is morally justified or not involves discussing morality at two separate points.’²³ Not only is the issue about morality but it is also a question of morality. Considering this, Hart distinguishes between utilitarians as “positive morality”, which is the morality accepted and shared by a given social group and “critical morality,”²⁴ which is the general moral principles used in the criticism of actual social institutions, including positive morality. Therefore he goes on to introduce the importance of the issue of justification. He considers that ‘the use of legal coercion by a society calls for justification as something *prima facie* objectionable to be tolerated only for the sake of some countervailing good.’²⁵ He identifies two objectionable consequences, namely the fact that enforcement involves punishing the offender resulting in some form of depravation. The other relates to those who are coerced into obedience by the threat of legal punishment. This has the undesirable consequence of impeding the exercise by individuals of free choice but also, in the context of a law enforcing a sexual morality, the repression of sexual impulses. Hart considers that “the consequences of this form of repression are different from those involved in the abstention from ordinary crime and he sees it as involving something which affects the development or balance of the individual's emotional life, happiness and personality.”²⁶ Then, after drawing on the distinction already made between positive and critical morality, he raises the issue as to which morality is to be enforced. On this point, the utilitarians and their critics differ. For the utilitarians, likely J.S. Mill, law should only punish activities, which are harmful, regardless of whether the utilitarian morality has been accepted as the positive morality of the society while their critics consider that it is precisely because certain

²¹ Bailli.

²² *Ibid.*

²³ HLA Hart, *The Law, Liberty and Morality* (Stanford University press 1962) p. 17.

²⁴ *Ibid* p. 20.

²⁵ *Ibid.*

²⁶ *Ibid* p. 22.

standards of behavior enjoy the status of a society's positive morality that they are enforced by law.

Hart goes on to develop further his thesis by arguing that 'the examples given by opponents of the utilitarian-based approach are not accurate examples of the use of law solely to enforce morality.'²⁷ The third of his examples, the crime of bigamy, is the perhaps most insightful for the purposes of examining the theoretical underpinnings of the law in Scotland on offences of indecency. Hart acknowledges that "there are a variety of harm-based reasons for punishing the bigamist. These include the need to protect public records from confusion or the need to protect religious feeling from offence by a public act desecrating the ceremony of marriage."²⁸ Furthermore, he adds that 'intervention by law on this latter ground involves punishing the bigamist neither as irreligious nor as immoral but as a nuisance.' Like the Lord Justice Clerk's reasoning in *Dominick*, Hart considered that correctly conceptualized, law is not concerned with the immorality of the bigamist's private conduct but with the offensiveness to others of his public conduct. He points out that the importance of this distinction can be seen by reference to the fact that in the past any denial of the truths of Christianity were punished as blasphemy whereas in modern times we would only consider punishing this behavior if made in an offensive or insulting manner likely to cause a breach of the peace. A similar dividing line exists in relation to sexual matters. This is not a new concept for in Roman times a distinction was drawn between the Censor, who was concerned with morals, and the Aedile, who was concerned with public decency. Although this distinction has sometimes been forgotten, Hart reinforces the point by reminding us that "sexual intercourse between husband and wife is not immoral, but if it takes place in public it is an affront to public decency."²⁹ While Hart acknowledges the slight force of the argument that distress caused by the bare thought of others offending in private against morality could be encompassed by the harm model, like the Lord Justice Clerk in *Dominick* he considers that these cases are of subsidiary importance and that they cannot be acknowledged by anyone who recognises individual liberty as a value.³⁰

Hart similarly dismisses the substantive arguments made by those in favour of the legal enforcement of morality. He considers that Lord Devlin advances a moderate thesis while Stephen proposes an extreme thesis. This

²⁷ *Ibid* p. 41.

²⁸ *Ibid* p. 42-44.

²⁹ *Ibid* p. 45.

³⁰ *Ibid* p. 46.

thesis requires that even conduct, which may not cause any harm, must nevertheless be viewed in terms of its effect on the moral code. A breach of moral principle, therefore, is an offence against society as a whole and society may use law to preserve its morality as it uses it to safeguard anything else essential to its existence. This is why the “suppression of vice is as much the law’s business as the suppression of subversive activities.”³¹ Lord Devlin does not offer a proven causal link between an immoral act and the breakdown of society and Hart attributes this inadequacy to what he terms an “undiscussed assumption”³² on the part of Lord Devlin. According to Hart, the basis for this assumption was Lord Devlin’s idea that all moralities, including sexual morality, form a single seamless web so that those who deviate from any part are likely to deviate from the whole. From this acceptable proposition that shared morality is essential to the existence of society, Hart detects a move to an unacceptable proposition that a society is identical with its morality at any given point in time. Viewed in this light, any change in morality is the equivalent of the destruction of society. It is on this basis that Lord Devlin makes his argument that law must prohibit private immorality and that sexual immorality, even when it takes place in private, is tantamount to treason. Hart argues that ‘far from being like a violent overthrow of government a society’s change in morality is more like a peaceful constitutional change in the form of government. Such changes are consistent not only with the preservation of society but with its advance.’³³ The extreme thesis prizes the enforcement of morality not merely for its instrumental value but also for its inherent value. Thus, on this model, there is no need to show harm or how the act weakened the moral fibres of society.

The most important issue Hart considers is means of enforcement that is coercion. Hart says that ‘punishment is the appropriate return for evil committed. He added that a theory which does not attempt to justify punishments by its results, but simply as something called for by the wickedness of a crime, is certainly most plausible and perhaps only intelligible, where the crime has harmed others, and there is both wrongdoer and victim’ - when it is felt that it is right or just that one who has intentionally inflicted suffering on others should himself be made to suffer.’³⁴ Hart also opined that apart from any justification that can be found for the punishment of immorality on the grounds of retribution then punishment can be justified on the ground that it has value as

³¹ Patrick Devlin, *Enforcement of Morals* (Oxford university press 1965) 139.

³² *Ibid* p. 53.

³³ *Ibid* p. 52.

³⁴ *Ibid* p. 39.

denunciation.³⁵ Then Hart says about ‘those who believe that law should properly fulfil this denunciatory function in reality they are saying that law should act to instil and strengthen respect for moral code’³⁶ Hart says that “moral values are changeable from time to time with social changes. So, the use of legal punishment to freeze into the immorality at a particular time in a society’s existence may possibly succeed but even where it does contribute nothing to the survival of the animating spirit and formal values of social morality and may do much more harm to them.”³⁷ Though Hart did not believe on punishment for immorality but at least believes that citizens should be encouraged to follow moral rules rather than legal coercion.

Conclusion

So, can it be said that interference in the actions of individuals in a civilised community against their wills is justified? There are a number of justifications, most of them are as follows: that interference in the liberty of an individual by the society or any sort of punishment will only be justified and accepted if his acts causes harm to others or poses others into the risk of harm or he is accused of some offence or because he has been duly convicted of some offence.

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