VOL.2 ISSUE.2
DROIT PENALE: INDIAN LAW JOURNAL ON CRIME AND CRIMINOLOGY (ONLINE)
ISSN:2456-7280

CRIMINALISING CONSENT
MILL'S HARM PRINCIPLE AND VICTIMLESS CRIMES

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ABSTARCT

Criminal law is the use of coercive power of the state. It is one of the most repressive ways in which the state defines acceptable behaviour. Thus, the question of criminality is inherently political and is related to the legitimate domain of state power. This paper uses John Stuart Mill's harm principle to attempt to define the legitimate scope of criminal law. The harm principle states that the state can only interfere with an individual's behaviour if it harms others in a significant way. It defines harm very carefully, excluding mere dislike or disapproval. In studying the concept of victimless crimes, those crimes that do not cause perceptible or significant harm to others, this principle becomes important. Using substance use and attempted suicide, it is argued that the lack of harm to others should be a sufficient ground to remove such acts from the reach of criminal law and that harm to the agent is not a sufficient ground for coercive or paternalistic interference by the state.

The harm principle

The legitimate contours of state authority have been debated since the inception of the state. Through the years, governments have tried to outlaw acts, behaviours and practices. Justifications for such legislation range from harm accruing to society to harm to the agent herself. This debate becomes even more polarised when the question of criminal conduct is raised. A crime is, by definition, an act that causes harm to larger society. The value of the harm principle lies here.

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In *On Liberty*, Mill defined the 'limits to the authority of the society over the individual'. In this, he differentiated between self-regarding conduct ("the part of life in which it is the individual which is chiefly interested") and other-regarding conduct ("the part which chiefly interests society"). According to him, power can only be rightfully exercised over an individual to prevent harm to others. Her own good, moral or physical, is not sufficient.[2] This harm may be violation of others' rights. Mill explains it further:

> Encroachment on their rights; infliction on them of any loss or damage not justified by his own rights; falsehood or duplicity in dealing with them; unfair or ungenerous use of advantages over them; even selfish abstinence from defending them against injury—these are fit objects of moral reprobation, and, in grave cases, of moral retribution and punishment.

Harm can be a violation of others' rights or a setback of their interests. Thus the criminalisation of murder for violation of another's right to life and the criminalisation of theft for the violation of someone's right to property. There is also larger societal harm when others' rights are infringed upon, as aggregate liberty of the society is brought down.[3]

However, no action can be seen as purely self-regarding or purely other-regarding. Therefore, if an agent acts in a way that *primarily* concerns with herself, she cannot be held criminally liable for it even if some significant or direct harm may be borne by society or other individuals. This conduct may end up harming others. Consumption of alcohol need not be criminalised, yet when done by a public servant such as a policeman or soldier, it hinders the performance of a definite duty incumbent on him to the public. This makes it a social offence.

Moreover, Mill also introduced actions that can "cause or are likely to cause" harm to others, which would include modern concepts of criminalisation such as negligence (e.g. driving under the influence of intoxicants) or recklessness (e.g. engaging in unprotected sex when the agent knows that he has a venereal disease). However, the causal link must be direct and immediate.

There are several questions within this simple maxim. The first being what comes under "other".[4] If the state can be identified as an entity which can experience harm, the criminalisation of sedition or treason would be justified within the principle. Mill himself only used the terms 'public' or 'society'.

[2] John Stuart Mill, On Liberty (1859).
[3] This would be a utilitarian understanding.
[4] Nina Peršak, Criminalising harmful conduct (2010).

Moreover, he criticised offences against religion and thus an analogy may be drawn with other power structures such as that of the state. Similarly, he saw society as consisting of individuals and thus harm must accrue to an actor and not the abstract notion of society.[5]

Second, there is debate about what would encompass Mill's notion of 'harm'. While traditional harms like harm to physical integrity or property are fairly uncontested, there is much contention around the concept of psychological harm. Mill had dismissed mere dislike or disagreement as an insufficient ground for intervention. In Jonathan Riley's reading,[6] "harm" means "perceptible damage" and thus emotional effects on others' feelings are excluded. However, such acts may be "justly punished by opinion, though not by law". Such "natural penalties" may include distaste or contempt. This is because such acts may *affect* others, but do not *harm* them.

The harm principle forms the bedrock of liberal principles such as individual liberty and toleration. It played an important part in the decriminalisation of homosexuality in England. In other contexts, it has been used to defend IVF, surrogate motherhood and abortion, arguing that the law should not prevent any mode of family formation that does not directly harm others.[7] It is now an accepted tradition in liberal jurisprudence.

The dangers of superseding the harm principle involve a threat to liberty of individuals. If criminal law becomes a tool to impose morality, it is the majority's morality which would be imposed. Mill is thus opposed to legal paternalism or legal moralism. Thus, the harm principle may be seen as a doctrine of state neutrality between different conceptions of the good.[8] Vesting the state with such totalitarian powers to decide what is moral and what is immoral would mean that they are more likely to be abused to the prejudice of liberty. The state can enter the intimate or private sphere of individuals, an area in which the state "has no business" and the individual should have sovereignty and "have perfect

[5] This would mean that under international law, genocide (the targeted killing of a community) would be no different from a crime against humanity, since the 'community' would not distinguish the nature of the crime and harm to individuals would be the only threshold required.
6 Jonathan Riley, '*One Very Simple Principle*', 3 Utilitas 1-35 (1991).

[7] Max Charlesworth, Bioethics in a liberal society (1999).
[8] Nils Holtug, *The Harm Principle*, 5 Ethical Theory and Moral Practice 357-389 (2002).

freedom, legal and social, to do the action and stand the consequences".[9] It is with this danger to liberty in mind that we begin our discussion of criminalisation of victimless crimes.

Contours of criminality

Criminalisation is inherently political. The world of politics penetrates the world of law through criminal policy. The power to criminalise certain conduct has immense power in shaping values, dividing the population into criminals and non-criminals and defining the contours of legitimate conduct.[10] It can be seen as an act by which the state interferes with and restricts the autonomy of the individual by proscribing certain conduct. As Mill wrote, "all restraint, *qua* restraint, is an evil".

The manipulation of people's conduct requires justification, especially when it is accompanied by censorious and punitive treatment of those who do not comply. A principles-based procedure of criminalisation is composed of two main parts:

> First, a decision must be taken on whether a given human conduct is wrongful and whether it should fall under the domain of the law. A positive answer for this does not lead to automatic application of criminal law. The legal order offers also other means of control of human conduct, such as civil or administrative law. Besides other, extralegal, ways of regulation should not be disregarded. The next step consists in the application of principles of criminalisation. Their action is twofold. First, they help decide whether criminal law is "the" kind of regulation that should be applied. If their application leads to a conclusion that a criminal law rule should be added to the legal order, their second objective is to determine minimal standards for the proper formulation of the rule.[11]

On the first condition of the wrongfulness of the act, we shall examine the dominant debate between the theory of legal moralism and the harm principle theory. The former, advocated by Lord Patrick Devlin, sees law as an instrument to uphold morality. This approach, however, raises several questions. Is immorality a sufficient ground for criminalisation? Which notion of morality is to be used in a multicultural society?[12]

[9] John Stuart Mill, On Liberty (1859).
[10] Nina Peršak, Criminalising harmful conduct (2010).
[11] Iwona Seredyńska, Insider Dealing and Criminal Law (2014).
[12] The debate on the burqa would be illustrative here, with differing notions of women empowerment as the right to choose modest clothing and resist objectification or reject imposition of an oppressive dress code.

The second theory, for many legal scholars, is seen as "the starting point of any discussion of criminalisation".[13] As explained above, this liberal theory of wrongfulness is based on violation of human rights, thus setting aside subjective notions of harm.[14] It considers factors such as causation, intensity of harm and identity of victim (as an individual actor or member of society). This theory is opposed to that of legal paternalism, which sees some behaviour as inherently wrongful as it harms the actor herself. This approach undermines personal autonomy and gives criminal law an infinite jurisdiction and is thus rejected here.

Regarding the second dilemma, the question is raised if use of other legal or extra-legal tools would achieve sufficient results as desired by society. The goal of the state is to find the legal means that would achieve their goals but would not unnecessary limit individuals' freedom, which is the idea behind proportionality of punishment. For instance, if taxation of cigarettes satisfies the goal of deterrence, criminalisation is not required. The principle of subsidiarity, moreover, assumes that the intervention of a higher rank entity should take place only if the treatment of the lower level is not enough to deal with a given issue. Thus the intervention of criminal law is justified only if other branches of law are not able to solve the problems arising from the given behaviour. This stems from the fact that criminal law reflects the strongest powers a state can exercise towards its citizens. Therefore, such power should be used prudently.[15]

Till now we have been focusing on the normative principle of harm as a ground for criminalisation. A more empirical analysis may be beneficial here. Such a study of the harm principle and its role in criminalisation has been conducted by Avani M. Sood and John M. Darley.[16] They begin by highlighting the universality of acceptance of the harm principle in legal discourse. The Model Penal Code of 1962[17] forbids and prevents "conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests" and this has been recognised in several judgements

[13] Andrew Ashworth, Principles of criminal law (2003).
[14] To the extent that human rights can be seen as objective.
[15] Iwona Seredyńska, Insider Dealing and Criminal Law (2014).
[16] Avani Mehta Sood & John M. Darley, *The Plasticity of Harm in the Service of Criminalization Goals*, 100 California Law Review 1313-1358 (2012).
[17] The MPC of 1962 was developed by the American Law Institute (ALI).

such as *Lawrence v. Texas* (2003).[18] They conducted several studies to test the predominance of this notion amongst the citizenry.

In the first study, the respondents were presented with acts "so contrary to widespread social values" that people would want to criminalise them regardless of the harm caused. All respondents identified criminality in harm, except in three situations of public nudity, flag defiling and self-cannibalism. In these situations they allowed criminalisation even in the absence of harm. The second experiment studied the plasticity of harm and respondents were told that harm is a necessary condition for criminalisation and found that several individuals imputed harm to fit this criterion. This shows rigidity of people's criminalisation goals as compared to reports of plasticity of harm in order to achieve the goals within the paradigm that was set. In their third study, they found out that harm is more likely to be imputed in cases of ideological difference. Participants recommended punishing an individual accused of public nudity differently based on whether the additional caveat of him advocating abortion (and the respondents' stand on the issue) was added. Incongruence of ideologies led to higher punishment.[19]

This study shows the dominant role the harm principle plays in intuitive opinion-formation on criminalisation and its wide acceptance. But the neutrality and objectivity of the principle must be assessed carefully for its utilisation. This need not mean a rejection of the harm principle. It functions as an ideal model and deviance to it can be studied and rectified without questioning its legitimacy.

Victimless/Harmless?

A victimless crime is at the centre of the intersections between crime and the harm principle. A victimless crime, according to *West's Encyclopaedia of American Law*, is one where there is no apparent victim and no apparent pain or injury and thus no harm. This includes activities that only concern the individual or activities between consenting adults. However, an exact definition of victimless crimes is difficult as the concept is not used univocally in the literature on it. Thus, we shall stick to a broad idea of the concept.

[18] In *Lawrence v. Texas*, the Court struck down a law criminalising sexual intercourse between individuals of the same sex.
[19] Interestingly, when asked to explain their decision, they listed harms associated with nudity and not their opinions on abortion.

The term first gained traction when Edwin Schur wrote *Crimes without Victims*[20] in which he wrote that 'borderline crimes' have less to do with the characteristics of behaviour than with the social processes by which certain behaviours and people who engage in them are labelled as 'deviant'. An element of consent, Schur averred, "precludes the existence of a victim—in the usual sense of the word," hence the coinage "victimless crimes."

Such crimes are border line for several reasons.[21] First, the agents involved do not perceive themselves as victims and thus there is an element of consent. The second reason is that such crimes are viewed ambivalently. They are located in a moral grey area and public attitudes towards them are characterised by temporal ambivalence and lack of consensus at any point in time. Ambivalence also characterises many individual attitudes. For instance, same-sex relationships may be tolerated privately with state-sponsored disapproval in the public.

The question then is – would victimless be equivalent to harmless in criminal law? If harm has been done to the actor consensually, it may be wrongful but it does not constitute "injury".[22] Several scholars have identified a "crisis of over-criminalization"[23] and society's tendency to "coerce virtue".[24] Others, such as Lord Devlin argued for legal moralism because "society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies".

Mill differs with Lord Devlin. His proclamation that all persons should be free to "go to Hell in their own way" has made important contributions to law. The argument for decriminalisation of victimless crimes is two-fold: first, an a priori claim is made about the proper scope of criminal law and second, a set of utilitarian claims are advocated about the undesirable consequences of enforcing statues that lie beyond the proper scope of criminal law.[25]

[20] Edwin M Schur, Crimes without victims (1965).
[21] John Dombrink & Daniel Hillyard, Sin No More (2007).
[22] Nina Peršak, Criminalising harmful conduct (2010).
[23] Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 American Criminal Law Review 17-34 (1968).
[24] Jerome H Skolnick, Coercion to virtue: a sociological discussion of the enforcement of morals (1967).
[25] Alan Wertheimer, *Victimless Crimes*, 87 Ethics 302-318 (1977).

The first argument starts with the proposition that immorality is not a sufficient condition for illegality as the function of criminal law is to protect persons and property. Ideally, the law must be stripped of its "moralistic excrescences" and remove itself from the realm of private morality.[26]

The utilitarian argument goes like this: some laws produce more social harm than good. Criminalisation has severe consequences for the accused/convict but the putative gain to the society is less than the costs borne by the individual. The enforcement of such laws is seen as discriminatory (for instance, an overwhelming amount of prisoners convicted of drug-related crimes belong to ethnic minorities) and high frequency of arrest puts an extremely heavy burden on the criminal justice system and these resources could be channelled elsewhere for better returns to society. These laws are also ineffective from the perspective of deterrence as the activities are consensual or private or not severely condemned by prevailing social norms.[27]

This paper mainly focuses on the former argument; however it is important to consider the utilitarianism in Mill's thought when examining what his stance on today's moral debates would be, an issue that we turn to now.

The argument for decriminalisation

(i) Drugs

Drugs lie at the intersections of personal choice and societal harm. The argument for the decriminalisation of narcotics is made both principally and practically. While the latter is concerned with the costs of criminalisation (e.g. black marketing, unhealthy practices such as use of infected needles, stigmatisation), we focus on the former here.

Mill's harm principle says that the only ground for criminalisation is harm, which cannot be restricted to only the agent. Here an examination of Mill's opposition to the prohibition laws is essential, as it is analogous to the matter at hand.[28] He was of the opinion that such laws, first, attacked private liberty as their ultimate purpose was to discourage the private consumption of alcohol. Since the act of drinking

[26] Norval Morris & Gordon Hawkins, The honest politician's guide to crime control (1970).
[27] Edwin M Schur, Crimes without victims (1965).
[28] Mark H. Moore, *Drugs, the Criminal Law, and the Administration of Justice*, 69 The Milbank Quarterly 529 (1991).

belonged to the private domain and did not impose substantial and unavoidable harms on others, it was wrong for the state to discourage such conduct. Second, he had a moral disagreement with the argument made by prohibitionists which he states in *On Liberty*:

> The Secretary . . . says, "I claim, as a citizen, a right to legislate whenever my social rights are invaded by the social act of an- other. ... If anything invades my social rights, certainly the traffic in strong drink does. It destroys my primary right of security, by constantly creating and stimulating social disorder. It invades my right of equality, by deriving a profit from the creation of a misery I am taxed to support. It impedes my right to free moral and intellectual development, by surrounding my path with dangers, and by weakening and demoralizing society, from which I have a right to claim mutual aid and intercourse."

To this, he responds:

> A theory of social right, the like of which probably never before found its way into distinct language: being nothing short of this- that it is the absolute social right of every individual, that every other individual shall act in every respect exactly as he ought; that whoso- ever fails thereof in the smallest particular, violates my social right, and entitles me to demand from the legislature the removal of the grievance. So monstrous a principle is far more dangerous than any single interference with liberty; there is no violation of liberty which it would not justify. .... The doctrine ascribes to all mankind a vested interest in each other's moral, intellectual, and even physical protection, to be defined by each claimant according to his own standard.

He was, however, willing to allow some restriction on who could sell alcohol. This is because selling can be seen as a social act, one that falls under the ambit of other-regarding conduct. Moreover, he was willing to punish individuals who commit crimes while intoxicated. What must be noted here is that the wrongful consequences of drinking are criminalised, not the act itself.

Criminalisation of substance use can thus be characterised as the medicalization of an issue to provide post-hoc justifications of moral injunctions.[29] Since opiates are characterised as a threat, the citizens have to be 'protected' and this legitimises increasing state intervention. Thus, the war on drugs is a tendency to "criminalise social policy".[30] Garland has called this approach "penal-welfarism" which creates a "culture of control".[31]

The first question here is whether substance use can cause harm, as defined at length earlier. In its most explicit form, it may be linked to crime. While many of those arrested for murder, robbery, and burglary use drugs, and criminal offenders who use drugs are among the most active and dangerous

[29] Norbert Elias, The Civilizing Process (2000).
[30] Michael Shiner, *British Drug Policy and the Modern State: Reconsidering the Criminalisation Thesis*, 42 Journal of Social Policy 3 (2013).
[31] David W. Garland, Culture of Control (2001).

criminal offenders, these facts do not prove a causal link between drugs and crime.[32] Perhaps the reason that drug users commit crimes is that crime is the only way they can earn enough money to pay for the drugs, which is a direct consequence of their illegality. Indeed, these alternative explanations gain increased credibility from experiments indicating that the direct pharmacological effects of many illicit drugs (including heroin and marijuana) is to make users pacific rather than aggressive at least while they are under the influence of the drug.

Other harms may include psychological harm and propensity to cause accidents or attacks. On the first, Mill would not see this as substantial harm unless it violates the human rights of others or is a significant setback to their interests. Thus, disagreement over moral ends is not sufficient harm. On the second, unless it poses a significant risk and more often than not *causally* leads to accidents or attacks, the argument does not hold. Since harm to oneself is based on consent and since the actor who makes the decision is the one who has to bear its costs, paternalism is not a sufficient reason for intervention.

The decriminalisation thesis must also recognise that drugs lie on a spectrum. Thus, if the harmlessness of cocaine or heroin cannot be proven, it should not lead to a blanket criminalisation of substances such as marijuana.

(ii) Suicide

Until March 2017, attempt to commit suicide was a criminal offence under Section 309 of the Indian Penal Code. It was only after the Mental Health Care Act, 2017 was promulgated that the decriminalisation of suicide happened in India. Aside from the discourse on mental healthcare, suicide is also an important test for the harm principle. While it was initially criminalised to impose a Catholic morality that treats life as sacrosanct, does it have any value in a secular society?

Suicide can cause harm to loved ones by depriving them of the bond they share with the individual who takes her life. It can also harm them materially if, for instance, the individual is a parent or the breadwinner of the family. It can be argued that such individuals have duties, an exception that Mill allowed. However, the duties of a parent to a child or a spouse cannot be seen as absolute as this is a slippery slope that would allow paternalistic intervention. As discussed above, substance use by a parent can also compromise the interests of the child. In fact, the logical conclusion to this is that the

[32] J. M. Chaiken & M. R. Chaiken, Varieties of Criminal Behavior (1982).

interests of the child need to have equal weight in any decision made by the parent – which would raise questions about the moral legitimacy of abortion. Thus, while it is difficult to atomise the individual, seemingly arbitrary lines need to be drawn for the preservation of individual autonomy.

Mill would even allow suicide on utilitarian grounds. Cases in which life has become such that it is not worth living, in the case of terminal illness or severe mental illness for instance, the aggregate benefits of ending one's life may outweigh the costs of sustaining it. In this case, the permissibility of harm to the agent may not even be required, since there can be benefits to the agent. The individual herself can make a decision about the costs and benefits and an outsider, especially society, need not morally evaluate her options.

Conclusion

In a world where the state is ever-expanding and assuming powers to define what is 'correct' and what is not, the autonomous sphere of the individual is shrinking. The importance of the harm principle lies in its ability to delineate objective criteria to define an individual's rights vis-a-vis the society. While it is being questioned and reinterpreted every day, whether on the question of the definition of harm or the fiction that 'self-regarding' action can be, the legitimacy it occupies in liberal jurisprudence and most modern democracies is nearly unquestioned.

The era of multiculturalism would benefit from embracing the harm principle. When cultures interact, their values clash and more often than not, in the absence of consensus, it is the majority will that is imposed. The harm principle can therefore be used as a means of conflict resolution, the bare minimum that can be agreed upon when dealing with the sensitive issue of penal conduct.

The threat to liberal values due to the rise of the Far Right is a strong reason to bring the discourse back to Mill. Paternalistic orders such as US President Donald Trump's decision to unilaterally disallow funding to international agencies which promote birth control must be opposed for the harm they cause to individual liberty.

In the absence of a clearly defined notion of criminality, the daily freedoms of individuals would be attacked and citizens would be turned into manufactured products controlled by states. Thus, theories such as the harm principle ought to be used to constantly defend against attacks on liberal democratic principles.