
LOVE, LAW AND LIMITS: THE CONSTITUTIONAL LIMITS OF CRIMINALIZING CONSENSUAL ADULT RELATIONSHIPS

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ABSTRACT

The extent to which the State may employ criminal law to regulate the consensual private relationships of adults remains a significant constitutional and jurisprudential question. This essay examines whether criminal sanctions are a legitimate means of enforcing societal morality in matters of personal autonomy, marriage, and intimate relationships. Drawing upon liberal constitutional theory, particularly John Stuart Mill's Harm Principle, and contrasting it with theories of legal moralism, the paper argues that criminal law should be confined to preventing tangible harm rather than enforcing prevailing moral or social norms. Through an analysis of judicial decisions including *Shayara Bano v. Union of India*, *Lawrence v. Texas*, *Dudgeon v. United Kingdom*, *Lata Singh v. State of U.P.*, and *Shafin Jahan v. Asokan K.M.*, the essay evaluates the constitutional principles of liberty, dignity, privacy, and decisional autonomy. It further critiques the criminalization of instant triple talaq as an example of punitive state intervention despite the underlying act having been declared legally void and argues that issues arising from consensual relationships are more appropriately addressed through civil legal mechanisms rather than penal sanctions. While emphasizing that the State bears an unequivocal duty to criminally prosecute coercion, abuse, and honour-based violence, the paper contends that consensual adult relationships must remain beyond the reach of the criminal justice system. It concludes that a constitutional democracy committed to individual liberty should distinguish between protecting citizens from harm and policing private moral choices, thereby preserving the fundamental rights guaranteed under the Constitution.

I. Introduction

The core question “whether the state possesses the legitimate authority to wield its coercive criminal apparatus to police the consensual, private relationships of adults” strikes at the very heart of what it means to live in a free society. This essay argues that modern constitutionalism, human rights jurisprudence, and liberal democratic values support limiting the use of criminal law in regulating consensual adult relationships¹. Article 21 has been judicially interpreted to encompass privacy, dignity, decisional autonomy and the freedom to make intimate personal choices. The constitutional right to privacy recognised in *Justice K.S. Puttaswamy v. Union of India*² firmly establishes decisional autonomy in matters concerning intimate personal choices. Criminal law is the most draconian tool at a state's disposal.³ It is characterized by the deprivation of liberty, social stigma, and punitive incarceration - utilizing such a blunt instrument to police the bedrooms, romantic choices and matrimonial disputes of consenting adults is not only a disproportionate overreach of state power but also a fundamental violation of individual autonomy. When the state criminalizes personal relationships to appease societal norms, it effectively prioritizes majoritarian moral sensibilities over the fundamental rights to privacy, dignity, and liberty.

II. Harm Principle vs. Moral Policing

John Stuart Mill's Harm Principle, articulated in *On Liberty*, holds that the only legitimate justification for state coercion is the prevention of harm to others. This principle illustrates why criminal law is ill-suited⁴ to govern consensual personal relationships. Notions like their own good or moral philosophies are not sufficient to warrant deprivation of fundamental rights or to dictate someone's personal choices. Lord Devlin⁵ argued that society possesses a legitimate interest in enforcing its shared morality through criminal law to preserve social cohesion. In contrast, H.L.A. Hart rejected this view, maintaining that moral disapproval alone cannot justify criminal sanctions⁶. Legal moralism is the theory that the State may legitimately prohibit conduct solely because society regards it as morally objectionable. Prohibiting consensual private conduct solely on the basis of social disapproval is inconsistent with the

¹ Ronald Dworkin, *Taking Rights Seriously* (Harvard Univ. Press 1977) & M.P. Jain, *Indian Constitutional Law* (9th ed., LexisNexis 2023).

² *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

³ Andrew Ashworth, *Principles of Criminal Law* 17–22 (9th ed. 2022).

⁴ Andrew Ashworth, *Principles of Criminal Law* 17–22 (9th ed. 2022).

⁵ Patrick Devlin, *The Enforcement of Morals* 10–18 (1965).

⁶ H.L.A. Hart, *Law, Liberty and Morality* (1963).

constitutional principles of liberty, privacy, dignity and personal autonomy unless the restriction is supported by a legitimate state interest and satisfies constitutional scrutiny.

III. The Triple Talaq Conundrum

One of the most striking contemporary example of the state misusing criminal law to regulate matrimonial expectations would be the legislative response to *talaq-e-biddat* (instant triple talaq) . In the landmark case of *Shayara Bano v. Union of India*⁷, the SC rightfully struck down the practice of triple talaq declaring it arbitrary, unconstitutional and void in law. The legal consequence of this judgment was clear and sufficient - if a Muslim man pronounced instant triple talaq, it had zero legal effect. The marriage remained entirely intact, and the husband remained legally obligated to maintain his wife.

Later in 2019 the Muslim Women (Protection of Rights on Marriage) Act was introduced which criminalized the pronouncement of instant triple talaq, making it a cognizable, nonbailable offence punishable by up to three years in prison. This step was fundamentally illogical and entirely unnecessary. Supporters of the legislation argued that civil invalidation alone had failed to deter the practice and that criminal sanctions were necessary to protect Muslim women from arbitrary abandonment⁸ They further contended that the legislation had both symbolic and deterrent value.

Some constitutional scholars have nevertheless defended the criminalization of instant triple talaq on the ground that purely civil remedies often fail to adequately protect vulnerable spouses. They argue that criminal sanctions serve not merely as punishment but as a strong deterrent against arbitrary abandonment, reinforce the constitutional commitment to gender justice, and signal that discriminatory practices will not be tolerated. From this perspective, the 2019 Act represents a legitimate exercise of the State's obligation to protect women from systemic discrimination and unequal treatment.

However, criminalizing a legally void utterance introduces a bizarre paradox because why is a man sent to prison for attempting to end a marriage in a way that the law says is impossible anyway. Furthermore, this criminalization actively harms the very women it claims to protect. If a husband is incarcerated for three years, he is stripped of his ability to earn a livelihood,

⁷ *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

⁸ Statement of Objects and Reasons, Muslim Women (Protection of Rights on Marriage) Bill, 2019.

making him entirely incapable of providing the financial maintenance his wife and children require. Merely declaring the divorce void was enough. All appropriate measures to settle matrimonial disputes lie within the civil court, even when seeking protection under domestic violence statutes. Then why criminalize mere utterance of 3 words. Incarceration achieves nothing but the destruction of the family's economic stability⁹. It serves as a prime example of the state using criminal law for performative moral policing rather than practical, restorative justice.

IV. Decriminalizing Love and Identity

For generations, the state invaded the most intimate spaces of consenting adults, labelling non-heteronormative love as "unnatural" and criminal. Allowing criminal law to regulate personal relationships in the name of "social morality" is the centuries-long persecution of the LGBTQ+ community. Turning tables against these draconian laws perfectly illustrates why social morality has no place in the penal code. In the case of *Dudgeon v. United Kingdom*¹⁰ the court struck down laws criminalizing homosexual acts between consenting adults in Northern Ireland. It was held that such laws are unduly interfering with the fundamental rights of individuals. Similar judgements can be seen in USA as well in cases like *Lawrence v. Texas (2003)*.¹¹ The SC adopted similar constitutional reasoning in *Navtej Singh Johar v. Union of India*¹², where Section 377 IPC was read down insofar as it criminalized consensual same-sex relations. The Court emphasized that constitutional morality must prevail over prevailing social morality when fundamental rights are at stake.

V. Civil Law as the True Engine for Uniformity

Often the argument for state intervention is uniformity and gender justice. If that's the goal then criminalization is emphatically not the necessary or correct route. Uniformity and egalitarianism in personal relationships should be achieved through civil legislation. A unified civil framework such as a Uniform Civil Code (UCC)¹³ or comprehensive secular family laws provides a far more effective and humane mechanism. The SC on multiple occasions has

⁹ Faizan Mustafa, Criminalisation of Triple Talaq: A Critical Analysis, Economic & Political Weekly, Vol. 54 (2019).

¹⁰ *Dudgeon v. United Kingdom*, App. No. 7525/76, 4 E.H.R.R. 149 (1981).

¹¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

¹³ INDIA CONST. art. 44.

observed that a Uniform Civil Code may promote greater consistency and equality in personal laws, while recognising that its implementation remains a matter of legislative policy rather than judicial mandate.

Rather than relying upon criminal sanctions, Parliament may pursue uniformity through comprehensive civil legislation governing marriage, divorce, succession and maintenance. Civil courts can easily mandate the equitable division of assets, enforce child support, grant alimony, and legally dissolve marriages without resorting to the penal code. Criminal law is inherently punitive¹⁴, its purpose is to punish acts against the state, but civil disputes in personal relationships cannot be justified as crimes against the state. Personal laws are meant to navigate the dissolution or structuring of a private relationship while ensuring fairness to the vulnerable parties. Confusing the two jurisdictions leads to the weaponization of the police force in private domestic spheres, often leading to extortion, harassment, and the complete breakdown of any potential for amicable dispute resolution.

VI. The Veil of "Family Honour"

The state should never criminalize love, but it must mercilessly prosecute violence. This distinction is important, the state is expected to not criminalize consensual relationships but it must use criminal law to protect individuals when their families resort to violence in the name of "family honour." In cases of inter-caste and inter-faith marriages,¹⁵ consenting adults routinely face severe backlash, coercion, and even "honour killings"¹⁶ orchestrated by their own families. In *Lata Singh v. State of U.P.*¹⁷, the SC held that there is nothing "honourable" in honour killings; they are simply brutal murders and the state must protect inter-caste and inter-faith marriages. Similarly, in *Shafin Jahan v. Asokan K.M.*¹⁸, the Hadiya case, the SC upheld the right of an adult woman to choose her religion and her partner, the right to marry a person of one's choice is an integral part of Article 21. The law's role is to act as a shield for the couple against the societal mob, never as a sword wielded by the mob against the couple. In *Shakti Vahini*, the SC directed States to adopt preventive, remedial and punitive measures

¹⁴ Andrew Ashworth, *Principles of Criminal Law* 17–22 (9th ed. 2022).

¹⁵ *Shakti Vahini v. Union of India*, (2018) 7 SCC 192.

¹⁶ Law Commission of India, 242nd Report on Prevention of Interference with the Freedom of Matrimonial Alliances (in the Name of Honour and Tradition) (2012).

¹⁷ *Lata Singh v. State of Uttar Pradesh*, (2006) 5 SCC 475.

¹⁸ *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368.

against honour crimes and unlawful interference by khap panchayats.

VII. Conclusion

When we look at how laws have changed over time one thing becomes very clear is that the the State has no legitimate constitutional justification for regulating consensual adult relationships through criminal sanctions. Just because a large part of society disapproves of something does not mean it should be a crime. Human relationships are complicated. They run on feelings, personal choices, and mutual agreement, not a strict rulebook of what is "legal" or "illegal." The boundary of state intervention must be unequivocally clear i.e. the coercive apparatus of criminal law has absolutely no place in the bedrooms, romantic choices, or matrimonial disputes of consenting adults. Ultimately, consensual love and private relationships are the purest expressions of human liberty, and they must forever remain beyond the suffocating reach of the penal code.