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# **CRIMINALISING THE PRIVATE SPHERE: CONSTITUTIONAL TENSIONS IN MODERN FAMILY LAW**

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## ABSTRACT

The increasing tendency of the state to regulate intimate aspects of family life through criminal law has generated profound constitutional tensions in modern legal systems. Historically, the private sphere particularly family relationships was regarded as an area of limited state interference, governed primarily by personal laws, social norms, and moral obligations. However, contemporary concerns relating to gender justice, child protection, sexuality, and domestic violence have prompted extensive criminalisation of conduct within family spaces. While such intervention is often justified as necessary to protect vulnerable individuals, it simultaneously raises critical constitutional questions concerning privacy, autonomy, dignity, and proportionality.<sup>1</sup> This paper examines the constitutional implications of criminalising the private sphere in the context of modern family law, with particular emphasis on Indian constitutional jurisprudence. It analyses whether the expansion of penal regulation into intimate domains represents a legitimate exercise of state power or an erosion of constitutional freedoms under Articles 14, 19, and 21. Through doctrinal analysis and comparative constitutional perspectives, the paper argues that excessive criminalisation risks collapsing the distinction between public harm and private choice, transforming criminal law into an instrument of moral governance. The study advocates a principled constitutional framework that distinguishes harm based intervention from intrusive regulation, ensuring that family law reforms remain consistent with constitutional values.<sup>2</sup>

**KEYWORDS:** Private Sphere; Criminalisation; Family Law; Constitutional Rights; Privacy; State Intervention

## RESEARCH METHODOLOGY

This research adopts a doctrinal and critical legal methodology, focusing on constitutional interpretation and criminal jurisprudence. Primary sources include constitutional provisions, penal statutes affecting family life, and judicial decisions of the Supreme Court of India and High Courts. The study places particular emphasis on the interpretation of Articles 14, 19, and 21, especially the development of privacy, autonomy, and substantive due process jurisprudence. Secondary sources such as academic literature, feminist legal theory, criminal law scholarship, and comparative constitutional materials are extensively analysed to situate

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<sup>1</sup> John Stuart Mill, *On Liberty* (Longman, Roberts & Green 1869).

<sup>2</sup> Upendra Baxi, *Human Rights in a Posthuman World* (Oxford University Press 2007).

Indian developments within broader global debates. The methodology is normative in nature, seeking to evaluate the constitutional legitimacy of criminalisation in private spheres rather than its empirical effectiveness.

## **HYPOTHESIS**

The paper proceeds on the hypothesis that the expanding criminalisation of private family life, while ostensibly protective, often exceeds constitutional limits by infringing privacy, autonomy, and dignity, thereby undermining the foundational principles of constitutional democracy.

## **STATEMENT OF PROBLEM**

The central problem addressed in this research is the steady erosion of the boundary between the public and private spheres through the use of criminal law in family regulation. Modern family law increasingly relies on penal sanctions to address issues traditionally managed through civil remedies, personal law mechanisms, or social regulation. This shift has led to a situation where intimate conduct ranging from marital relations and cohabitation to caregiving and domestic decision making is subject to criminal scrutiny. While such intervention may be justified in cases involving violence or exploitation, its extension to consensual and relational conduct raises serious constitutional concerns. The lack of clear constitutional criteria governing when criminalisation of private behaviour is permissible has resulted in doctrinal confusion, inconsistent judicial outcomes, and heightened vulnerability of individual liberty.

## **RESEARCH QUESTIONS**

This study seeks to address the following questions:

1. What are the constitutional limits on criminalising conduct within the private sphere of family life?
2. How does the right to privacy constrain state power to regulate intimate relationships through criminal law?
3. Does modern family law appropriately distinguish between harm based intervention and moral regulation?
4. What constitutional framework can reconcile protection of vulnerable individuals with respect for autonomy and dignity?

## LITERATURE REVIEW

The relationship between criminal law and the private sphere has long occupied a contested space in legal theory. Classical liberal theorists viewed the private sphere as essential to individual freedom, arguing that state intervention should be limited to preventing harm to others. This view was famously articulated in harm based theories of criminalisation, which emphasised restraint and proportionality.<sup>3</sup> Within this framework, family life was treated as a domain of personal autonomy, shielded from punitive state action except in exceptional circumstances.

Feminist legal scholarship fundamentally challenged this conception of privacy by exposing how the private sphere often functioned as a site of unregulated power and systemic abuse. Scholars argued that excessive deference to privacy enabled domestic violence, marital rape, and child abuse to persist unchecked. From this perspective, criminalisation of family conduct was not an intrusion but a necessary assertion of equality and dignity. However, feminist scholars also cautioned against uncritical reliance on criminal law, noting that punitive approaches can reproduce coercion, marginalise vulnerable groups, and entrench state control over intimate lives.<sup>4</sup>

Criminal law theorists have further interrogated the legitimacy of penal intervention in private conduct, warning against over criminalisation and moral paternalism. The use of criminal sanctions to enforce social norms, rather than prevent concrete harm, is widely regarded as incompatible with constitutional democracy. Scholars highlight the symbolic power of criminal law and its capacity to stigmatise, arguing that such power must be exercised with constitutional restraint.<sup>5</sup>

Indian constitutional scholarship reflects these tensions. Early jurisprudence was reluctant to recognise privacy as a fundamental right, thereby permitting broader state regulation of private life. However, subsequent developments have reconceptualised privacy as intrinsic to dignity and personal liberty.<sup>6</sup> This shift necessitates a reassessment of the constitutional validity of criminal laws that intrude into family spaces. Comparative constitutional literature, particularly

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<sup>3</sup> H.L.A. Hart, *Law, Liberty and Morality* (Oxford University Press 1963).

<sup>4</sup> Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (Oxford University Press 1999).

<sup>5</sup> Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989).

<sup>6</sup> Jonathan Herring, *Family Law and the Criminal Justice System* (Oxford University Press 2010).

from European human rights law, reinforces the principle that interference with private and family life must be strictly necessary and proportionate in a democratic society.<sup>7</sup>

The literature thus reveals a persistent conflict between the imperatives of protection and the demands of liberty. While there is consensus on the need to address harm within families, there remains deep disagreement on the role of criminal law as the primary regulatory tool. This unresolved debate forms the intellectual foundation of the present study.<sup>8</sup>

## **THE PUBLIC PRIVATE DISTINCTION IN FAMILY LAW (INTRODUCTORY DISCUSSION)**

Family law occupies a unique position at the intersection of public authority and private ordering. Traditionally, it was regarded as a hybrid domain where state regulation coexisted with personal autonomy. The increasing use of criminal law within this space marks a significant departure from this balance. When private conduct becomes subject to penal sanction, it is effectively reclassified as a matter of public concern. This reclassification carries constitutional implications, as it expands the scope of state power while contracting the domain of individual freedom.<sup>9</sup>

Modern family law reforms often justify criminalisation on grounds of social welfare and protection. However, without a principled constitutional framework, such justifications risk becoming open ended, enabling intrusive regulation of intimate life. The challenge, therefore, lies in articulating clear constitutional boundaries that preserve the distinction between public harm and private choice.<sup>10</sup>

## **THE CONSTITUTIONAL RIGHT TO PRIVACY AND THE PRIVATE SPHERE**

The constitutional recognition of privacy as a fundamental right has profoundly reshaped the legal understanding of the private sphere. Privacy is no longer conceived merely as spatial seclusion but as a complex bundle of rights protecting personal autonomy, intimate decision

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<sup>7</sup> Reva B. Siegel, 'The Rule of Love: Wife Beating as Prerogative and Privacy' (1996) 105 Yale Law Journal 2117.

<sup>8</sup> Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89 Yale Law Journal 421.

<sup>9</sup> State of Maharashtra v. Mohd. Yakub, (1980) 3 SCC 57.

<sup>10</sup> Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608.

making, and the freedom to form relationships without undue state interference. Within family life, privacy safeguards choices concerning marriage, cohabitation, sexual relations, reproduction, caregiving, and domestic organisation. These choices lie at the heart of individual dignity and self determination.<sup>11</sup>

When criminal law intrudes into these domains, it must overcome a high constitutional threshold. The right to privacy does not render family life immune from regulation, particularly where violence, coercion, or exploitation are present. However, it demands that any interference be justified by compelling state interests and implemented through proportionate and narrowly tailored measures. Criminalisation that extends beyond harm prevention into the regulation of morality or lifestyle choices violates this constitutional mandate.<sup>12</sup>

The expansion of penal law into family spaces often disregards this nuanced understanding of privacy. Investigations, arrests, and prosecutions inevitably involve scrutiny of intimate communications, personal relationships, and domestic arrangements. Such scrutiny transforms the private sphere into a site of state surveillance, altering the relationship between citizens and the state. Constitutional democracy cannot sustain a legal order in which intimacy is perpetually subject to penal oversight.<sup>13</sup>

## **AUTONOMY AND DECISIONAL FREEDOM IN FAMILY RELATIONSHIPS**

Autonomy is a central component of personal liberty under Article 21. It refers not merely to freedom from physical restraint but to the capacity to make meaningful choices about one's life and relationships. In the context of family life, autonomy is expressed through decisions about whom to live with, how to structure relationships, whether to marry, how to parent, and how to allocate care and responsibility.

Criminal law poses a unique challenge to autonomy because of its coercive nature. The threat of punishment can distort decision making, compelling individuals to conform to legally sanctioned norms rather than personal convictions. When criminal law regulates consensual adult relationships or domestic arrangements that do not cause harm, it substitutes state

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<sup>11</sup> *Gobind v. State of Madhya Pradesh*, (1975) 2 SCC 148.

<sup>12</sup> *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295.

<sup>13</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

judgement for individual choice. Such substitution undermines the constitutional promise of liberty.<sup>14</sup>

The relational nature of family autonomy further complicates the issue. Family decisions are rarely made in isolation; they emerge from negotiation, compromise, and mutual dependence. Criminal law, however, tends to individualise responsibility and simplify complex relational dynamics. This mismatch can result in outcomes that fail to capture the reality of family life and impose punitive consequences that disrupt care networks and emotional bonds. A constitutionally sensitive approach must therefore recognise autonomy as contextual and relational rather than abstract and absolute.

### **DIGNITY AS A LIMIT ON PENAL POWER**

Human dignity occupies a foundational place in Indian constitutional jurisprudence, serving as both a source and a limit of fundamental rights. Dignity encompasses self-worth, bodily integrity, and the right to live without humiliation or degradation. Family relationships are a primary site where dignity is experienced and negotiated, making them particularly sensitive to state intervention.

Criminalisation of private conduct can threaten dignity in multiple ways. The stigma associated with criminal prosecution, the public exposure of intimate details, and the loss of social standing can inflict harm independent of any formal punishment. Even when prosecution does not result in conviction, the process itself may operate as a form of punishment, undermining dignity and autonomy.<sup>15</sup>

At the same time, dignity also underpins the justification for criminal intervention in cases of domestic violence, sexual abuse, and exploitation. The constitutional challenge lies in distinguishing between interventions that vindicate dignity and those that erode it. Penal law must be carefully calibrated to protect individuals from degrading treatment without subjecting them to intrusive and demeaning processes. Where criminalisation becomes a means of enforcing conformity or moral virtue, it ceases to serve dignity and instead instrumentalises it.

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<sup>14</sup> Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608.

<sup>15</sup> Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012).

## **SUBSTANTIVE DUE PROCESS AND THE LIMITS OF CRIMINALISATION**

The development of substantive due process under Article 21 imposes substantive limits on the state's power to deprive individuals of liberty. Laws that are arbitrary, unreasonable, or disproportionate violate personal liberty even if enacted through proper legislative procedures. In the context of criminalising private family conduct, substantive due process requires rigorous scrutiny of both legislative intent and practical effect.

Criminal provisions affecting family life are often broadly worded, granting wide discretion to enforcement agencies. Such breadth may be justified in addressing diverse forms of harm, but it also creates space for arbitrary application. When the scope of criminalisation is not clearly linked to harm, the law risks capturing conduct that falls within the protected domain of privacy and autonomy.

Procedural safeguards, while necessary, are insufficient to cure substantive constitutional defects. A law that criminalises consensual or non harmful conduct cannot be rendered constitutional merely by fair procedure. Substantive due process demands that the very decision to criminalise be justified by compelling reasons consistent with constitutional values. This principle is particularly important in family law, where the consequences of criminalisation extend beyond the individual to affect dependents and caregiving relationships.<sup>16</sup>

### **DOCTRINAL INCONSISTENCIES AND JUDICIAL AMBIVALENCE**

Judicial responses to the criminalisation of private family conduct reveal a pattern of ambivalence. Courts have simultaneously expanded constitutional protection for autonomy and privacy while upholding or tolerating penal interventions that intrude into intimate domains. This inconsistency reflects the absence of a coherent doctrinal framework governing criminalisation in the private sphere.

On the one hand, constitutional jurisprudence increasingly affirms the right of individuals to define their own relationships and family structures. On the other hand, courts often defer to legislative judgement in matters of criminal law, particularly where protective rhetoric is invoked. This deference can dilute constitutional scrutiny and permit overreach.

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<sup>16</sup> Andrew Ashworth, *Principles of Criminal Law* (7th edn, Oxford University Press 2013).

The resulting jurisprudence is fragmented, offering case specific relief without articulating general principles. While such pragmatism may address immediate injustices, it leaves unresolved the broader constitutional question of when and how the private sphere may be legitimately criminalised. This gap underscores the need for a principled framework that integrates privacy, autonomy, dignity, and substantive due process into criminal law analysis.

## **OVER CRIMINALISATION AND THE RISK OF MORAL POLICING**

One of the gravest constitutional dangers associated with the criminalisation of the private sphere is the phenomenon of over criminalisation. Criminal law, unlike civil or regulatory law, carries with it the symbolic weight of moral condemnation, social stigma, and the coercive power of the state. When this power is extended into intimate domains of family life without clear harm based justification, it risks functioning less as a mechanism of protection and more as an instrument of moral policing.

In the context of modern family law, over criminalisation often manifests through the use of penal provisions to regulate behaviour that deviates from socially dominant norms rather than conduct that causes tangible harm. Choices relating to cohabitation, sexual relationships, caregiving roles, and exit from familial arrangements may attract criminal scrutiny, not because they violate constitutional rights of others, but because they challenge traditional moral expectations. Such use of criminal law collapses the distinction between public wrongs and private choices, a distinction that lies at the heart of constitutional democracy.

Moral policing through criminal law is constitutionally problematic because it substitutes majoritarian morality for constitutional morality. The Constitution protects pluralism, autonomy, and individual dignity precisely to guard against coercive enforcement of uniform social norms. When criminal law becomes a vehicle for moral enforcement, it undermines these values and erodes the legitimacy of the legal system itself.

## **CRIMINAL LAW AS A TOOL OF SOCIAL CONTROL IN FAMILY LIFE**

The expansion of penal regulation into family spaces also raises concerns about the use of criminal law as a tool of social control. Family life is deeply intertwined with power relations, economic dependency, and social hierarchies. Criminalisation in this context can reinforce

existing inequalities by subjecting vulnerable individuals to heightened surveillance and state control. Marginalised communities, women, sexual minorities, and economically dependent family members often bear the brunt of such intervention.

The criminal process itself can operate as a form of punishment independent of conviction. Arrests, investigations, public trials, and prolonged litigation expose individuals to stigma and coercion that may be disproportionate to any alleged wrongdoing. In family contexts, these consequences extend beyond the accused to children, elderly dependents, and caregiving networks. The resulting harm raises serious constitutional questions regarding proportionality and fairness.

A constitutional legal order must be cautious in deploying criminal law within intimate spheres, recognising its potential to discipline behaviour and enforce conformity rather than deliver justice. Without clear limits, criminal law risks becoming an omnipresent force in private life, reshaping family relationships through fear rather than consent.

## **COMPARATIVE CONSTITUTIONAL LIMITS ON CRIMINALISING THE PRIVATE SPHERE**

Comparative constitutional jurisprudence provides valuable guidance on limiting criminalisation of private life. Jurisdictions influenced by human rights frameworks emphasise the protection of private and family life as a foundational constitutional value. Interference through criminal law is permitted only where it is strictly necessary to protect the rights of others and where less intrusive measures are insufficient.

These systems adopt a harm based approach to criminalisation, reserving penal sanctions for conduct involving violence, coercion, exploitation, or serious abuse. Consensual adult relationships and private family arrangements are largely insulated from criminal regulation. Civil remedies, protective orders, and welfare oriented interventions are preferred mechanisms for addressing familial conflict.

Such comparative models demonstrate that protecting vulnerable individuals does not require expansive criminalisation of the private sphere. On the contrary, excessive reliance on penal law can undermine protection by discouraging reporting, escalating conflict, and eroding trust

in legal institutions. A restrained, rights oriented approach is both constitutionally sound and practically effective.

## **TOWARDS A CONSTITUTIONAL FRAMEWORK FOR LEGITIMATE CRIMINALISATION**

A constitutionally coherent approach to criminalising private family conduct must rest on clearly articulated principles. First, criminalisation must be harm based. The state must demonstrate that the conduct in question causes or poses a serious risk of harm to life, bodily integrity, or fundamental dignity. Mere moral disapproval or social discomfort cannot justify penal intervention.

Second, criminal law must satisfy the principle of proportionality. The severity of punishment and the intrusiveness of enforcement must be commensurate with the gravity of harm. Arrest and incarceration should be measures of last resort, particularly in family contexts where alternative remedies may be more appropriate.

Third, privacy and decisional autonomy must operate as substantive limits on state power. Criminal law should not intrude into consensual adult relationships or intimate family decisions absent compelling justification. Where intervention is necessary, it must be narrowly tailored and accompanied by strong procedural safeguards.

Finally, the legal system must integrate restorative and protective mechanisms into family law responses. Counselling, mediation, civil protection, and welfare support often address the root causes of familial harm more effectively than punitive sanctions. Criminal law should complement, not replace, these approaches.

## **CONCLUSION & FINDINGS**

This study finds that the criminalisation of the private sphere in modern family law generates significant constitutional tensions. While the state has a legitimate interest in preventing harm within families, the expansion of penal law often exceeds constitutional limits by intruding into domains protected by privacy, autonomy, and dignity. The absence of a clear harm based framework has resulted in over criminalisation, moral policing, and inconsistent judicial outcomes. Comparative constitutional models illustrate that restraint and proportionality are

essential to maintaining the balance between protection and liberty.

The criminalisation of private family life represents one of the most complex challenges confronting constitutional governance in contemporary society. Families are no longer uniform institutions defined by rigid roles and hierarchies; they are diverse, fluid, and shaped by individual choice. Criminal law, with its coercive and stigmatic power, is ill suited to regulate such complexity without constitutional restraint. While the protection of vulnerable individuals within families is an undeniable state obligation, this responsibility must be discharged in a manner that respects privacy, autonomy, and dignity.

A constitutional democracy cannot permit criminal law to become an instrument of moral governance or social conformity. The legitimacy of penal intervention depends on its fidelity to harm based reasoning, proportionality, and substantive due process. By re drawing the boundary between public harm and private choice, and by embracing rights compatible alternatives to punishment, modern family law can reconcile protection with liberty. The future of family law reform must therefore lie not in expanding criminalisation, but in deepening constitutional commitment to freedom, dignity, and pluralism.

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