

## CRIMINAL LAW AND MORALITY: INFLUENCE & IMPACT

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### INTRODUCTION

Since the dawn of civilization, Mankind has been guided by two main forces: legal laws, and extra- legal laws. The extra- legal laws have broadly been divided into religious laws and moral laws. This project will focus primarily on the relation between Criminal Law and the latter of these.

Before proceeding, however, it would be prudent to examine what exactly these morals are. The Oxford Dictionary defines “morals” as “standards of behavior; principles of right and wrong”.<sup>1</sup> However, it is to be noted at this stage that the concepts of ‘right’ and ‘wrong’ are highly relative, and what is considered right (or even not- wrong) by one individual or section of society may be considered wrong by another. An example of this that is pertinent to the debate at hand is the criminalization of cow slaughter in Maharashtra in 2014.<sup>2</sup> This is an example that will also be analyzed in considerable detail in this project, for its pertinence to Indian society, as well as the questionable motives behind the same. Another example that I shall focus on in considerable detail is the criminalization of certain sexual offences, such as homosexuality and prostitution. It is important to note that all of these ‘offences’ are all *mala prohibita*, and not *mala in se*, i.e., they are offences only by virtue of their being expressly prohibited by law, and not because they are inherently wrong in themselves.<sup>3</sup>

Through the course of this paper, I will aim to establish whether or not there exists a nexus between criminal law and morality, and if so, how this relationship exists in light of the subjective nature of ‘right’ and ‘wrong’, given that these concepts appear to be the binary that

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<sup>1</sup> Definition of Morals, THE OXFORD ENGLISH DICTIONARY (2<sup>nd</sup> edn.).

<sup>2</sup> India: Bans on Cow Slaughter Based on Narrow Sectarian Vision - Statement by PUDR, *South Asian Citizens Web* (March 24<sup>th</sup>, 2014), available at <http://www.sacw.net/article10890.html> (Last visited on September 6<sup>th</sup>, 2015).

<sup>3</sup> Although it is also acknowledged that the very concept of *mala in se* and *mala prohibita* are in themselves dependent on the concept of morality, and therefore subjective in themselves.

comprises the moral code. In order to do this, I will rely heavily on the views of J. S. Mill, H. L. A. Hart, Lord Patrick Devlin, and the Wolfenden Committee Report on Homosexual Offences and Prostitution, 1927.

While it is true that the majority of the aforementioned sources focus primarily on the criminalization of homosexuality and prostitution, they will be used mainly for extracting views on the nature between criminal law and morals in general, as compared to homosexuality in specific. I will begin this project with an analysis of some important thinkers' perspectives on the same, and then proceed to give my understanding of the concept, along with the influences and impacts of intertwining criminal law and morality.

I will also establish in the latter part of this project why the enforcement of morals in criminal law – and indeed law in general – have no place in a democratic, secular society such as the one we profess ourselves to be.

## **BACKGROUND OF THE LAW AND MORALITY DEBATE**

The enforcement of morals using the threat of legal sanction is not a new concept to legal philosophers. In fact, in his book, "Natural Law", Alexander Passerin d'Entrives says that there is a "point of intersection between law and morals," which must be kept in mind in framing policy today.<sup>4</sup> This view is also echoed in "The Myth of Is and Ought" by Marxist playwright Bertolt Brecht, when he says that "what is and what ought to be are somehow indissolubly fused or inseparable",<sup>5</sup> and Lon L. Fuller in his book, "The Law in Quest of Itself".<sup>6</sup>

Different conceptions of morality vary as to the degree of what is 'right' and what is 'wrong', or 'good' and 'bad', and hence, each group, country or society may have its own morality, according to the local dogmas, whether religious, or political, or social.<sup>7</sup> Professor H. L. A. Hart in "Law, Liberty and Morality" follows in the footsteps of the Utilitarians of the preceding century<sup>8</sup> and proposes two 'working definitions' of morality: the first of these is "positive

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<sup>4</sup> Alexander Passerin d'Entrives, *NATURAL LAW* (2<sup>nd</sup> edn., 1952).

<sup>5</sup> Bertolt Brecht, *The Myth of Is and Ought*, *HARVARD LAW REVIEW*, Vol. 54, No. 8 (1941).

<sup>6</sup> See generally Lon L. Fuller, *The Law in Quest of Itself*, *HARVARD LAW REVIEW*, Vol. 71, No. 1 (1958).

<sup>7</sup> Yves Caron, *The Legal Enforcement of Morals and the So- Called Hart- Devlin Controversy*, *MCGILL LAW JOURNAL* Vol. 15, No. 1 (1969).

<sup>8</sup> See Austin, J., *The Province of Jurisprudence Determined*, (London, 1954),

morality”, which is the “morality actually accepted and shared by a given social group”, and the “critical morality”, defined as the “general moral principles used in the criticism of actual social institutions including positive morality”.<sup>9</sup> Through the course of this book, Hart also goes on to analyze the concept of legal enforcement of morals “as one of critical morality about the legal enforcement of positive morality”.<sup>10</sup>

However, before proceeding, it is important to clarify the meaning and scope of the term ‘enforcement’. Taking Hart’s views into context, the meaning that this researcher has inferred the term ‘enforcement’ to carry is that legal enforcement of morals essentially requires the estrangement of crimes and sins. There are two main mechanisms to enforce the same: the *first* is statutory legislation, while the *second* is judicial precedent.

An important question to be asked at this stage is, “*Why should society care for the legal enforcement of morals in the first place? Is the right to punish or to impose sanctions an essential or natural right of every society?*”<sup>11</sup>

Answers to this question have been given in several reports and commentaries. Among these, the Wolfenden Committee Report on Homosexual Offences and Prostitution of 1957 is especially important. The Canadian Supreme Court case of *Klippert v. The Queen* is an important highlight of the debate encompassed in this report, and is important to get a background of the same.<sup>12</sup>

The facts of the case are as follows: Klippert was an adult male who was charged with four counts of public indecency for homosexual intercourse with *consenting adult males*. However, as per the Canadian Criminal Code, he was to be classified as a ‘dangerous sexual offender’, on par with rapists and paedophiles, and subject to indefinite preventive detention.<sup>13</sup> In ruling against Klippert for the majority, Justice Fateaux held that:

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<sup>9</sup> H. L. A. Hart, *LAW, LIBERTY AND MORALITY* (1<sup>st</sup> edn., 1963), at 20.

<sup>10</sup> *Id.* at 27.

<sup>11</sup> H. L. A. Hart, *Positivism and the Separation of Law and Morals*, *HARVARD LAW REVIEW*, Vol. 71, No. 4 (Feb., 1958).

<sup>12</sup> *Klippert v. The Queen* [1967] SCR 822.

<sup>13</sup> *Id.*

*“With deference, I cannot either agree with the view that the intent and object of the provisions dealing with dangerous sexual offenders, is solely to protect persons from becoming the victims of those whose failure to control their sexual impulses renders them a source of danger and that to apply the definition to a person, who is not to be a source of danger, would give the definition an effect inconsistent with the intent or object of these provisions.”<sup>14</sup>*

However, there was considerable difference from this view in the minority dissenting judgment, when Justice Cartwright, held that “It would be with reluctance and regret that I would have found myself compelled by the words used to impute to Parliament the intention of enacting that the words 'dangerous sexual offender' shall include in their meaning 'a sexual offender who is not dangerous'.”<sup>15</sup>

These opinions draw a reasonable nexus to the implementation of morality in law by imposing fear of grossly excessive sanctions. In context of this, the Wolfenden Committee was constituted on August 24<sup>th</sup>, 1954, and submitted its report on August 12<sup>th</sup>, 1957. The Committee defined what it considered to be the nature and function of the law. However, through intensive examination of witnesses, the committee admitted that its views of the same were so different that it was forced to rely upon views that were acceptable to the community as a whole, but may not necessarily have been acceptable to many of the citizens that comprised it. They therefore reached "conclusions for ourselves rather than base them on what is often transient and seldom precisely ascertainable".<sup>16</sup> The Wolfenden Committee takes the stance that laws must be suitable to the general moral sense (as decided by their own pursuit), and that laws should not enter the scope of "private moral conduct" unless such behavior adversely impacts the public good.<sup>17</sup> It went on to say:

*“The function of the criminal law... is to preserve public order and decency, to protect the citizen from what is offensive or*

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<sup>14</sup> *Per* Fateaux J., *Klippert v. The Queen* [1967] SCR 822, at 834.

<sup>15</sup> *Per* Cartwright J., *Klippert v. The Queen* [1967] SCR 822, at 831.

<sup>16</sup> Report of the Committee on Homosexual Offences and Prostitution (London, 1957), at para. 19.

<sup>17</sup> *Supra* note 16, at para 13.

*injurious, and to provide sufficient safeguards against exploitation and corruption of others ... It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior, further than is necessary to carry out the purposes of we have outlined."*<sup>18</sup>

The essence of the Report is summed up in paragraph 61, when it says that: (Emphasis supplied.)

*"There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and **the law ought to give to individual freedom of choice and action in matters of private morality.** 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 and immorality which is, in brief and crude terms, not the law's business.** To say this is not to condone or encourage private immorality. On the contrary, to emphasize the personal and private nature of moral or immoral conduct is to emphasize the private and personal responsibility of the individual for his own actions, and that is **a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law.**"*<sup>19</sup>

Therefore, the Report concluded that the law should not criminalize private acts between consenting adults, even if they are immoral, as the individuals should be given their modicums of freedom. However, the Government did not act upon the report of the Committee.

J. S. Mill, in his 1859 book "On Liberty" differs from the argument adopted by the Wolfenden Committee. He says that there are certain activities which when conducted in public are offensive to other citizens, and should be criminalized as a whole because of this:

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<sup>18</sup> *Supra* note 16, at para 26.

<sup>19</sup> *Supra* note 16, at para 61.

*"Again, there are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners and, coming thus within the category of offenses against others, may rightly be prohibited. Of this kind are offences against decency; on which it is unnecessary to dwell, the rather as they are only connected indirectly with our subject, the objection to publicity being equally strong in the case of many actions not in themselves condemnable, nor supposed to be so."*<sup>20</sup>

The important difference between J. S. Mill and the Wolfenden Committee Report is that while the latter admits that homosexuality is immoral but should not be criminalized, the former says the opposite: homosexuality is not immoral, but should be criminalized because doing homosexual acts in public is harmful to the public good. Therefore, Mill, too, attempts to protect individual liberty insofar as he says "unless the activity of consenting adults either is conducted in public, and hence offends others, or else is an activity that harms others who have not consented to it, it is not fit for moral condemnation, and *a fortiori*, cannot be criminalized." Another prominent thinker is Lord Patrick Devlin, who wrote a famous attack on the Wolfenden Committee report in "Morals and the Criminal Law" in 1959. He disagreed with the fundamental argument of the report. However, his arguments are not very different from those of J. S. Mill. He says at one point: "I do not think that one can talk sensibly of a public and private morality",<sup>21</sup> thereby implying that the notion of a 'private morality' in itself is disjointed. He also specifically criticizes the opinion of the Report that "no act of immorality should be made a criminal offence unless it is accompanied by some other feature such as indecency, corruption, or exploitation"<sup>22</sup> when he says that some acts are offences simply by virtue of their being immoral:

*"There is only one explanation of what has hitherto been accepted as the basis of the criminal law and that is that there are certain standards of behavior or moral principles which*

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<sup>20</sup> J. S. Mill, ON LIBERTY, 97 (1859)

<sup>21</sup> Lord Patrick Devlin, MORALS AND THE CRIMINAL LAW, 97 (1959).

<sup>22</sup> *Supra* note 16, at para 68.

*society requires to be observed; and the breach of them is an offence not merely against the person who is injured but against society as a whole.*"<sup>23</sup>

Devlin further talks about how allowing immoral acts is in itself encouraging the dissolution of society in the sense that "there is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration."<sup>24</sup>

*"How are the moral judgments of society to be ascertained? ...*

*It is surely not enough that they should be reached by the opinion of the majority... English law has evolved and regularly uses a standard that does not depend on the counting of heads. It is that of the reasonable man. He is not to be confused with the rational man. He is not expected to reason about anything and his judgment may be largely a matter of feeling. It is the viewpoint of the man in the street... For my purpose I should like to call him the man in the jury box, for the moral judgment of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous ... Immorality, then ... is what every right-minded person is presumed to consider to be immoral ... There is, for example, a general abhorrence of homosexuality. We should ask ourselves in the first instance whether, looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it."* <sup>25</sup>

Also to be considered is what is commonly known as the Hart-Devlin discourse, which comprises of the back- and- forth views of Professor H. L. A. Hart and Lord Patrick Devlin,

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<sup>23</sup> *Supra* note 21, at 71.

<sup>24</sup> *Supra* note 21, at 76.

<sup>25</sup> *Supra* note 21, at 78-80.

expressed in a number of publications. These readings are particularly interesting because they afford the reader the opportunity to read each author's "comments on one another's comments of one's own comments."<sup>26</sup>

Comparing Devlin and Hart is the same as contrasting two polar opposite entities; their methodology of the concept of morality, and their purpose are different. The former seeks to establish a 'modus vivendi', viewing societies as groups that require structuring and laws for regulating the behavior of its citizens, whereas the latter ideals with the idea of fundamental concepts and the rationalization of the actions of citizens. Moreover, Hart's foremost apprehension is in favor of the individual, whereas Devlin's main thought is for society. Their philosophies at the end of the day are not very far apart. "Hart deals with the opposition between law and morality, while Devlin discusses the interplay of law and morality."<sup>27</sup>

## **CRIMINAL LAW AND MORALITY IN CONTEMPORARY INDIAN SOCIETY**

Having seen the views of many important thinkers, it remains to be seen whether or not there is a nexus between the criminal law and morality in modern Indian society.

Before proceeding, however, it is important to consider the influences of Criminal Law in India. *Inter alia*, the important sources of criminal law are custom, the influence of the British, and morals. Important influences also include several prominent figures, including Lord Macaulay. It has been contended that the British conception of morality as prominent at that period was important influences on the draft of the Indian Penal Code that was submitted, and later passed in 1950.

One of the first thoughts that strike the informed Indian citizen when the topic of legal enforcement of morals is mentioned is that of the infamous Section 377 of the Indian Penal Code, which reads: "Whoever voluntarily has carnal intercourse against the order of nature..."<sup>28</sup> (Emphasis supplied.) The very use of the phrase "against the order of nature"

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<sup>26</sup> Robert A. Burt, *Moral Offenses and Same Sex Relations: Revisiting The Hart-Devlin Debate*, YALE FACULTY SCHOLARSHIP SERIES (1<sup>st</sup> January 2004), available at [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1693&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1693&context=fss_papers) (Last visited on September 6<sup>th</sup>, 2015).

<sup>27</sup> *Supra* note 7, at 21.

<sup>28</sup> Section 377, Indian Penal Code, 1860.



suggests that such a penalty or sanction as prescribed by this section is being imposed not by virtue of the act being so wrong in itself as to warrant punishment (*mala in se*), but because it is considered to be wrong by the society. The concept of criminalization of homosexual sexual activity is one prevalent in various parts of the world, and India is no exception.<sup>29</sup>

The first question to be asked is, “Why is homosexuality being penalized?” Proponents of such criminalization argue that the act is immoral and therefore should be punished in order to prevent ‘corruption’ of society.<sup>30</sup>

In the opinion of this researcher, such sanctions being imposed on the issue of gay marriage are reflective of the grossly intolerant attitude of the Indian government. It is claimed that Section 377 with respect to homosexual intercourse exists in order to enforce societal morals. However, it is my contentions that the ‘morals’ sought to be enforced are really the morals and beliefs of the ruling government. How else can the government justify repeatedly ignoring mass movements of the Indian people asking for the revocation of the aforementioned law? If in fact the contested Section is reflective of the morals of Indian society as a whole, why are millions of people gathering in protest of it?

This brings me to the most important impact of interlacing law and morality – it leads to a deprivation of the essential freedoms of the people that we seek to protect by virtue of the Constitution. That is, the enforcement of law and morality necessarily involves over-riding the beliefs of a large fraction of the population, and instead forces them to accept the views of the government.

This is not the characteristic of the democratic society we pride ourselves in being. If our government feels the need to impose its own morals (as has been expressed in the beef ban, the pornography ban, and countless incidents of censoring), it loses the right to call itself a Government “of the people”. Instead, it devolves into a biased dictatorship.

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<sup>29</sup> Suresh Kumar Koushal v. NAZ Foundation, Civil Appeal No. 10972/2013.

<sup>30</sup> Payal Gwalani, *Shame Forcing Gay Men To Get Married To Straight Women*, THE TIMES OF INDIA (September 4<sup>th</sup>, 2015), available at <http://timesofindia.indiatimes.com/city/nagpur/Shame-forcing-gay-men-to-get-married-to-straight-women/articleshow/48795234.cms> (Last visited on September 4<sup>th</sup>, 2015).

Another important example of the enforcement of morals in criminal law is the cattle slaughter ban that was enforced in Maharashtra in 2014. The government made doing so a criminal offence punishable with 5 years of imprisonment and a fine of Rs. 10,000.<sup>31</sup>

Article 48 of the Indian Constitution reads, “The State shall endeavor to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.”<sup>32</sup> Therefore, the contention of the government of Maharashtra in this case has been that it is merely trying to enforce the Directive Principles of State Policy. While hiding behind this rather thin veil, the government has tried to please the Right- Wing Hindu population of the State, while completely disregarding the other aspects of such a policy ban, which have included malnourishment among the poor, loss of employment for millions, apart from being in blatant violation of several of the Fundamental Right and existing laws, including animal rights laws.<sup>33</sup>

Even if morals are to be implemented, they should be secondary considerations, and not primary. That is to say, morals should not be implemented in Criminal law at the cost of other values, including, but not limited to social welfare.

While it is true that all law is in one way the enforcement of a moral, a line is to be drawn between common morals and personal views. Another important impact of such mixing of law and morality as described above is that very often confusion may occur among the legislature as to the nature of a moral and a personal view. For example, common morals tell us that murder is wrong. This is a common moral because it is the same for all people, and does not vary from one individual to another. However, something as subjective as making the slaughter of cows punishable under Criminal Law is most definitely bound to differ from one section of people to another. As a result it is permissible to enforce the morals behind the former, but not behind the latter view.

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<sup>31</sup> Section 5, Maharashtra Animal Preservation (Amendment) Act, 1995.

<sup>32</sup> Article 48, THE CONSTITUTION OF INDIA, 1950.

<sup>33</sup> Aditya Karekatte, *The Socio-Legal Impacts of the Beef Ban*, NATIONAL LAW SCHOOL OF INDIA UNIVERSITY (March 18<sup>th</sup>, 2015).

Another important impact of legal enforcement of morals is that it may quickly lead to resentment among the citizens. This has been seen in both the above cases, as well as the massive public backlash to the government's recent decision to ban pornography.<sup>34</sup>

## CONCLUSION

Through the course of this project, we have seen the varying opinions of various thinkers on the link between Criminal Law and Morals, apart from its influences and impacts in today's society, with close reference to the cow slaughter ban in Maharashtra, and the criminalization of homosexuality and prostitution.

However, this researcher feels that despite the considerable literature available on these subjects, the proponents of the legal enforcement of morals have not met the heavy burden imposed on them by virtue of their claims.

The main purpose of the law is to regulate the behavior of citizens to conform to the standards expected of them. However, the very existence of the concepts of *mala in se* and *mala prohibita* (wrong by its very nature, and wrong because of express prohibition alone) necessitate the view that there are some behaviors expected of citizens that may not be wrong per se, but have been made offences by the government as per its own personal views. The beef ban reeks of such an implementation. Further, the main question that has not been addressed by these views is that if morals are the driving force behind certain behaviors, then they should be followed by citizens in the ordinary course of behavior. What is the need to have a legal sanction to enforce them? The very fact that the need is felt to coerce people into obeying them shows that they are not truly the morals of the society. If these so-called morals are really morals in the true sense, they would not require fear of sanction to be obeyed. Obviously, morals (which are not grounded in any other principle of law) do not conform to 100% of the society, and for that fraction of the populace that does not subscribe to them, these enforcements become arbitrary and oppressive. Again, the beef ban is an example of this.<sup>35</sup>

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<sup>34</sup> Sanjoy Majumder, *India Porn Ban: How The Government Was Forced To Reverse Course*, BBC NEWS (August 8<sup>th</sup>, 2015), available at <http://www.bbc.com/news/world-asia-india-33810775> (Last visited on September 8<sup>th</sup>, 2015).

<sup>35</sup> Taran N. Khan, *Mumbai's Beef Ban: A Swipe at Cultural Diversity*, AL-JAZEERA NEWS NETWORK (March 20<sup>th</sup>, 2015), available at <http://www.aljazeera.com/indepth/features/2015/03/mumbai-beef-ban-swipe-cultural-diversity-150316060416301.html> (Last visited on April 17<sup>th</sup>, 2015).

In fact, the situation in India of enforcement of 'morals' has devolved to such an extent that on September 7<sup>th</sup> 2015, the government announced that it would entirely ban the consumption of meat for a period of 4 days in various parts of the country, in keeping with a Jain festival.<sup>36</sup> Clearly it seems as though the so-called 'moral' decisions are now being taken without considering at all the views of the populace, rather enforcing the views of a Right-Wing, minority-pleasing government.

The Constitution of India begins with a preamble. As a nation of ourselves, we pride ourselves in this document, which has been described as 'organic', 'dynamic', and 'ever changing'. Indeed, the Preamble begins with the phrase, "We the People of India, having solemnly resolved to constitute India into a Sovereign, Socialist, Secular, Democratic Republic..."<sup>37</sup> It is to be noted that the Preamble does not say "We the majority class of India, having solemnly resolved to constitute India into a fundamentalist, capitalist, moral ...", and therefore the government should stop acting as though it does. As has already been said in this project, the enforcement of morals (apart from the common morals as discussed previously) has no place in Indian society.

Lest it be assumed that I am side-tracking from the discussion at hand, *viz.*, the influences and impacts of Criminal Law and Morality, the issues of criminalization of homosexuality and slaughter of cows are among the best examples of the legal enforcement of 'morals'. It cannot be a coincidence that these are also among the two best examples of gross miscarriage of justice and misuse of power.

There is a thin line between implementation of common morals and implementation of personal views. In the opinion of this researcher, it is better to leave such an area of human behavior unregulated by law – instead leaving the Courts to decide upon any cases that may arise, if at all they do – rather than to attempt to implement common morals, but end up implementing mere personal values, at the steep cost of individual liberties and natural justice.

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<sup>36</sup> *Four- Day Meat Ban in Mumbai During Jain Festival*, THE INDIAN EXPRESS (September 8<sup>th</sup>, 2015), available at <http://indianexpress.com/article/india/india-others/4-day-meat-ban-in-mumbai-during-jain-festival/> (Last visited on September 8<sup>th</sup>, 2015).

<sup>37</sup> The Preamble, THE CONSTITUTION OF INDIA (1950).

The only way a true objective administration of justice can be achieved is if limitations are imposed on the legislature to enforce merely those morals that are common to all, and being able to draw the line between the aforementioned common morals and mere personal viewpoints. Admittedly, all law is morals of some form, but the thin line between commonly acceptable morals and personal viewpoints must be kept in mind at all times, lest it be lost over the horizon while gazing at progress.

However, to answer the question posed in the introduction to this project, there is, unfortunately, a nexus between criminal law and morality in today's society.

