

LAW AND MORALITY

GENERAL INTRODUCTION EU LAW AND BEYOND

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OVERVIEW

LAW AND MORALITY

1. Common ground of law, justice, values, morality, ethics and religion
2. Terminology
3. EU law and morality

Law and morality

GUIDING QUESTIONS



- ❑ What is the common ground of law, justice, values, morality, ethics and religion?
- ❑ How do the two concepts of ethics and morality distinguish themselves from each other?
- ❑ What's the relationship of EU law and morality?

Law and morality

Different concepts, but similar objectives

“These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, **justice**, solidarity and equality between women and men prevail.” (Article 2 para. 2 TEU)



Law and morality

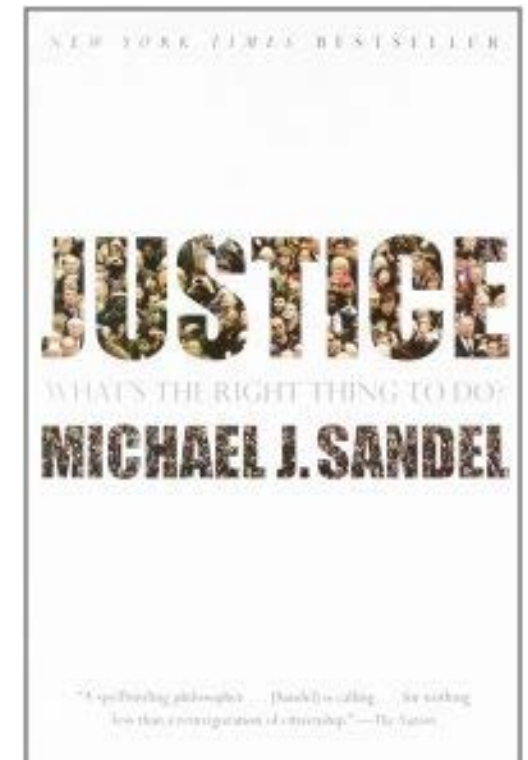
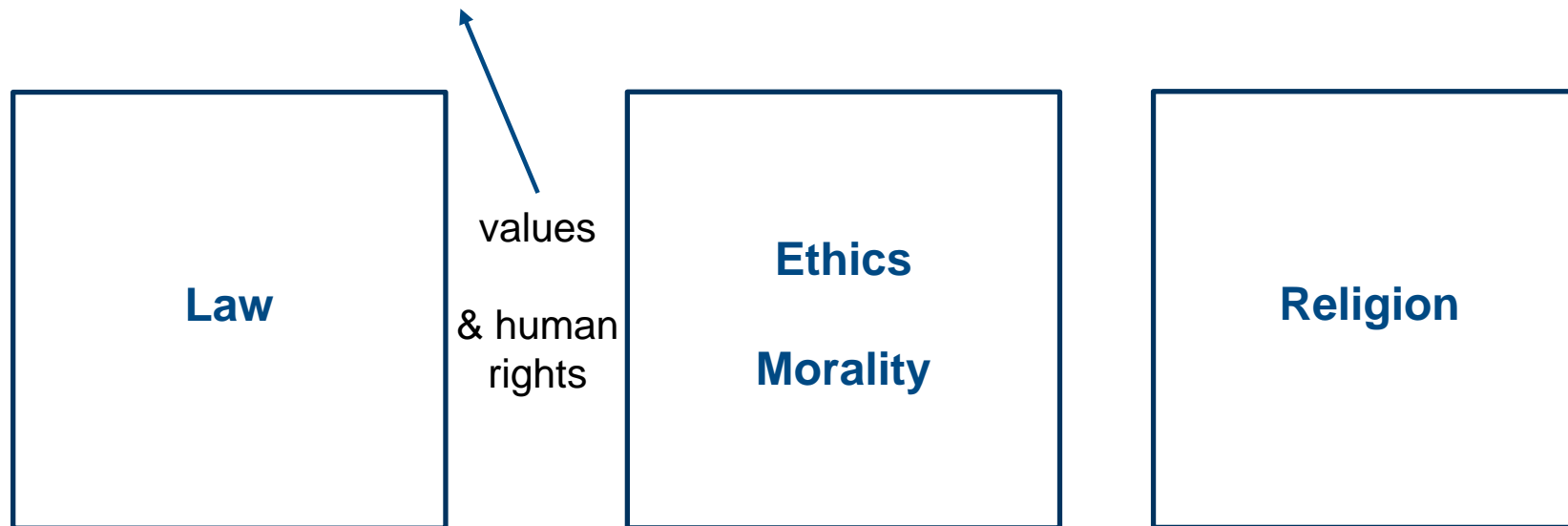
Different concepts, but similar objectives

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Justice:

What’s the Right Thing to Do?

(Sandel, 2010)



Law and morality

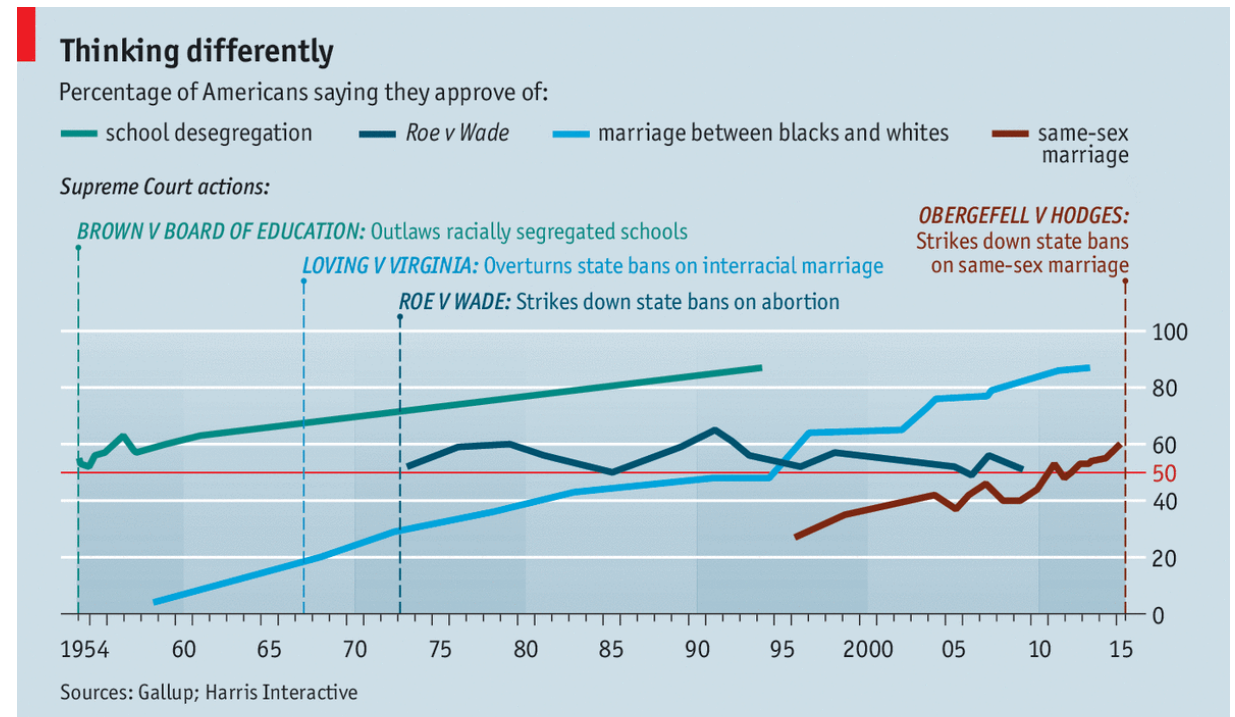
Law and development due to external factors

Public opinion has clearly changed over the times with regard to the following questions:

- Same sex-relationships (partnership and marriage)
- Abortion
- Cannabis

Previous attitudes of society

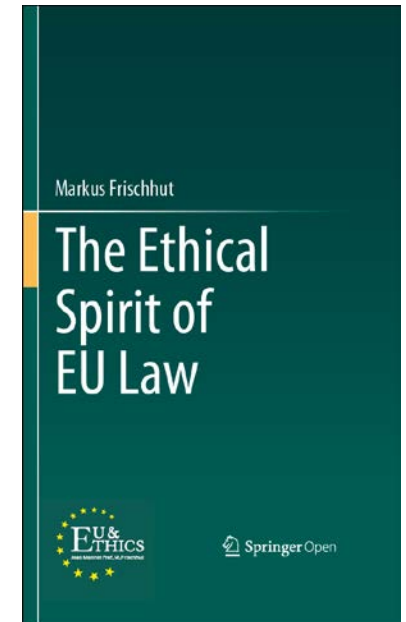
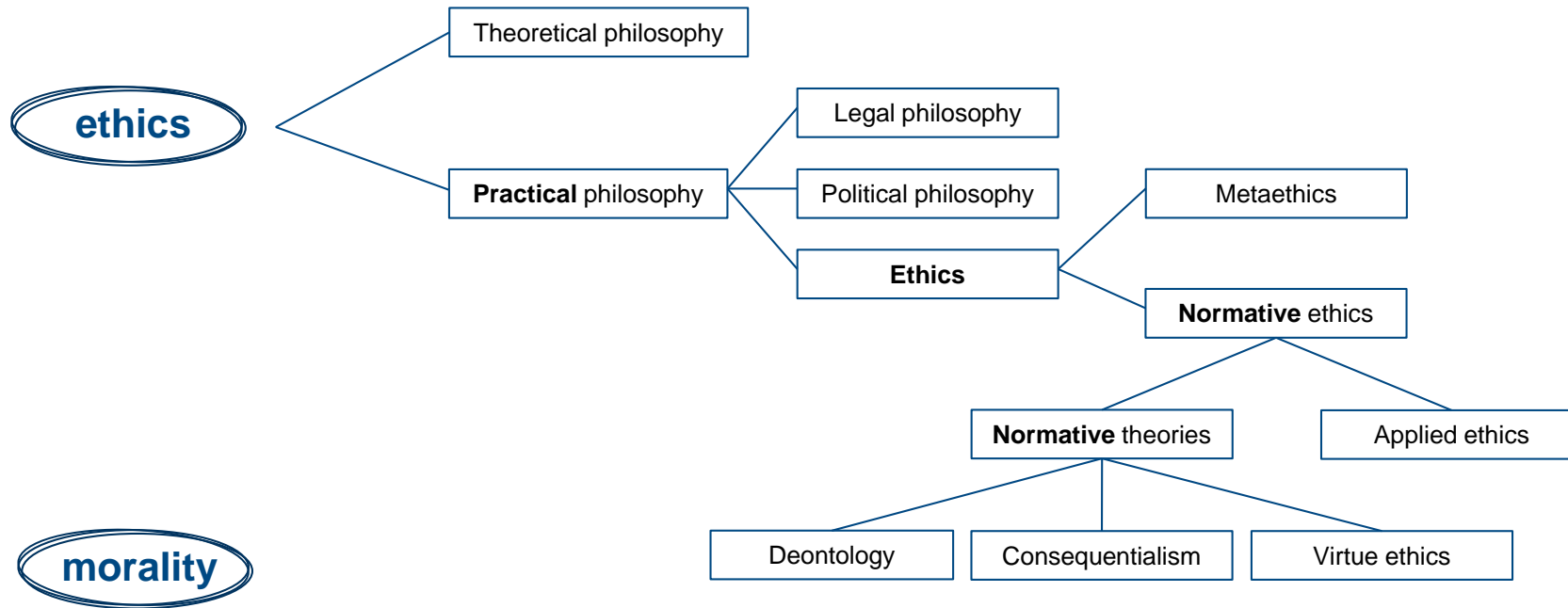
Today's attitudes of society



Economist.com

Source: The Economist (2015, July 9). Change is gonna come: The Supreme Court.

Terminology: ethics and morality



Source: Frischhut, 2019, p. 9

“In its most familiar sense, the word *morality* [...] refers to **norms about right and wrong human conduct** that are so widely shared that they form a **stable social compact**. As a social institution, morality encompasses many standards of conduct, including moral principles, rules, ideals, rights, and virtues. **We learn about morality as we grow up [...]**”

Source: Beauchamp & Childress, 2013, pp. 2-3.

Terminology: morality

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Frischhut

- Territorial (regional) and cultural
- Temporal component (evolutionary character)
- Value based

According to the ECJ, morality has a cultural, a regional and a temporal component. While morality changes over the years (evolutionary character),⁹⁸ it is different from country to country (“in its territory”) and is based on certain values (“in accordance with its own scale of values”). That is why the ECJ, in a way of judicial self-restraint, has accepted the Member State’s competence in determining their understanding of morality. This morality (as mentioned in Art. 36 TFEU), is a *public* one, so in a way collective and in this context defined by public authorities, not by individuals.

morality

Source: Frischhut, 2015, p. 544

“In that context, as most of the Member States which submitted observations to the Court have noted, the legislation on **games of chance** is one of the areas in which there are **significant moral, religious and cultural differences** between the Member States. In the absence of Community harmonisation in the field, **it is for each Member State to determine** in those areas, in **accordance with its own scale of values**, what is required in order to ensure that the interests in question are protected [...]”

CJEU judgment of 8 September 2009, *Liga Portuguesa*, C-42/07, EU:C:2009:519, para. 57

Functions of law



- Order (*Ordnung*)
 - E.g. road traffic – doesn't matter whether left-hand or right-hand driving
- **Fairness** (*Gerechtigkeit*)
 - **Law** has a function of **morality** and also a social function
- Power (*Herrschaft*)
 - Law also has a function to maintain leadership
 - E.g. Constitutional law
- Control of power (*Herrschaftskontrolle*)
 - Constitutional review
 - Checks and balances
 - Separation of powers

Morality in EU law | umbrella approach



Public morality (not defined) as reason of **justification** in the context of the free movement of **goods** (Art. 36 TFEU)

Nothing in Treaties shall affect nat. law concerning “questions of **moral significance**” and “the protection of human life” (Declaration Accession Treaty 2003)

Nothing in Treaties shall affect Irish constitutional law concerning **abortion** (Prot. Maastricht Treaty 1992)

Nothing in Treaties shall affect nat. law concerning **abortion** (Prot. Accession Treaty 2003)

EU Charter does not affect right to legislate “in the sphere of **public morality** [...] of human dignity and respect for **human physical and moral integrity**” (Declaration Lisbon Treaty 2007)



EU law and morality



Public morality (not defined) as reason of **justification** in the context of the free movement of **goods** (Art. 36 TFEU)

- Case about the **seizure** by the UK **customs authorities** of various consignments of **goods imported from Germany** by Conegate Limited.
- “In the course of an inspection at the airport where the consignments arrived, customs officials discovered that the goods consisted essentially of **inflatable dolls** which were clearly of a sexual nature and other erotic articles. They considered these goods to be '**indecent or obscene**' articles whose **importation into** the [UK] is prohibited [...]“. (para. 2)
- Is it **possible** for an EU Member State (MS) **to prohibit** the import of these goods? Who is in charge of defining of what qualifies as 'indecent or obscene'?

EU law and (double) morality



Public morality (not defined) as reason of **justification** in the context of the free movement of **goods** (Art. 36 TFEU)

- **Yes**, such restrictions on the free movement of goods can be justified on grounds of ‘**public morality**’, as “in principle it is for each [MS] to determine in accordance with its own scale of **values** and in the form selected by it the requirements of public morality in its territory”. (para. 14)
- However, what about a situation, where “the **same** goods may be **manufactured freely** on [the MS’s] territory **and marketed** on its territory”? (para. 20)
- This would not be considered as morality, but as **double morality**, and consequently would not be accepted by the Court. (para. 20)
- CJEU judgment of 11 March 1986, *Conegate*, 121/85, EU:C:1986:114

EU law and morality



Public morality (not defined) as reason of **justification** in the context of the free movement of **goods** (Art. 36 TFEU)



- The **EU** as such does **not have** a **competence** to legislate on public morality.
- The **Court of Justice** of the EU (CJEU) **leaves it to** the **Member States** to apply their understanding of public morality, as long as they do not follow a principle of public double morality. In other words: the CJEU applies the so-called concept of ‘judicial self-restraint’ and does **not** want to **interfere in sensitive areas**.
- This morality (as mentioned in Art. 36 TFEU), is a **public** one, so in a way **collective** and in this context defined by public authorities, not by individuals.
- Morality has a **cultural**, a **regional** and a **temporal** (evolutionary character) component, and is **based on values**.
- Member States’ competence to determine their understanding of public morality is only limited, yet **not actively determined**. First, it is **limited**, if it proves to be a form of **double moral or discrimination**, or if it is **incoherent**.

Literature mentioned on slides



- Beauchamp, T. L., & Childress, J. F. (2013). *Principles of biomedical ethics* (7th ed). Oxford University Press.
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- Wesel, U. (1997). *Geschichte des Rechts: Von den Frühformen bis zum Vertrag von Maastricht*. C.H. Beck.



- ❑ What is the common ground of law, justice, values, morality, ethics and religion?
 - ✓ In the end, they all try to provide an answer to the question ‘what is the right thing to do’.
- ❑ How do the two concepts of ethics and morality distinguish themselves from each other?
 - ✓ Ethics: branch of practical philosophy.
 - ✓ Morality as a concept relative to culture, location and changing over the course of time; based on values.



□ What's the relationship of EU law and morality?

- ✓ Ideally, law should correspond to concepts of morality.
- ✓ Morality is a relative concept that changes over the course of time, differs in different societies and is based on certain values.
- ✓ EU law allows Member States to have their approach on morality, as long as this is not double morality.
- ✓ E.g. 'public morality' is a so-called 'reason of justification' which allows for limitations on the free movement of goods (Art. 36 TFEU). N.B. 'Public morality' refers to a collective notion, not to one's individual morality.