1 Introduction

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1.1. General Introduction

The relationship between law and morality is intricate, reflecting the complex interplay between societal norms, ethics, and the structures of governance. At their core, both law and morality are concerned with regulating human behavior, but they operate in distinct spheres with varying degrees of overlap. Morality often serves as a foundational principle upon which laws are built. Many legal principles and statutes are rooted in moral values such as justice, fairness, and respect for human rights. For instance, laws against murder and theft may be said to reflect a shared moral consensus that these actions are inherently wrong.

However, while morality provides a framework for the development of laws, it does not dictate them entirely. Legal systems are shaped by a multitude of factors including historical precedent, political ideologies, and practical considerations of enforceability. Consequently, laws may diverge from individual or cultural moral beliefs, leading to debates over the legitimacy and effectiveness of legal frameworks.

Conversely, the law can also influence and shape moral norms within society. Legal sanctions and enforcement mechanisms can act as a deterrent, shaping behavior and reinforcing certain moral standards. In addition, legal recognition of rights and protections can contribute to the evolution of societal attitudes towards issues such as equality and discrimination. In essence, while law and morality are interconnected, they remain distinct concepts, each with its own sphere of influence and role in governing human conduct. The dynamic interaction between the two reflects the ongoing dialogue within society about the values and principles that underpin our collective existence.

This edited volume aims to provide insight into this interaction by investigating how law and morality relate to each other in several subdomains. Each contribution asks how law and morality depend, influence or supersede on each other in fields such as freedom of speech and religion, constitutionalism, the universality of human rights (including animal rights), democracy and terrorism. This edited volume honors the work of professor emeritus Paul Cliteur, who was affiliated with the Department of Jurisprudence at Leiden University from 1984 to 2022, and as a Professor of Jurisprudence from 2002. As a legal philosopher, he maintained a keen interest in the intersection of law and morality and did not hesitate to take and defend unpopular stances in the academic debate. This pertains to his contributions to debates on free speech, secularism, atheism, constitutional review, animal rights, the role of

civil servants in democracy, terrorism and natural law. These and other subjects are important threads running through the present volume. It consists of contributions by renowned academics, including some of his former colleagues and PhD candidates, and is dedicated to his academic work.

1.2. Freedom of Speech

There is wide agreement amongst those who discuss freedom of expression that morality plays an important role in legal disputes where that freedom is concerned. However, since, particularly in liberal democracies, consensus is not extant with respect to the moral criteria that are decisive in addressing the issue of whether and, if so, to what extent, freedom of expression should be limited, they are in agreement that morality's purview in this domain should be as limited as possible.

Hare's contribution is focused on analyzing the role of morality in judicial evaluations with respect to the issue of whether a limitation of freedom of expression is justified. To that end, he inquires the case law of the Supreme Court of the United Kingdom, the Supreme Court of the United States and the European Court of Human Rights (ECtHR). He maintains that, in light of the absence of a consensus on mutual moral values, judges must use a method of analysis that ensures that (the contested) moral values bear as little as possible on (possible) limitations of freedom of expression. To that end, they need to distinguish between 'content-based' and 'content-neutral' forms of speech regulation.

Stam concentrates on the question of how tolerant a liberal democracy should be towards offensive, hateful or discriminatory remarks about ethnic or religious minorities. He concludes that the Dutch Supreme Court uses a conception of toleration which makes it too easily susceptible to the private morals of prosecutors and judges, because it is not clear where exactly the boundaries of this toleration principle lie. Instead of this negative conception of tolerance, which is based on the idea that freedom of speech can only be permissible if it meets certain moral criteria, in particular respect for people's human dignity, Stam pleads a positive toleration principle, i.e., one in which as many viewpoints as possible will be protected. As a consequence, section 137c of the Dutch Criminal Code (specifying group insult) should be abolished.

Collard investigates the question of how law, morality and ethics relate in the field of (definitions) of extremism and terrorism. Collard is especially worried with regard to the way extremism is defined by the Dutch legislator. In the fight against extremism there is a large risk that that morality will restrict (extremist) speech, resulting in the authorities' already acting upon someone's thoughts. **Hasan** examines the arguments for free speech and the limits that should be set in advanced democracies, especially in reference to the online word. The UK's Online Safety Bill aims to protect children and young people online. But because of its severe sanctions, one may expect that tech

companies will err on the side of caution and remove myriad material, not limiting themselves to (potentially) illegal items, extending the removal to (potentially) harmful ones. According to Hasan, this risk of a chilling effect also applies to the EU Digital Services Act. Hence, what is thought morally right and thus necessitates legal protection, such as the protection of children from harm in online activities, can lead to a curtailment of free speech online, which, according to Hasan, is in the end a harm to a free society.

Klos also addresses the question of online free speech regulation, in particular online platform regulation. New regulation not only includes liability for failing to remove illegal or unlawful content, but also seeks to regulate what service providers cannot moderate, and the means of moderation. These so-called internet intermediary liability regimes can cause a legal incentive for both undermoderation and overmoderation. Overmoderation occurs when content that otherwise would be passed is sanctioned. It is here that the interplay between law and morality becomes explicit: overmoderation can have as a consequence that content that is immoral but not illegal is moderated. Moderation may even lead to the removal of such content. From a freedom of speech perspective this is undesirable because it puts the user at the mercy of the online platform, making moral judgments on a case-by-case basis. Klos therefore pleads moderate moderation: state legislators should only set rules on what providers should remove.

Inquiring case law of the ECtHR pertaining to blasphemy laws, **Herrenberg** explores a realm where law and morality are interwoven, which accordingly provides a proper arena to demonstrate the interrelatedness of both domains. He presents four cases as illustrations to convey that two pillars of the case law (the first being that blasphemy is considered a threat for public order and the second that blasphemy undermines tolerance) are problematic. With respect to the first pillar, the court too readily accepts restrictions on blasphemy under the banner of a possible disruption of 'religious peace', which, while potentially constituting a legitimate ground for such restrictions *in abstracto*, cannot provide such a basis by appealing to a vague connection between an expression and possible public disorder. The second pillar is criticized on account of the court's interpretation of 'tolerance' and its concomitant limitations of freedom of expression, which Herrenberg opposes, pointing to an alternative interpretation of 'tolerance', in accordance with which it is demanded of those who might be offended, shocked or disturbed to endure (and thus tolerate) what is expressed, with the corollary that a limitation of freedom of expression amounting to blasphemy is not as easily justified as the ECtHR's case law might make it appear.

1.3. Freedom of Religion

The morality of the modern liberal democratic state is a plurality of *weltanschauungen*, which entails freedom of religion as one of its core principles. In other words, the liberal democratic state has a morality of inclusion as its core value as far as different worldviews are concerned. At the same time, the morality of religion is one of exclusion: only when one adopts its doctrine and rules one is allowed to be part of it. In this way it necessarily distinguishes between us – the believers – and them – the non-believers.

In his contribution, **Petty** focuses on liberalism's paradox that the freedom of religion as the cornerstone of the modern liberal state is at the same time a threat because religious groups try to evade its laws when they collide with their religious rules and practices. When too many groups turn to religion as a means to seek dispensation from generally applicable laws, religious morals will erode the rule of law, thereby becoming a threat to the liberal legal order. **Blackford** – studying the jurisprudence of the ECtHR – observes that the morality of (religious) minority protection, which is a core principle of the liberal democratic state, has led to a widening of the freedom of religion, in the sense that it also consists of refraining from offending believers in their religious feelings. Blackford considers this an unwelcome development and demands the ECtHR to stick to the liberal-secular philosophy which should be its starting point.

Wahedi also discusses the problems that arise for a liberal democratic state when religion is singled out for special treatment. According to him, the position that we have freedom of religion because of the specialness of the metaphysics of religion can no longer apply. The morality of the modern liberal state should abstract from the religious dimension: religion is considered a protection-worthy category because of values that are not necessarily of a religious nature, such as human conscience. A liberal theory of religious freedom should draw on egalitarianism and advocate an egalitarian approach towards the choices people make to live their lives in accordance with their own beliefs. The consequence of this approach is that there is no need for a special right of religious freedom: as long as the freedoms of conscience, expression and association are guaranteed one can have religious liberty without having a constitutional right of religious freedom.

Sap focuses on the relationship between religion and human rights in his contribution. Religion and human rights are systems with different norms and values and have their own language, but at the same time can complement each other. In addition, the moral value of respect for human dignity lies at the heart of both (Christian) religion and human rights, according to Sap. **Somos** discusses Cliteur's book *The Secular Outlook: In Defense of Moral and Political Secularism* in regard to the thesis that a constitutional neutrality stance towards religion is not possible. He concludes that the objection that Cliteur's advocacy of secularism would not be neutral with regard to religious freedom is misplaced. *The Secular Outlook* positions law as a mediator between social morality and religion, but what happens, Somos asks, when judges subvert the Western

tradition of moral and political secularism? The most cogent criticism of Cliteur's call for secularism is, in other words, that it provides no safeguards against desecularizing, retrograde legislation. According to Somos, the book's underlying assumption of law's potential to mediate between morality and religion remains, however, both plausible and necessary.

In **Van Schaik**'s exposition, the relationship between law and morality is explored by means of an analysis of the development of human rights. Van Schaik inquires salient aspects of the drafting history of the Universal Declaration of Human Rights, aiming to demonstrate to what extent religious elements are extant in the text; whether such elements should be introduced – and, if so, which ones – was a bone of contention. This proved a particularly challenging issue on account of the fact that consensus had to be found between parties with diverse perspectives. In that light, the option of secularism seems promising, as it appears compatible with the idea of a shared moral outlook.

1.4. Constitutionalism

Associated with the core idea of constitutionalism is a legal limitation of the powers of government; its authority or legitimacy, as a consequence, depends precisely on the given that it observes these limitations. The question is, then, what these limitations ought to look like. The specifications of constitutionalism may consist of the separation of powers, checks and balances, and the protection of fundamental rights. The definitions of constitutionalism thus range from a very thin view of constitutionalism, containing merely the structures of government, towards a very thick view, containing various substantive human rights. The thicker constitutionalism is, the more law and morality intertwine, creating moral limitations on the decision-making power of the democratically chosen legislator.

Manenschijn concentrates, in her contribution, on the idea of militant constitutionalism: the idea that the values of constitutionalism must be (actively) protected against abrogation. Such a theory of militant constitutionalism shows the potential to provide a new and more adequate answer to the rule of law (and democratic) backsliding. At the same time, demands to protect a thicker version of constitutionalism must be greeted with caution, since the thicker constitutionalism is, the more law and morality intertwine. **Van der Schyff** writes about the discussion of whether or not to introduce constitutional review in the Netherlands. He distinguishes between public morality and private morality. Public morality can best be understood as encompassing 'society's bonds' or 'common values'. The basic principles of liberal or constitutional democracy should form the basis in determining those morals. In this regard, Van der Schyff investigates the question whether the time has arrived for the Netherlands' own conception of public morality to also include the constitutional review of Acts of