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Understanding What Our Culture Demands of Its Judges

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ABSTRACT
Judges are being called upon to make decisions in a litigious culture and a consumerist culture. In this culture, choice is the ultimate value and criticism of another's choices is therefore regarded as a serious wrong. The cultural priority given to freedom of choice has shaped human rights theory in the direction of possessive individualism. The weakening of the bonds of civil society has both accelerated the diversity of lifestyle choices and reduced the power of extra-legal mechanisms for dispute resolution. Judges are not only expected to be impartial between the parties but now to uphold the ideal of neutrality between differing lifestyles. A morally neutral balancing exercise is, however, an impossibility. What is coming to dominate judicial thinking in England is the assumption that equality requires consumers to have exactly the same access to exactly the same services from exactly the same providers. This consumerist conception of equality unjustifiably overrides freedom of conscience and is illiberal in its effects.

INTRODUCTION

Sunday 15th May 2011 saw voters in Zurich, Switzerland take part in a referendum to decide whether or not they wished to ban assisted suicide in their canton or to prevent "suicide tourism" by limiting the practice only to Swiss citizens. Are decisions as to the law on such acute moral issues best made by electorates as a whole, by politicians or by the courts?

Should issues such as abortion be addressed as part of the constitution of the nation (as in Ireland), by decision of Parliament (as in many other European countries), or analysed by judges on the basis of competing rights (as in the United States in *Roe v. Wade*)?[1]

1. In *Roe v. Wade*, 410 U.S 113 (1973), the U.S. Supreme Court decided that the right to privacy under the due process clause in the Fourteenth Amendment to the United State Constitution extends to a woman's decision to have an abortion, but that right must be balanced against the state's two legitimate interests in regulating abortions: protecting prenatal life and protecting a mother's health. The Supreme Court held that these state interests become stronger over the course of a pregnancy, and declared to be unconstitutional many state and federal restrictions on abortion during the first two trimesters of pregnancy.

In the UK, two particular issues have brought to the fore a debate about the balance of powers between Parliament and the courts: the enforcement of pre-nuptial agreements and the development of the law relating to the protection of privacy. The latter, in particular, highlights the consequences of the domestication of the European Convention on Human Rights in the UK Human Rights Act 1998. Through a series of cases, the courts have developed a new right to privacy, in an area which raises important questions about the extent to which a person's behaviour in private is relevant to the roles which they take on in public.

This paper seeks to explore how British society in particular conceives of the role of its judges, although there are parallels to be drawn with developments in other Western countries. It examines whether there is an increasing tendency for judges to make decisions about social morality? And, if so, is that something Christians should be concerned about?

IS THERE AN INCREASED TENDENCY FOR JUDGES TO MAKE DECISIONS ABOUT SOCIAL MORALITY?

Lawyers and politicians often attribute the blame to one another for the developments in the law which are the most controversial. The lawyers criticize the politicians for making bad laws and the politicians accuse the lawyers of misapplying the laws in ways which were never the politicians' intention.

It is important to recognise that judges are not responsible for creating disputes or for initiating cases, either under the common law or the Continental system. For a judge to have the opportunity to adjudicate on a contentious issue of social morality a dispute must have arisen between the parties which has escalated into litigation *and* that dispute has been one which the parties have not been capable of resolving themselves without a decision from the judge.

This raises the questions: what is it about our current culture which is generating so many disputes about social morality?, and what is it about our current culture which is leading to judges being called upon to adjudicate on so many of those disputes?

Two cultural trends in particular have contributed to these phenomena: the dominance of a "consumer culture" and the development of a "litigation culture".

1. A "consumer culture"

Choice as the supreme value. Bob Goudzwaard's 1981 book *Idols of our Time* is a popular example of the Dutch neo-Calvinist critique of the idolatries of modernity.[2] In that book he identified revolution, nation, material prosperity, and guaranteed security as the idols dominating the twentieth century. At the start of the twenty-first century, contemporary European culture has given price of place in the idolatrous pantheon to a new god: the idol of choice.

The idol of choice is not new. David Bentley Hart, in his award-winning book, *Atheist Delusions* claims that modernity, as a period of thought, is characterised by the idea that the ultimate good is freedom of choice.[3] What is, however, distinctive about the current cultural moment is the extent of the claims being made in the name of freedom of choice, as seen most clearly in the cultural pressures being exerted in favour of the right to die and the right to an assisted suicide.

The cultural deference, or rather enslavement, to freedom of choice combines with a secularist consumerist mentality which says: "if you find yourself with a desire, you are entitled to satisfy that desire." Self-control, control of one's sexual appetites, whether hetero-sexual or homo-sexual, is seen as pathological self-repression rather than as healthy self-discipline.

In Western society, choice has become the supreme value *per se*. That you make a free choice is more important than what you choose. Taken to its ultimate extreme, argues Hart, there is no value at all other than choice. 'Freedom—conceived as the perfect, unconstrained spontaneity of individual will—is its own justification, its own highest standard, its own unquestionable truth.'[4]

To criticise another's choices is therefore to challenge the ultimate value in our civilisation, it is to commit the ultimate wrongs of being intolerant and

2. Goudzwaard, *Idols of our Time* (Kok, 1981). Translated Mark Vander Vennen. Downers Grove: IL, IVP, 1984.

3. Hart, *Atheist Delusions: The Christian Revolution and its Fashionable Enemies.* New Haven: Yale, 2009, 21.

4. Hart, *Atheist Delusions*, 105.

judgmental. But if there is no value other than choice; there is also no such thing as the truth. What is true, what is good, what is beautiful are no longer things which exist objectively, out there or in reality. All that there is are the things that are true for me, the things that I think will be good for me, and the things that I regard as beautiful.

So our culture is marked by an ideology, an idolatry, of choice which says:

1. if you have a desire you are entitled to satisfy that desire; and
2. to criticise another's choices is to commit the ultimate wrongs of being intolerant and judgmental.

As will be discussed below, the application of those two principles has radically transformed the way Western society views equality and the way Western society views neutrality. The application of those two principles has also heavily marked the development of human rights theory. Human rights theory operates today within a culture which is consumerist: maximum choice of goods and services is paramount, because choice is the only absolute value which our culture recognises

It is therefore little surprise to see that human rights theory has developed in ways which are not only compatible with, but in fact reinforce, the ideology of freedom of choice.

Human Rights interpreted in terms of Possessive Individualism. Although there appears to be a broad theological consensus that a significant proportion of the content of the claims labelled as "human rights" are compatible with a Christian worldview, there is a lively debate as to whether the language of human rights is an appropriate way of talking about those claims or whether it is so full of dangerous presumptions as to be, in practice, irredeemable. On one side of the argument, Nicholas Wolterstorff and Christopher D. Marshall have attempted to set out the Christian foundations for a sustainable human rights theory.[5] Against them, Joan Lockwood O'Donovan insists that the perspective which developed from Franciscan thought via natural rights theory into human rights theory has always been poisonous because of its intrinsic association with the idea of "possessive individualism", the idea that

5. N. Wolterstorff, *Justice: Rights and Wrongs*. Princeton: Princeton University Press, 2008. C. Marshall, *Crowned with Glory and Honour: Human Rights in the Biblical tradition*. Scottdale, PA: Herald, 2001.

rights are subjective property entitlements, i.e., "things which belong to me".[6]

Although, on balance, I think that human rights theory *may* be capable of being reclaiming and re-formulated in the ways envisaged by Wolterstorff and Marshall, I am persuaded that Joan Lockwood O'Donovan has accurately diagnosed that contemporary human rights theory does understand rights in terms of "possessive individualism".

Thus, human rights are thought of as rights of ownership, ownership over things in creation, and ownership of one's own acts (i.e. the right to freedom). People come to see themselves as individuals, with the right to be free from pressure from other people, externally imposed obligations, and natural limitations. So, for example, the right to a child is asserted in support of a claim be given IVF treatment after the menopause.

Lockwood O'Donovan warns us about where this leads. It leads to rights being asserted as demands, as claims by individuals, to the detriment of wider society. The logical conclusion, she argues, is that rights will be claimed to everything which can be the object of human desire and possession. What gets squeezed out in the clamour for more and more rights are the shared goods of community.

Rights thought of as subjective property entitlements (things which belong to people) do not provide a stable basis for a political society because they cannot account for those shared moral obligations, notably the common good, which make up the bonds of community which government must protect.[7]

Goudzwaard identified the post-war generations as materialists. They chose "belongings" over "belonging". We are in a different cultural phase, where it is "ownership of self", expressed as freedom of choice, rather than either belongings or "belonging to and with" others which is highly prized.

6. J. Lockwood O'Donovan has developed this account in a series of articles: 'Historical Prolegomena to a Theological Review of "Human Rights",' in, *Studies in Christian Ethics* 9 (1996), 52-65; 'The Concept of Rights in Christian Moral Discourse,' in, M. Cromartie, ed., *A Preserving Grace: Protestants, Catholics, and Natural Law*. Grand Rapids: Eerdmans, 1997; 'Christian Platonism and Non-Proprietary Community,' in, O'Donovan and O'Donovan, *Bonds of Imperfection: Christian Politics, Past and Present*. Grand Rapids: Eerdmans, 2004, 73-96.

7. Lockwood O'Donovan argues that we belong to Christ, and "receive all the good that we are, have, and do from him, as a 'loan.'" As we relate to others, we are to fulfil the demands of justice, not the demands of one another. Justice is constructed not from the rights of individuals but from a matrix established by "God's right … of divine, natural, and human laws or objective obligations that constitute the ordering justice of the political community." 'The Concept of Rights in Christian Moral Discourse,' 145.

The secularist consumerist culture and the possessive individualism of contemporary understandings of human rights have contributed to the growth of a litigation culture.

2. A "Litigation Culture"

Litigation as a means of validation. Much less has been written about the rising litigation culture in Europe than about American litigation culture. Although the two litigation cultures have some common features, litigation culture in Europe also has some specific features of its own. In Europe, it is not money it is validation that is the reason behind many of the cases which raise contentious claims.

For example, court cases have been brought and a government proposal to change the law to allow for gay marriage. Since the law already provides the same benefits to those who are in a civil partnership as it does to those who are married, the issue is not a material one, it is solely about status.

In the 1960s, people who held different values from the majority sought legal changes and legal protection in order to be left alone. Today, people who hold differing values now use legal rights as a way of asserting the equal status of their lifestyle choices. For the right to die campaigners, it is not enough that suicide is no longer a criminal offence, now it is sought to make that ultimate act of ownership of self something which is condoned by the state.

All of this has contributed to a radical change in the meaning of equality. No longer is equality thought of primarily in terms of "equality of opportunity". Instead, in the last 15 years of so, we have moved towards a new idea of equality as requiring equal state recognition of all lifestyle choices.

Litigation as the default solution. As already noted, contemporary human rights theory reinforces a sense that we are individuals whose primary relationship to one another is not one of belonging together but rather one of having rights against one another. This individualism is corrosive of civil society, of those communities of belonging, whether trade unions, societies, clubs or even churches, which are human-sized associations in which people can find their place. Robert Putnam famously traced the rise of this individualism in the decline in bowling leagues in America in his book,

Bowling Alone.[8]

The significance of this cultural trend is that the less attached people are to these institutions of "civil society", the more they tend to view the public square as consisting only of, individuals on the one hand and the state on the other hand. This has two consequences. First, it contributes to the belief that it is the sole or primary responsibility of the state to satisfy all my needs and to provide for all my rights as an individual. So it is to the state rather than to my extended family or my neighbours that I look for care when I am suffering with a long-term illness. This gives rise to claims against state agencies which judges are called upon to decide or to appeals made to judges, as representatives of the state, to vindicate my rights against others.

Second, this decline amounting to a collapse of civil society both explains why social morality is more and more contested and why seemingly ever greater numbers of cases require a decision by a judge. Anthropologists and sociologists have long observed the importance of social conventions, communal understandings of the boundaries of acceptable behaviour. Civil society is one of the chief means by which those boundaries are communicated and policed. If people are less and less bound to the institutions of civil society they are less and less bound by the institutions of civil society. Hence, the words of the Book of Judges, "everyone did as he saw fit" (Judges 21:25), seem increasingly apt as a description of Western societies.

However, there is a further aspect to this. It is not just that civil society, when it is healthy, reduces the number of disputes surrounding social morality which arise; it is also that civil society, when it is healthy, is one of the mechanisms or pressures, which contributes to the resolution of those disputes. Think about the social pressure within a church, a club or a trade union not to litigate against a fellow member. If both parties to a dispute feel a strong loyalty to the group, they may, because they value being a part of that group, resolve their dispute. Where their communal loyalties are weak, they have less reason to compromise. The result is that there is less informal accommodation of difference and so more litigation; less extra-legal dispute resolution and so more call for judicial decision-making.

Conclusion: the reasons why judges are called upon to determine more

8. Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community.* New York: Simon & Schuster, 2000).

issues of social morality today

So, judges today are being called upon more frequently than before to determine issues of social morality because of the contemporary cultural trends of consumerism and litigiousness.

In contemporary consumer culture, choice is the supreme value, if you have a desire, you are entitled to satisfy that desire, and to criticise another's choices is to commit the wrongs of intolerance and judgementalism.

This consumer culture fosters an understanding of human rights interpreted in terms of possessive individualism, where rights are seen as "things which belong to me" and "ownership of self" is chosen over "belonging to and with others".

This consumer culture gives rise to a litigation culture, in litigation is used as a means of validation, and the notion of equality has changed from equality of opportunity to equal state recognition of all lifestyle choices. The individualism of human rights means that litigation is increasingly seen as the default solution because the less people are bound *to* the institutions of civil society, the less they are bound *by* the institutions of civil society.

THE PARADIGM FOR JUDICIAL BEHAVIOUR: THE NEUTRAL UMPIRE

Two hundred years ago, the utilitarian thinker Jeremy Bentham asserted that each of us should be free to decide for ourselves what we like and what we dislike, what increases or decreases our well-being, and no-one else has any right to criticise us, *unless* what we are doing decreases the well-being of others. For him, therefore, the game of "push-pin is as good as poetry".[9] The task of government is, by applying the Utility Principle which Bentham coined, to order society so as to maximise aggregate well-being. Applying the Utility Principle exhausts the task of enforcing public morality.

Not only has Bentham's Utility Principle gone on to dominate economics (and thus to feed in to consumerist culture), it has also given rise to one of

9. What Bentham wrote, in *The Rationale of Reward* (London: Robert Heward, 1830), 206, was, "Prejudice apart, the game of push-pin is of equal value with the arts and sciences of music and poetry." In setting out his dispute with Bentham on this point, J.S. Mill, misquoted Bentham as having written "Push-pin is as good as poetry": "Bentham," *Dissertations and Discussions*, Vol. I. London: Parker, 1859, 389.

those mental images of the role of government which many people today find intuitively appealing: the idea of the neutral public square. This is the picture of life as a competition, in which each of us wants to pursue the things which we think will make us happy, and the job of the government, the role of the law, is to act as an impartial umpire, making sure that the competition remains free and fair. So the law makes no judgments about the relative merits of loud rock music and enjoying a quiet Sunday afternoon walk, but provides regulations which make both possible within limits.

The idea of the judge as a neutral umpire has an intuitive appeal. It chimes with our ideas of fairness and lack of bias. However, there is a significant difference between the traditional ideal of the unbiased judge and the contemporary paradigm of the neutral umpire. Just as the concept of equality has been re-defined; so too has the idea of judicial neutrality.

The unbiased judge is called upon to be *neutral as between the parties*. The contemporary paradigm of the neutral umpire demands that the judge affirm and uphold an ideal of neutrality between differing lifestyles. In short, the role of the judge is thought of not as enforcing that crystallisation of social morality which has been given the force of law but rather as the protector of lifestyle equality, of freedom of choice, against those judgmental, intolerant, discriminatory individuals and groups who insist on holding to traditional, old-fashioned or, worst of all, religious moralities.

SHOULD CHRISTIANS BE CONCERNED ABOUT THIS TENDENCY?

There are three reasons to be concerned about these developments. First, the courts are the wrong forum for these disputes to be played out. Second, the neutral balancing exercise which the courts are asked to carry out is in fact impossible and, given the dominant cultural value of freedom of choice, the scales are already loaded in favour of outcomes which maximise choice. Third, the results of the courts' adjudications are appearing increasingly illiberal.

The courts are the wrong forum for these disputes to be played out

Legislation and judicial decision-making are different. Legislation lays down general rules which apply within a determined sphere following a public

debate to which all interested parties may contribute through political representatives and lobbyists. Judicial decision-making focuses on resolving a dispute between two parties. Its perspective is narrowed to the parties to the immediate dispute. Although judicial decisions, in both common law and civil law systems have wider implications in fact, judges are less well-equipped to determine what those wider implications will be than are politicians.

The courts are the wrong forum for determining social policy because they are not equipped with the tools, in particular the listening ears, to make social policy well. If post-modernism has anything to teach us, it is that there is no view from nowhere. Because they are less likely to have been given an adequate overview of the likely implications of their decision, judges are at a considerable disadvantage when determining social policy compared to politicians.

The neutral balancing exercise which the courts are asked to carry out is impossible

The purported idea that judges can act as a neutral umpire, applying the law a-morally when confronted with litigants who hold to opposing moralities, is ridiculous. The idea of the judges as neutral umpires is obviously unrealistic. Its lack of reality was exposed in America over 100 years ago. In the United States of America at the turn of twentieth century, judges claimed that the interpretation of statutes and legal precedents was purely a formal exercise. A judge deciding a case was not making a moral decision but was merely applying a rule, in the same way that one would apply a rule of grammar.

This unreality of this claim was exposed in the infamous decision of the U.S. Supreme Court in the case of *Lochner v. New York* 198 US 45 (1905). In *Lochner*, the US Supreme Court struck down legislation from the state of New York on the basis that by imposing a limit on the working hours of bakers to no more than 10 hours a day and 60 hours a week the legislators were violating the employees' freedom of contract. Such a decision caused outrage.[10] The judges in the US Supreme Court were not making a morally neutral adjudication but instead giving priority to the nineteenth century ideology of freedom of contract, an ideology which ignored the realities of the disparities of power in the baking industry.

10. Discussed in Tamanaha, *Law as a Means to an End: Threat to the Rule of Law.* Cambridge: Cambridge University Press, 2006, at 47-52.

In Europe, the freedom of choice which is prioritised today is no longer the freedom of the industrialist or capitalist to determine how long they want their workers to work, it is the freedom of choice of consumers which is valued above all else. Ironically, the results can be very similar. For example, workers lose the right to have Sunday as a guaranteed day of rest because of the consumer demand for 7-day a week shopping.

The neutral a-morality which judges are supposed to apply turns out to be the new morality of consumerist freedom of choice in disguise. In the supposed neutral adjudication by judges, the dice are pre-loaded in favour of choice. Take, for example, the following debates. The pro-choice/ pro-life debate: 'a woman has the right to choose whether to carry a pregnancy to term or to abort the foetus inside her womb'; 'the foetus is an unborn child which has the right to life'. Framed in those terms, the woman's right to choose resonates more strongly with the dominant value of contemporary culture.

What about the debate about the levels of pay in the banking industry? On the one side there are those who say: 'The market should decide pay levels for top brokers'; and on the other side, those who argue that 'The rewards should be proportionate to the social value of the activity and not be designed in ways which promote excess risk-taking'. Notice how the rhetoric of those defending "fat cat" bonuses is based on the ideology of market choices.

The purported neutrality of a-moral judicial decision-making is a mirage. As social commentator Melanie Phillips has said: "there is no neutrality in the culture wars".[11] Judges are being asked not to undertake a technical, a-moral task, but rather to implement a new programme of social morality, one in which the consumerist value of freedom of choice is to be given expression throughout more and more of society.

The results of the courts' adjudications appear increasingly illiberal

In the UK, a number of decisions arising from the collision between sexual orientation rights and the rights to freedom of conscience have resulted in illiberal outcomes. Instead of human rights being applied to protect the expression of differing viewpoints in society, it has been used to enforce and

11. 'Standing up for the values of the biblical faith today', *Church of England Newspaper*, 16th September 2010. Available online at http://www.religiousintelligence.org/churchnewspaper/eos/standing-up-for-the-values-of-the-biblical-faith-today/ (accessed 18 May 2011).

entrench a particular account of social morality.

The Catholic adoption agencies. In the UK there are a number of charitable agencies which worked in partnership with local authorities to find homes for children in need of adoption. A small number of these agencies were Catholic and were supported and funded by the Catholic Church in Britain. These agencies had a good track record in finding homes for children who were otherwise hard to place. The introduction of new equalities legislation meant that those agencies would have to place some children with practising homosexuals.

In response to the new legislation, some agencies cut their ties with the Catholic Church but others chose to close. An application by Catholic Care, one of the adoption agencies, to change its charitable objects to allow it to continue to operate in accordance with its previous practice, was rejected for a second time by the Charity Tribunal on 26th April 2011 [2011] ULFTT B1 (GRC).

There exist other adoption agencies in the UK which were happy to place children with practising homosexuals so overriding the freedom of conscience of the Catholic adoption agencies was not necessary in order to provide practising homosexuals with access to children to adopt. However, the consumerist assumption is that practising homosexuals should be given *exactly the same access* to adoption services *from exactly the same providers* as everyone else. Applying the equalities legislation in this way overrode the associational liberty of Catholic adoption agencies to organise their own internal affairs and reduced the chances of "hard-to-place" children being adopted.

Ladele v. London Borough of Islington [2010] IRLR 211. Ms Ladele was a registrar of births, marriages and deaths. She was a Christian who had a conscientious objection to homosexual practice. She asked to be excused from officiating at civil partnerships. She made informal arrangements with her colleagues to swap rosters so as to avoid having to officiate at civil partnerships but two of her gay colleagues objected complaining that they felt "victimised" by Ms Ladele's refusal to "do civil partnerships."

Allowing Ms Ladele to opt out of performing civil partnership ceremonies did not affect the ability of practising homosexuals to enter into that form of

legal arrangement. Many of her colleagues were prepared to officiate at such ceremonies. And yet, it was assumed by the Court of Appeal that, allowing one individual to stand back from particular duties, would undermine the Council's commitment to non-discrimination. This does not follow. Underpinning the decision is the ideology of consumerist freedom of choice which is not content with allowing all people access to a public service but which demands that all those involved in the provision of public services do so without any form of recognition or accommodation of their moral beliefs. The effect of the decision is decidedly illiberal, as it leaves conscientious believers with a choice between being excluded from particular public employments and public hypocrisy.

The bed and breakfast case. In a third case (*Hall and Preddy v. Bull*, 17th January 2011), a Christian couple who provided bed and breakfast accommodation in their own home, were fined for breaching the equalities legislation by refusing to let a double-bedded room to a homosexual couple who wished to stay the night.

One can present the issue in a number of different ways: was it about the owners' right to freedom of religion versus the holidaymakers' right not to be discriminated against on the grounds of their sexual orientation? Was it about the owners' freedom to choose who to let into their home versus the holidaymakers' right freedom to choose wherever they wanted to stay the night? Put in the latter terms, the consumerist freedom of choice overrode the rights of the owners to express their conscientious beliefs and their religious convictions in the way in which they conducted their business affairs.

Again, there was no suggestion in the case that the homosexual couple would have been unable to find double-bedded accommodation elsewhere in the area or that it would have been a serious interference with their relationship if they had been obliged to sleep in separate rooms for a night.

The common thread across all of those cases is the application of the ideology that equality requires consumers to have exactly the same access to exactly the same services from exactly the same providers. Irrespective of one's views on the particular issue of sexual orientation, the assumptions about what equality requires and what neutrality means in twenty-first century Britain give cause for concern.

The future of illiberalism? One can see the ideology of consumerist freedom of choice giving rise to pressures in the future in other areas. If consumers have the right to *exactly the same treatment from exactly the same service providers*, what happens to the right of medical professionals to object, on conscience grounds, to carrying out abortions, to screening embryos for genitive defects, or to assisting suicides?

This change in the meaning of equality to mean lifestyle equality, with the new emphasis on "non-discrimination" understood in consumerist terms as meaning the right to demand *exactly the same service from exactly the same service providers* means that equality rights are given undue priority over religious liberty rights. The right to manifest religious belief in public, in one's working life, is being squeezed.

The previous sections have considered the cultural climate within which judges are asked to make decisions and have explored both the reasons why so many contentious questions seem to be coming before the courts and the assumptions which are guiding judicial decision-making. In the final section, an alternative understanding of the role of the judge will be sketched.

RE-CONCEIVING THE ROLE OF JUDGES: A-POLITICAL NOT A-MORAL

Moral not a-moral

There is an important debate to be had about the nature of equality and about the place and extent of freedom of religion in Europe today but the courts are not the primary place where that debate should be taking place.

However, that does not mean that we should return to the illusion that the judicial task should be carried out a-morally, by the technical application of some morally neutral criteria.

Harvard Professor Michael Sandel, argues that the ideal of "liberal neutrality", which has dominated modern law and jurisprudence for decades,—namely that we should never bring moral or religious convictions to bear in public discourse about justice and rights"[12] – is actually an impossibility. The reason is that "Justice is inescapably judgmental. Whether

12. Michael J. Sandel, *Justice: What's the Right Thing to do?* Farrar, Straus and Giroux, 2009, 248.

we're arguing about financial bailouts . . . surrogate motherhood or same-sex marriage, affirmative action or . . . CEO pay . . . questions of justice are bound up with competing notions of honour and virtue, pride and recognition. Justice is not only about the right way to distribute things. It is also about the right way to value things."[13]

What is significant is that Sandel's examples are not just about private choices; they are about questions of what the law should and should not permit. They are about how the law reflects our public morality.

The biblical example of the a-moral judge is Pilate washing his hands whilst ordering Jesus' execution (Mt. 27:24). The Old Testament presents us instead with the picture of the morally committed judge, determined to deliver the oppressed and condemn the oppressor (Deut. 10:17-18; Isaiah 33:22; Psalm 97).[14]

Judging rightly requires wisdom and wisdom is a skill of knowing how to discern between right and wrong and knowing how to apply that distinction in practice. Judging is necessarily rooted in moral values.[15] Decisions about how to interpret legislation, how to balance various rights against one another, and what the implications are of equality in particular circumstances, all have to be made in accordance with moral values. As Joseph Raz has written: "Legal reasoning is an instance of moral reasoning. Legal doctrines are justified only if they are morally justified, and they should be followed only if it is morally right to follow them."[16]

Moral not Political

However, to say that judicial reasoning *always* involves moral reasoning does not mean that judges have to make political decisions. Indeed, because of the constraints of the litigation process, judges are not best-placed to make political decisions. The European Court of Human Rights acknowledges the limitations on the judicial role by allowing states a "margin of appreciation". Human rights law should be there to deal only the exceptional case when the normal political processes have produced a totally abhorrent outcome.

13. Sandel, *Justice*, 261.

14. D.H. McIlroy, *A Biblical View of Law and Justice*. Carlisle: Paternoster, 2004, 70-71.

15. T.R.S. Allan, 'Review of Bellamy Political Constitutionalism' *Cambridge Law Journal* 67 (2008) 423-26.

16. Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*. Oxford: Clarendon, 1994, 324.

Domestic judges similarly need to recognise the margin of appreciation, and that the margin of appreciation should be afforded not just to government but also to the institutions of civil society and of economic and social life. Judges could benefit from training in the Reformed idea of sphere sovereignty so that they learn to recognise the legitimate rights to self-governance of other bodies.[17]

This will not entirely solve our problems. After all, the British cases which have illustrated the cultural trends have arisen from the way in which the UK Government has implemented the EU Equality Directive, but, as a matter of general political theory, matters of general public importance tend to be better debated by legislatures than in courtrooms.

CONCLUSION

Western culture values consumerist freedom of choice above all else and sees litigation as the default solution when disputes arise. It is a culture that places its judges in the role of an a-moral neutral umpire but which has pre-loaded the dice in favour of outcomes which promote consumerist freedom of choice. This is leading to increasingly illiberal outcomes and we therefore need to think differently about judges, seeing their task as one which instead of responding to political agendas involves the application of moral wisdom.

In his first letter, Jerome describes the miraculous deliverance of a woman wrongly condemned to death for adultery. He comments: 'where there is most law, there, there is also most injustice.'[18] Jerome's comment might make an appropriate motto for our age.

17. D.H. McIlroy, 'Subsidiarity and Sphere Sovereignty: Christian Reflections on the Size, Shape, and Scope of Government,' *Journal of Church and State* 45 (2003), 739-64.

18. Jerome, Letter 1, para. 14.