Question: Are there any legal decisions which judges should not make?

To what extent should judges make legal decisions on the right to die?

In order to maintain a state of democracy in England and Wales, it is essential for members of the public and those who stand before judges in court to trust that their cases will be decided in accordance with the law. The Bangalore Principles of Judicial Conduct declares that judges must conform to the core principles of independence, impartiality and integrity (Courts and Tribunals Judiciary, n.d.). Judges are often defined as arbiters of law, highlighting their knowledge and authoritative status in court. In trials, they decide the facts of the case using sufficient evidence presented to the court, establish pertinent points of law, and then apply this law to the particular case to reach a decision. If a jury is involved with the case, the judge will direct the jury on the law and allow them to reach a unanimous or majority verdict. Upholding the principle of parliamentary sovereignty, Parliament creates the law, which judges usually interpret and apply to make legal decisions (Greene, 2021). In common law, they are able to make comments that explain the reasons for their decisions, which can become binding precedent for lower courts. However, there may be some legal decisions that judges should not make, due to the fact that their enforcement can require complex rules and regulations to be put in place, they may not have the constitutional power to make certain significant decisions, and applying the law to certain cases may make the decision feel ethically and morally wrong. If a judge makes a decision that is controversial, this can create complications and conflict. A topic demonstrating the importance of legal decisions is the idea of assisted dying in England and Wales. Following previous debates on euthanasia and the right to die, a new Bill proposes that High Court judges will have to make the choice to approve individual requests for assisted death. The Assisted Dying Bill, which is a Private Members' Bill that was introduced by Baroness Meacher in 2021, is currently awaiting the committee stage in the House of Lords (UK Parliament, 2021b). This Bill proposes that terminally-ill adults will be enabled to request specified assistance to end their own life. If it reaches the final stages and becomes part of the statute, High Court judges will be part of the approval process. As iterated by Nigel Biggar (2018), judges are experts in the law and arguably have no special authority in ethics, morality or social prediction. In this letter to the editor of The Times, Biggar questioned Baroness Mallalieu's insistence that the courts should be the appropriate locality for the adjudication of the public right to assisted dying, instead of Parliament. This links back to the ongoing debate on euthanasia, which draws upon the idea that some judicial decisions can go beyond the scope that the common law can handle; these

decisions are so significant that they should arguably be left to Parliament. As a result, it should be questioned whether there are certain decisions judges should not make.

Immediately, it could be argued that some decisions involve moral and ethical reasoning, as well as legal reasoning. For example, the idea of legally ending someone's life is surrounded by controversy, which could remain in the back of the judges' minds, potentially influencing their decision on a contextual basis. They are entitled to exercise the rights and freedoms available to all citizens, suggesting that they have the right to form their own moral opinions and ideas. This method of assisted killing, which has been defined as "physician-induced killing", according to Stevens (2022), differs from euthanasia. It involves the individual taking prescribed drugs themselves, as opposed to doctors deliberately ending a patient's life to cease their suffering. Despite this, both concepts are surrounded by contradictory views on the ethics. However, judges are still required to remain impartial, which includes the maintenance and enhancement of the confidence of the public, the legal profession and litigants (Courts and Tribunals Judiciary, n.d.). As a result, their subjective opinions on political, social and legal issues should be disregarded in order to maintain a state of judicial impartiality. Although their personal views on concepts like assisted dying and euthanasia should not be incorporated into their decision, there are moral debates that may influence their attitudes towards approving or disapproving the requests. According to Waldron (2008), the ability of judges to reason in a deliberative, analytic and measured manner links closely to moral philosophers' desired way of reasoning, implying that judges are also good at considering the moral implications of cases. Despite this, it is up to the judges to apply the pertinent points of law to the case they are hearing; their personal views are not considered in their decision-making process. A judge can face disqualification if any personal bias or opinion forms the reason for their legal decision, which can be seen in the case of *R v Bow Street Magistrate ex parte Pinochet (No.2) (2000),* where the judge had links to a party to the case (Ahmed, 2019). Furthermore, Biggar's letter included the phrase "necessary forensic myopia"; judges are only able to use the evidence that they are presented with, but are not able to commission comprehensive inquiries like parliamentarians. From this and their encounter with the terminally-ill adult, they will need to conclude whether they are mentally competent and are making a clear, settled decision of their own violation. Therefore, introducing moral and ethical debates into court arguably goes beyond judges' roles of legal decision-making; as said by Waldron (2008), the decisions on the application of the law is not

supposed to be affected by moral reasoning and thinking. The fact that only one High Court judge would approve the request, along with two doctors, could burden them with a sense of guilt and unrest, leading to potential repercussions. Nigel Biggar (2018) stressed that judges are experts in the law, not ethics, morality or social prediction. Another example is the debate surrounding a different branch of assisted killing, which is known as euthanasia. In the case of *Nicklinson*, a paralysed man lost the High Court case to allow doctors to end his life without fear of prosecution. Lord Justice Toulson described it as "deeply moving", instantly showing how emotions and moral struggles can be interwoven into judicial thinking (Gallagher, 2012). The judiciary often has to make controversial decisions about matters; High Court judges in the Family Division do have to consider matters like the potential separation of conjoined twins. Presenting them with more ethical questions could bring ideas on ethics, society, religion and morality into the legal system.

In addition, it could be argued that making significant decisions like these would have "consequences far beyond the present cases", as Lord Justice Toulson declared in the case of *Nicklinson* (Gallagher, 2012). He also said that the decision to allow euthanasia would create a major change in the law, which is arguably beyond the scope of the common law. Such monumental legal pronouncements would arguably be up to Parliament to make. Three of the judges that formed part of the majority verdict in this case agreed on the view that the decision should be down to Parliament, as the courts lacked constitutional authority required (UK Parliament, 2015). They described it as an "inherently legislative issue". In the case of *Conway*, Lady Hale, Lord Reed and Lord Kerr also stressed this, with Noel Conway himself stating that he was eager to turn his attention to Parliament (Bowcott, 2018). Consequently, such significant legal decisions should arguably be left to Parliament. Moreover, the topic of assisted killing is extremely controversial. Creating precedent for future cases sets up the expectation that doctors can kill their patients (Walsh, 2012), which would mean that complex regulations would need to be put in place for subsequent cases. Legalising assisted suicide for terminally-ill people following the Bill's potential acceptance, the future may bring further extension to those without such an illness. This highlights the complexity that could result from judges making such momentous decisions. After canvassing the perspectives of its members, the British Medical Association adopted a neutral stance on the potential Assisted Dying Bill; approximately 49% of members were in favour of neutrality, whilst 48% were against it (Patterson, 2021). The medical ethics committee chair, John Chisholm, declared that these statistics demonstrate the "wide range of personal views on this

important issue", cementing the idea that the moral and ethical subjective views of individuals often differ. As a result of these differences of opinion, the judge making the decision on whether to allow assisted suicide is likely to face scrutiny and criticism. When Parliament makes a decision that is controversial, any citizens who disagree or oppose the outcome are given the political opportunity to have their views considered. However, unlike Members of Parliament, judges are not elected; they are appointed. According to Benwell and Gay (2011), although judges are independent and form part of the separation of powers in England and Wales, they are subordinate to Parliament and must not modify the validity of an Act of Parliament. This was confirmed by *Pickin v British Railways Board (1974).* Consequently, the fact that the judiciary could make such a significant decision on the concept of assisted killing and euthanasia, combined with the fact that only one unelected High Court judge would be necessary from the legal system to approve the request, may make those who oppose the judge's decision see the circumstance as an act of tyranny. People who hear about this decision may demonstrate dissent, leading to undoubtable conflict. In current English law, S.2 Suicide Act 1961 tells us that it is a criminal offence to assist someone wishing to commit suicide, with a custodial charge of up to 14 years imprisonment (Wyatt 2021). Consequently, the act of judges imposing a significant change in law would be likely to cause disagreements.

Despite this, there are many supporters of allowing euthanasia in the UK. Individuals have gone to court to challenge whether the right to die with assistance is compatible with Article 8 of the European Convention on Human Rights, which includes the right to respect for private and family life (UK Parliament, 2015). Euthanasia is legal in other countries, including Belgium, Luxembourg and Colombia (BBC, 2014). As a result, many people who want to control the way in which they die travel abroad at great expense and earlier than they might like. The law, therefore, arguably restricts their decisions on death, meaning that they may suffer more during the lead-up to their final moments (Dignity In Dying, 2016). As Bills take a substantial amount of time to be made into law, there have been multiple court cases concerning this. However, the decisions of judges to change the law after many debates and deliberations would require complicated regulations and guidelines to ensure that the assisted killing of healthy and well individuals is not carried out. Baroness Mallalieu previously insisted that the UK Parliament were avoiding making decisions on the matter of euthanasia and assisted death, stating that judges should be made to intervene (Biggar, 2018). In response, Biggar highlighted the fact that the issue has been deliberated on many times,

which includes the Marris Bill from 2015 (Dignity In Dying, 2016) and the current Private Members' Bill.

In conclusion, judges are experts in law, but have no superior authority in ethics or social prediction. Potential judicial decisions about assisted death are arguably outside of the scope that common law can handle. Whilst it is true that judges are able to make decisions that form precedent for subsequent cases, Benwell and Gay (2011) confirm that they are subordinate to Parliament. This cements the conception that judges should not be able to make decisions on widely-debated areas (with a particular focus on euthanasia and assisted death) that will require complex regulations and guidelines; the judges are often not in agreement with one another, so the decision should ultimately be left to the UK Parliament.

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