
ARE THERE ANY LEGAL DECISIONS WHICH JUDGES SHOULD NOT TAKE?

Judges should not take legal decisions which go against standards for ethical conduct. Before I discuss what those standards are, let me elucidate a few terms. A judge is a person who presides over court proceedings, whose primary role is to settle a legal dispute by hearing all the evidence and then issuing a ruling based on the evidence and his/her interpretation of the law. This essay will focus on what conduct is required from judges who hold judicial offices in England and Wales, although case studies could also be taken from foreign jurisdictions.

The word “should” is defined in the Oxford Dictionary as a term “used to show what is right, appropriate, etc., especially when criticizing someone’s actions”; then the meaning of “should not” is the opposite. I would not be able to give a reliable answer to the question if I would base the interpretation of “wrong and inappropriate” on an individual’s opinion since it would vary from person to person. For example, some may believe that judges should not take any legal decisions which are influenced by public opinion, whereas others would eagerly support that. Therefore, the most appropriate way of approaching the question is to rely on authoritative sources, such as statutes and official guidelines. Although they do not guarantee insight into a universal “right and wrong”, they undoubtedly provide a greater degree of reliability.

Judges in England and Wales should adhere to standards for ethical conduct set in the Bangalore Principles of Judicial Conduct. These principles are independence, impartiality, integrity, propriety, equality, and competence. For the purposes of this essay, we should assume that the breach of these principles is “wrong and inappropriate”. Therefore, judges should not take any legal decisions which breach them.

1. Independence

“Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.”¹

1.1 Extraneous influences

Judges should be independent from outside influences, such as the media. Although they, as anyone else, read newspapers and watch television, their duty is to deliver a judgment based solely on the facts and the law but not popular opinion.

A response of the President of the Constitutional Court of South Africa to their citizens who did not regard a death sentence for extreme cases as a cruel form of punishment supports my argument:

¹ The Bangalore Principles of Judicial Conduct

“The question before us, however, is not what the majority of South Africans believe a proper sentence should be. It is whether the Constitution allows the sentence.”²

Judges follow this principle only to a limited extent. In his work “Who Influences Law Lords” (1982), Professor Alan Paterson found that none of the interviewed Law Lords mentioned media as a source of influence in their decisions. However, he uncovered that there are other influences, namely, the quality of judgments in the courts below, counsel’s arguments, their colleagues’ thoughts, and legal academic opinion.

Some extent of influence is inevitable since judges neither are, nor should be, isolated from society. However, it is their job to critically evaluate information around them and draw their judgment on the evidence and law only.

1.2 A link with parties to a dispute

Judges should be independent of any connection with the parties to the legal dispute. By a connection, I mean any relationship e.g., family relationship, friendship, professional, and financial relationships.

In the UK, it is recognized that a judge may have a “specific interest” in one party to a case if both are somehow linked; to avoid any unfair decisions the judge should be disqualified from hearing the case involving that party. An example of such a situation occurred during the appeal in the House of Lords of the case of Senator Pinochet³, the former dictator of Chile who was convicted of torture. Here, Lord Hoffmann, one of the Law Lords who heard the case was found to have a connection with one of the parties. He was the chairman and a director of Amnesty International Charity Limited, while Amnesty International was an interested party in the case. He was “in effect, acting as a judge in his own cause”, according to Lord Hope. This resulted in Lord Hoffmann being dismissed from hearing this case and a fresh hearing with another panel of Law Lords was granted.

Lord Hutton argued that “public confidence in the integrity of the administration of justice would be shaken if [Hoffmann’s] decision was allowed to stand.” This case proves that judges should not take legal decisions where they may be suspected of an interest to one party.

1.3 Separation of Powers

The judiciary should be independent of the legislative and executive branches. The concept of separation of powers is well-known because of the work of French political philosopher Montesquieu called “The Spirit of Law” (1748). He suggested that the division of powers between different bodies would prevent tyranny and preserve liberty. The separation of powers is a way to promote the system of checks and balances, which is essential for a just government.

In common law jurisdictions, such as the UK and the USA, some law derives from cases, meaning that it can be argued that judges make the law and therefore act as legislators which is contrary to the principle of the separation of powers. On the other hand, judges are the people who discover the law in the principles of justice. This is a highly complex debate and at this stage, I cannot give my personal stance on it, but the viewpoint of William Blackstone supports the argument that the judiciary is not the legislator: a judge is “sworn to determine, not to his own private judgment, but

² S v. Makwanyane, Constitutional Court of South Africa, 1995 (3) S.A. 391, per Chaskalson P.

³ R v Bow Street Metropolitan Stipendiary Magistrate and others, ex p Pinochet (No 2) [2000] 1 AC 119

according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one”.

Furthermore, the judiciary should be independent of the government in order to exercise its function of judicial review the purpose of which is to assess the lawfulness of actions by the public bodies.

Judges in the UK should not be involved in the law-making process i.e., sit in either House of Parliament, as proclaimed in s137 of the Constitutional Reform Act 2005. The Act also created a separate Supreme Court, and the Lord Chief Justice replaced the Lord Chancellor as a head of the judiciary in England and Wales.

Therefore, judges should not take any legal decisions or responsibilities of legislators or executive bodies.

2. Impartiality

“Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.”⁴

Judges should be impartial in their decision-making process. “The word ‘impartial’ connotes absence of bias, actual or perceived.”⁵ A biased judge would undermine public confidence in the justice system, as well as the operation of the justice system itself.

There are two types of biases: social and cognitive. Social bias occurs when a person has an unfair opinion about another person based on the social group they belong to. For example, a fear that a person of a different nationality is untrustworthy. Cognitive bias is a systematic error in thinking, such as confirmation bias or anchoring effects.

A bias can be exhibited either verbally or physically. Nicknames, epithets, and stereotyped humour are examples of verbal biases. Physical biases can be displayed in the form of facial expressions or body language.

There is a wide list of studies on judicial biases, but here it is only possible to draw attention to a few. Two groups of researchers in the USA asked judges and ordinary people to assess a few hypothetical cases where the race of the defendant had been manipulated. The first group found that white lay adults given the problem were more likely to convict the black defendant than the white defendant (90 percent versus 70 percent)⁶, whereas the second one found that white judges did not express any difference in the conviction rate⁷. This outcome suggests that judges are less inclined to racial bias than people of other professions.

⁴ The Bangalore Principles of Judicial Conduct

⁵ Commentary on the Bangalore Code of Judicial Conduct.

⁶ Sommers R.S. and Ellsworth C. P.(2001) ‘White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom’, 7 Psychol. Pub. Pol’y & L. 201, 216–17.

⁷ Rachlinski J., Wistrich J. A. and Donald B.B. (2023) ‘Getting Explicit about Implicit bias’, Judicature. Available online: <https://judicature.duke.edu/articles/getting-explicit-about-implicit-bias/> [accessed: 26/07/2023]

Nevertheless, when there is a risk that a judge is partial, he should be disqualified from deciding the case. The test for the disqualification is whether there is a “real danger of bias”⁸ that would be judged by the standards of a “fair-minded and informed observer”.

The judiciary should not take any legal decision if they are biased against or in favour of any of the parties to the dispute.

3. Competence

“Competence is a prerequisite to the due performance of judicial office”⁹

A judge should be competent in exercising his duties. A competent judge would have knowledge of the law, be well-trained, and have the personal characteristics required for his job.

This is a very substantial point to our question. Assume that a judge met all of the previously discussed criteria but does not possess any legal knowledge. How can he or she take any legal decision? Plainly, he or she cannot do so because, in England and Wales, this would not be allowed. To become a judge here, a person should have considerable experience of working as a lawyer.

Therefore, a judge should not take a legal decision if he or she has not acquired an appropriate experience of the law and its operation.

Conclusion

There are legal decisions which judges should not take. Those decisions are contrary to the Bangalore Principles of Judicial Conduct. Specifically, judges should not make any legal decisions in cases where they: a) are influenced by external pressure; b) have a link with the party to a dispute; c) act as legislators or the executive; d) are biased; e) are incompetent.

This essay considered nothing but a legal approach to the question. However, I should acknowledge that an individualistic standpoint would give a different set of answers. For example, the extent to which a judge’s decisions concerning abortion or euthanasia are unethical by the author’s standards and thus should not be taken.

Apparently, there should be some limits to judicial power, otherwise, its members would be over-omnipotent which could result in abuse of power or a miscarriage of justice.

⁸ Helow v Secretary of State for the Home Department [2008] UKHL 62 [14]

⁹ The Bangalore Principles of Judicial Conduct