

Are there any legal decisions which judges should not take?

In contemporary democratic governance, the principle of separation of powers stands as a fundamental cornerstone, strategically devised to avert the concentration of authority within any single branch of government. Within this context, judges assume a vital responsibility in exercising restraint and refraining from meddling in purely political matters, thereby preserving the delicate equilibrium among the executive, legislative, and judicial branches. Regardless, certain scholars advocate for judicial activism, urging judges to adopt a more interventionist role in political decision-making. This essay delves into the significance of judicial restraint, the critical need to uphold the tenets of separation of powers, and the challenges posed by impartiality and extraterritorial jurisdiction in the pursuit of justice and the preservation of democratic governance.

In the realm of democratic governance, the principle of separation of powers stands as a foundational tenet, designed to prevent the undue concentration of authority within any single branch of government¹. In this context, judges bear a crucial responsibility to abstain from intruding upon purely political matters, as their restraint upholds the delicate balance between the executive, legislative, and judicial branches. When judges venture into the domain of politics, there is a risk of blurring the boundaries between branches, thereby compromising the integrity of the checks and balances system and potentially undermining the democratic process itself. Such an encroachment would contravene the core tenets of the separation of powers, which seek to ensure the autonomy and distinct functions of each branch. Moreover, decisions that involve policymaking and governance inherently carry a political dimension; often demanding consideration of intricate social, economic, and ethical factors. The formulation and implementation of public policies necessitate extensive deliberation and public discourse, squarely within the purview of elected representatives. When judges intervene in these policy matters, it may erode political accountability, given that judges do not face the same direct public scrutiny as elected officials. Consequently, this dilution of political accountability threatens the democratic legitimacy of verdicts that significantly impact public policies and governance.

Nevertheless, some proponents of judicial activism - like the eminent legal philosopher Ronald Dworkin - argue for judges to play an assertive role in political judgements, particularly in the protection of fundamental rights and in response to potential abuses of power. Dworkin's underscores the judiciary's responsibility as a guardian of individual liberties and constitutional principles, advocating for a proactive stance in the face of potential governmental overreach². In Dworkin's view, judges should adopt a principled approach, drawing on legal principles and moral values to arrive at just conclusions, even if it necessitates venturing into the domain of politics. However, upholding the principle of judicial restraint is not a relinquishment of the judiciary's responsibilities; rather, it serves as a safeguard against judicial overreach. The case of *Cherry/Miller* exemplifies this commitment to restraint³. The UK Supreme Court, in its examination of the justiciability of prorogation, demonstrated a profound appreciation for the constitutional significance of

¹ Charles-Louis de Secondat, Baron de Montesquieu, "The Spirit of the Laws" (1748), Book XI, Chapter 6.

² Ronald Dworkin, "Freedom's Law: The Moral Reading of the American Constitution" (Oxford University Press, 1996), 120-140.

³ R (on the application of Cherry) (Respondent) v. Advocate General for Scotland (Appellant) (Scotland) [2019] UKSC 41.

Are there any legal decisions which judges should not take?

avoiding judicial encroachment into political matters. Recognising the inherently political nature of the issue, the court exercised restraint, deferring political decisions to the purview of elected representatives. By embracing restraint in political matters, the judiciary reiterates its commitment to its primary function: interpreting and applying the law. This principled approach fosters public trust in the judiciary's independence and integrity.

Impartiality stands paramount within the judicial system - serving as the bastion of trust and integrity in the administration of justice. Judges bear the solemn duty to prioritise impartiality, transcending their personal moral or religious beliefs. This imperative becomes particularly critical when confronting cases involving sensitive issues, where the potential influence of personal convictions could jeopardise the very essence of equality. To ensure fair and just outcomes, judges must shield their deliberations from the undue sway of personal beliefs. When judges succumb to the allure of their own values, individuals or minority groups may find themselves at a disadvantage, their rights potentially subjugated to the preferences of the presiding judge.

Critics may argue that complete impartiality is an unattainable ideal, asserting that judges, as human beings, inevitably carry their personal values into the courtroom. While this contention holds some truth, the judiciary's commitment to the rule of law necessitates striving for objectivity and minimising the impact of personal biases. Judges undergo rigorous training and adhere to ethical codes that demand unwavering commitment to impartiality. While perfection in impartiality may be elusive - the aspiration for objective evaluation remains the cornerstone of judicial integrity. To counter the challenge of personal biases, legal scholars like Lon Fuller advocate for a principled approach⁴. By grounding their rulings in universal moral principles and legal values, judges can rise above the constraints of personal biases, ensuring fair and consistent deliberation. Lord Bingham's profound articulation of the "subordination of discretion to law" underscores the paramount importance of impartiality in judicial ruling⁵. By adhering to this principle, judges uphold the rule of law and maintain fidelity to the core tenets of justice. Therefore, upholding impartiality in the face of complex and sensitive cases fortifies public confidence in the judiciary and reinforces its indispensable role in safeguarding the values upon which a just society rests.

Policymaking, inherently steeped in complex socioeconomic and ethical considerations, is a function of the legislative branch. To preserve the democratic fabric - judges should exercise utmost restraint and abstain from being driven solely by social or economic policies. By doing so, the judiciary ensures its integrity as an impartial arbiter while respecting the distinct prerogatives of elected officials in shaping public policies. In democratic societies, policymaking thrives through the rigorous and inclusive processes of the legislative bodies. These processes encompass public deliberations, consultations with experts, and the input of elected representatives who embody the diverse voices of the populace. It is through

⁴ Lon L. Fuller, "The Morality of Law" (Yale University Press, 1969), 85-100.

⁵ Lord Bingham, "The Rule of Law" (Penguin Books, 2011), 73-88.

Are there any legal decisions which judges should not take?

these mechanisms that policies genuinely reflect the multifaceted needs and interests of the society.

Despite this, proponents of interventionism may advocate for judicial intervention to redress critical social issues when the legislative machinery falters. While driven by a noble quest for justice, such an approach merits scrutiny. Unchecked judicial assertiveness risks venturing into judicial overreach, potentially undermining the democratic principles of representative governance. By trespassing into the domain of policymaking, judges may inadvertently disrupt the balance of power among the branches of government, unsettling the foundation of democracy. In response, scholars like Robert Alexy argue for a theory of proportionality to guide judicial decision-making⁶. Proportionality analysis compels judges to strike a balance between safeguarding individual rights and deferring to the legislature's policy choices. The case of *R (Nicklinson) v Ministry of Justice* illustrates the application of proportionality in policymaking⁷. Confronted with the profoundly sensitive issue of assisted dying; the UK Supreme Court showcased prudence and humility. Instead of overstepping their constitutional boundaries, the court engaged in a thorough proportionality assessment, weighing the interests of the individual against the broader societal concerns. By doing so, the court acknowledged that complex moral and ethical issues, like assisted dying, are better addressed by the legislative branch, which can incorporate diverse perspectives through public debates and consultations. Advocates of judicial prudence emphasise that while courts play a vital role in protecting constitutional rights and liberties, they should be cautious not to supplant the legislation.

The application of extraterritorial jurisdiction presents a formidable challenge for judges, demanding an astute understanding of international law and diplomatic intricacies. This complex concept involves cases that transcend national borders, implicating multiple jurisdictions and foreign parties. When confronted with such matters, judges must delicately navigate the maze of international relations while upholding the principles of law and diplomacy. The weighty decision to assert extraterritorial jurisdiction requires meticulous consideration of the potential ramifications on global affairs, international comity, and state sovereignty. Judicial overreach in international affairs can disrupt the delicate balance of international relations and lead to diplomatic tensions among nations. While there may be a call for courts to play an active role in addressing global issues and protecting human rights, unbridled interventionism can clash with the principles of state sovereignty and national autonomy. The consequences of judicial overreach can be far-reaching - potentially inflaming political sensitivities and undermining cooperation among nations.

Yet, some may argue that a robust judiciary is indispensable in addressing transnational crimes and human rights abuses, particularly when national governments fail to act. Nonetheless, striking a balance between global integrity and respecting the sovereignty of states is a challenging undertaking. Embracing the guidance of distinguished experts like Sir Hersch Lauterpacht, who highlights the significance of adhering to established mechanisms of international law, can offer a coherent and principled approach to transnational issues⁸.

⁶ Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2004).

⁷ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657.

⁸ Sir Hersch Lauterpacht, *"International Law and Human Rights"* (Oxford University Press, 1950).

Are there any legal decisions which judges should not take?

By adhering to international legal norms - judges demonstrate their commitment to upholding a rules-based international order and fostering mutual respect and cooperation among nations. In a notable case, *Belhaj and Another v Straw and Others*, the UK Supreme Court confronted the complexities of extraterritorial jurisdiction and state immunity⁹. The case involved the alleged rendition of Libyan dissident Abdul-Hakim Belhaj and his wife to Libya by the UK government. Despite the government's claim of state immunity, the court ruled that Belhaj, and his wife could sue the UK government. This ruling reaffirmed the importance of respecting international norms and human rights principles, while acknowledging the inherent limitations of extraterritorial jurisdiction. Therefore, navigating the realm of extraterritorial jurisdiction necessitates judicial acumen, an appreciation of international law, and a profound understanding of diplomatic complexities.

In conclusion, the judiciary's role in democratic governance demands a delicate balance between impartiality and restraint. Upholding the separation of powers while navigating complex policy and international issues is crucial to preserving the integrity of the democratic system. Embracing a principled approach, grounded in universal values, ensures fair decision-making while safeguarding justice and equality. Judges play a vital role in fortifying public trust in the judiciary and upholding the essence of democratic governance.

⁹ *Belhaj and Another v Straw and Others* [2017] UKSC 3.