Do judges make law?

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Although for the traditionally-minded the question "do judges make law?" could seem irrelevant, its application to the bioethics field probably deserves a more considered response, for two reasons.

Firstly, at least in countries that do not adhere strictly to the *stare decisis* doctrine, judicial activity and bioethics both refer to a flexible system of norms.

Secondly, judicial doctrine and bioethics have another feature in common, in that they are factual and practical systems applying rules to specific situations on a case by case basis.

The judicial process has therefore often been used in the brief history of bioethics and law for securing rapid answers to judicial issues arising from the bioethics debate.

Taking this definition of and approach to law making, France probably offers a good example to quote in discussion since the courts appear to have been extremely active in fields such as reproductive technologies, embryo protection and medical malpractice.

But great activity in the courts does not mean that the law is made exclusively by the judges, because of the "natural" limits on the role of

the judge, and it should be noted that the French ... legislation is also remarkably well developed.

Consequently, we believe that the real question concerning bioethics and law is not "do judges make law?", but rather "do judges make better law than parliament?".

In reply to those who detect judicial arrogance in such an approach I would argue that this is not so. It only raises a further key question: who is best qualified to decide on matters relating to individual rights and collective choices?

Asking whether the courts offer better safeguards for fundamental freedoms and social values is a way of warning members of the community of the risks of promoting absolutism, whether legal absolutism or scientific absolutism.

By providing the opportunity for a public and balanced debate on bioethics issues, it is to be hoped that the judicial system will serve as a focus for broader citizen participation in social choices. In applying legal rules, based on common values, to particular cases, judges are supposed to respect both the collective and the individual interests.

One interesting and unique example of a major bioethics controversy that the machinery of justice brought to the forefront of public debate was the blood transfusion scandal.

Faced by a lack of information on and explanation of what really happened when blood was contaminated by the AIDS virus, the victims and their families had no other way of drawing public attention to their plight than taking the matter before the courts.

What is particularly interesting about the courts' involvement is that they forced the government to discuss in the judicial arena what it refused to refused to talk about in the political domain.

I now wish to consider the judicial process as a focus for participation in drawing up bio-law.

It is often said that the difference between ethics and morals is that ethics are persuasive and morals authoritative. Bioethics are therefore characterised by pluralism and free and open discussion.

Unlike the governmental and parliamentary approaches, which in France have left very little scope for pluralism in the bioethics debate, the judicial process has no option but to listen to different views. And contrary to what usually happens in ethics committees, the organisation of court hearings actually highlights the differences between these views. While their inability to tackle bioethics issues has encouraged French politicians to adopt a common political approach, the courts have had to deal with opposing interests. By proclaiming that "we are all responsible but not guilty", the French Minister for Social Affairs created a public

perception that the government was in fact refusing to examine its own responsibility.

In a 1993 decision, the supreme administrative court ruled that, through its lack of administrative and regulatory control of the blood transfusion service, the state was responsible for the contamination that had occurred. This opened up the path seven years later, after complex procedural reforms, to the criminal trial of the Prime Minister, the Minister of Social Welfare and the Minister of Health who were in office at the time of the contamination.

My reason for quoting this case as an example of the role of the judiciary in promoting public debate on taboo issues is two-fold: it shows what the judicial system can do and the associated constraints and disadvantages. It is clear that it was only thanks to the judicial process that there was a genuine public and adversarial debate on the causes of the blood transfusion scandal - a debate that benefited from the results of the police investigations. It is also clear that this approach was chosen as an alternative to what should have occurred but did not: a political explanation by the government in parliament followed by a vote of confidence. Bringing the most senior government figures to trial provided an opportunity to reveal the truth and inform the public, but it also contributed to the decline of our democracy.

In some respects, the experience of ethics committees, which is deeply rooted in procedural rules designed to take account of a range of views from a variety of disciplines, also offers a challenge to our democratic institutions if the latter fail to exercise their role.

A second advantage of the machinery of the courts is that it comes up with solutions that can be adapted to the social context, whereas too much detailed regulation would rapidly become obsolete and could also impose rigid controls on scientific applications and individual autonomy.

Family relations are now largely governed by individual social choice - whether or not to marry or to found a one parent family. At least in France, the legal provisions relating to relationship by descent give the courts a considerable margin of discretion in interpreting the relevant sections of the Civil Code. The implication is that the new reproductive technologies and their consequences for family law should be able to draw on a deep well of judicial rulings.

Unfortunately, the role of the courts has not brought the expected results. Judges have lacked legal inventiveness. For example, only one decision has ruled that a husband who consented to his wife's insemination with the sperm of an anonymous donor could not subsequently disavow to the resulting child.

The explanation for such legal timidity is that when a case symbolises a major social controversy it is difficult for the courts to impose their views. In such circumstances legislation represents the better option. Yet in other controversial areas, such as surrogacy, the courts have not hesitated to rule that cases involved matters of principle and to base their decisions on unwritten fundamental legal principles.

What then makes the difference? Probably the fact that the judiciary traditionally adopt a more conservative stance while the role of the legislative and executive branches is to propose new family standards when general social rules are brought into question. The judicial process cannot therefore serve as a good model for resolving social controversies. The reason for this is simple: although they offer an arena in which to discuss controversial issues and hear opposing arguments, courts are obliged to settle the cases that are brought before them.

In social controversies that challenge family and social values, the arguments put forward are more important than the final decision because that decision has to be accepted not just by the opposing parties in the judicial proceedings but also by society as a whole.

Let us now return to our initial question: "do judges make better law than parliament?". The answer will certainly be in the affirmative if we confine ourselves to the legal consistency of the judicial ruling and even, in some respects, its flexibility to cover new situations.

On the other hand, the answer will certainly be negative if we consider its ability to achieve a new consensus in society because the judicial process has limited scope for transforming social and political arguments into legal ones. It is unreasonable, therefore, to expect the courts to rule on individual cases in a flexible fashion when the issues are the subject of sharp public debate.

Surrogacy again provides a good illustration of this problem.

During the 1980s, he courts considered that children born through a surrogate mother could be adopted by the spouse of the commissioning couple when legal obligations were respected. Once the media drew public attention to this practice, the courts became reluctant to withdraw all parental rights from the surrogate mother and the supreme court finally decided that this sort of adoption was unlawful, even though all the legal conditions had been met, simply because surrogacy was illegal.

Our final conclusion is that the flexibility enjoyed by the judiciary to apply existing legal principles to new cases is limited once such cases become the subject of public and social controversy. The courts then retain very little room for manoeuvre to resolve new legal issues.

Even though it is considered to be a highly technical legal area, malpractice law is also subject to such interference. When the supreme court decided in November 2000 to compensate not only the parents but also the child born disabled as a result of medical negligence in testing

the pregnant mother, the resulting public outcry created such pressure on the court that three other cases were rejected in July 2001.