

The Influence of Personal Values on Legal Judgments

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PhD Thesis

Cardiff University

2015

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SUMMARY

The law, as laid down in a code, or in a statute or in a thousand eloquently reasoned opinions, is no more than capable of providing all the answers than a piano is capable of providing music. The piano needs the pianist, and any two pianists, even with the same score, may produce very different music.¹

Cases that reach the Supreme Court are ‘hard cases’ where the result is not clearly dictated by statute or precedent. To reach a decision in these cases, a judge must exercise discretion and the non-legal factors that influence discretion have been the subject of extensive debate. Theoretical and empirical studies examining the influences on judicial discretion have focused on demographic characteristics and facets of the judicial personality including political ideology and attitudes. Personal values are related to these factors and have been demonstrated to play a role in decision making. This thesis demonstrates a relationship between personal values and judicial decision making in the Supreme Court.

This thesis translates theories and techniques used in psychological research to examine the role of personal values in judicial decision making. A novel method of assessment of value expression in judgments was developed. This method revealed a different pattern of values expressed in the majority and minority judgments of cases that divided the Supreme Court, demonstrating a relationship between values and judicial decisions (value: decision paradigm). This was confirmed by an empirical study of legal academics. Drawing on this novel method, a series of Supreme Court cases were analysed to develop a theory of

¹ Lord McCluskey, *Law, Justice and Democracy. The Reith Lectures 1986* (Sweet and Maxwell Ltd 1987)

discretion, division, uncertainty, and values, suggesting that the influence of values is mediated through largely subconscious instinctive responses in cases where the outcome is perceived as uncertain.

The role of values has significant implications in the debates surrounding judicial diversity, which have centred on overt characteristics, how the judiciary are seen. The study of judicial values has revealed tacit diversity in the Supreme Court which is associated with judicial decision making. The value: decision paradigm provides a new framework to analyse judicial decision making, judicial division, and the exercise of judicial discretion and the subconscious influences on these processes.

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I would like to Prof. Shalom Schwartz (The Hebrew University of Jerusalem) who developed the model on which my research is based, answered every e-mail and provided the tools for my analysis and Prof. Gregory Maio (Department of Psychology, Cardiff University) who directed me to Prof. Schwartz. I would also like to thank Ben Wilson, Head of Communications at the Supreme Court, who answered my questions as did Cordelia Jarvis a friend and a psychologist who provided guidance when requested over coffee.

Most of all I would like to thank my family who have survived the experience, Jennifer and Faye who have grown up with the *book* and especially Peter who had been through it all before yet encouraged me to do another. This is the last one.

The law and analysis is stated as of October 2014.

PUBLICATIONS

Cahill-O'Callaghan, Rachel J. 'Reframing the judicial diversity debate: personal values and tacit diversity' *Legal Studies* 35.1 (2015): 1-29 won the SLS Best Paper Prize (2014).

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Components were also published as posters:

'Do Personal Values Tip the Scales of Justice?' awarded the SLS Poster Prize 2013

'Personal Values: An Important Element in the Diversity Debate.' awarded the SLSA Poster Prize 2013

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TABLE OF CASES

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Ahmed Mahad (previously referred to as AM) (Ethiopia) v Entry Clearance Office, Sahro Ali (previously referred to as SA) (Somalia) and Amal Wehelia (previously referred to as AW) (Somalia) v Entry Clearance Officer [2009] UKSC16

Airedale NHS Trust v Bland [1993] 1 All ER 821

Apollo Engineering Limited v James Scott Limited (Scotland) [2013] UKSC37.

Baker v Quantum Clothing Limited [2011] UKSC 17

Barratt Homes Ltd v Dwr Cymru Cyfyngedig (Welsh Water) [2009] UKSC13

Berrisford (FC) v Mexfield Housing Co- operative Limited [2011] UKSC52

Burnetts Trust v Grainger and Another [2004] UKHL 8,

Down Lisburn Health and Social Service Trust v H [2006] 36 UKHL

Farstad Supply A/S v Enviroco Limited [2011] UKSC16

Global Process Systems Inc v Syarikat Takaful Malaysia Berhad [2011] UKSC5

HJ (Iran) (FC) v Secretary of State for the Home Department, [2010] UKSC31

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HM Treasury v Al-Ghabra [2010] UKSC2

In the matter of Brigid McCaughey (Judicial Review) (Northern Ireland) [2011] UKSC20

Inveresk plc v Tullis Russell Papermakers Limited (Scotland) [2010] UKSC19

Jones v Kaney [2011] UKSC 13

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M v Secretary of State for Work and Pensions [2006] 2 AC 91,

McInnes v Her Majesty's Advocate (Scotland) [2010] UKSC 7

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R(on the application of Nicklinson and another) v Ministry of Justice, R (on the application of AM) (AP) v The Director of Public Prosecutions [2014] UKSC 38

R (on application of Sainsbury's Supermarket Ltd) v Wolverhampton City Council [2010] UKSC 20

R (on the application of Smith) v Secretary of State for Defence [2010] UKSC 29

Radmacher v Granatino [2010] UKSC 42

Re Sigma Finance Corp (In Administration) [2009] UKSC2

Revenue and Customs Commissioners v Holland [2010] UKSC51

Secretary of State for Environment, Food, and Rural Affairs v Meier [2009] UKSC11

Secretary of State for the Home Department v AF [2009] UKHL 29

Stack v Dowden [2007] UKHL 17

Star Energy Weald Basin Limited & Anor v Bocardo SA [2010] UKSC35

The Office of Fair Trading v Abbey National plc & Others [2009] UKSC6

I (A) Child [2009] UKSC10

Tomlinson and others (FC) v Birmingham City Council [2010] UKSC 8

Walumba Lumba (Congo) v Secretary of State for the Home Department, Kadian Mighty (Jamaica) v Secretary of State for the Home Department. [2011] UKSC 12

Yemshaw v London Borough of Hounslow [2011] UKSC3

ZH (Tanzania) (FC) v Secretary of State for the Home Department [2011] UKSC4

TABLE OF LEGISLATION

Constitutional Reform Act 2005

Criminal Proceedings etc. (Reform) (Scotland) Act 2007

Housing Act 1996

Human Rights Act 1998

Terrorism Act 2006

Protection of Freedoms Act 2012

Crime and Courts Act 2013

European Convention on Human Rights 1950

DEFINITIONS

This thesis is an empirical study of judicial decision making combining terms from law and psychology. The key terms used in this thesis are defined below.

Close call: A decided case which divided the court and where the majority and minority opinions are separated by a single Supreme Court Justice. These are cases where the court is divided (majority: minority) 3:2, 4:3, or 5:4.

Consensus: Judicial agreement on the outcome of the appeal.

Consensus judgment: A judgment written in support of the majority position.

Decision: The outcome of an appeal.

Divided case: A decided case where two or more Supreme Court Justices dissent from the majority decision.

Division: Where the Supreme Court Justices are divided on the final outcome.

ECHR: European Convention of Human Rights

ECtHR: European Court of Human Rights

Judgment: Formal written ruling of the court or individual members of the court. In discussing the psychological account of systems based reasoning, the term judgment is defined more simply as a reasoned decision. The term is used in this way by psychologists and there was no sufficiently accurate substitute.

Justice: Judicial member of the UK Supreme Court

Lead judgment: In the Supreme Court, the lead judgment is the one which is published first. It will usually represent the majority opinion in the case and typically contains a detailed statement of the facts.

Minority cases: A decided case where more than one Supreme Court Justice disagrees with majority but it is not a close call.

Opinions: Views on the outcome.

Single Dissent: A decided case, where only one Supreme Court Justice disagrees with the final outcome of the appeal and delivers a dissenting judgment.

Psychology

Heuristics: Heuristics are intuitive responses which function as mental shortcuts in decision making. The thesis centres on the affect heuristic which operates when you have an immediate positive or a negative reaction to some idea, proposal, person, object or argument and occurs outside awareness or subconsciously.

Dual process reasoning: This is the two stage account of decision making brought to public attention by Daniel Kahneman in his book 'Thinking Fast and Slow'.² It suggests that decision making is governed by two systems, the intuitive system 1 and the logical reasoned system 2.

Judgement: In the context of the psychology of decision making a judgement is the process of forming an opinion based on the available evidence. It encompasses a process of weighing alternatives within a given context.

² D Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011)



JUDICIAL OFFICE

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1st August 2014

Dear Dr Cahill-O'Callaghan

I apologise again for the delay in providing you with a decision in your request for judicial assistance with research.

Having considered your request, the Master of the Rolls is not minded to agree to judicial participation in your research project.

Your research proposes to examine the relationship between the personal values that a judge may hold and the role these play in decision making. As you will be aware, on appointment to judicial office all judges take the judicial oath and undertake to '*do right to all manner of people after the laws and usages of this realm without fear or favour, affection or ill will*'. It is, therefore, our view that judges administer the law in accordance with the judicial oath and any perception that judges allow matters other than the evidence and arguments presented in court to influence their decision making could potentially undermine public confidence in the judiciary.

I appreciate the importance of this project to you so I know that this news will come as a disappointment. I am sorry that your request for judicial participation in your research cannot be agreed.

Yours sincerely

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PREFACE

A Response Grounded in Psychology and Law

The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, *often an inarticulate and unconscious judgment* it is true, and yet the very root and nerve of the whole proceeding.³

The letter on behalf of Lord Dyson, Master of the Rolls, highlighted that some aspects of judicial decision making remain shrouded in a myth of objectivity and impartiality.⁴ This myth is fuelled by the importance and finality of Supreme Court decisions.⁵ Yet, the Supreme Court judiciary decide cases, where the answer is not clearly dictated by the ‘evidence and arguments’, hard cases where judicial discretion plays a role. It is now widely recognised that in exercising discretion, a judge is often making an ‘*inarticulate and unconscious*’ judgement which may be influenced by facets of the individual personality. This is particularly true of cases which divide judicial opinion as Lord Dyson acknowledges;

³ OW Holmes, 'The Path of Law' (1897) 10 Harvard Law Review 457, 465 – 466, italics added.

⁴ See letter on previous page, from Simon Carr Assistant Private Secretary to the Master of the Rolls, Lord Dyson. JA Segal and HJ Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002); J Malbon, 'Extra-Legal Reasoning' in Ian Freckelton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Thompson Reuters 2009); Justice Michael Kirby, 'A Darwinian Reflection on Judicial Values and Appointments to Final National Courts' in James Lee (ed), *From House of Lords to Supreme Court Judges, Jurists and the Process of Judging* (Hart 2011).

⁵ JA Segal and HJ Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1993);

I am not surprised that there are differing opinions, that is inevitable at this level, with the nature of the cases that we hear. They are complicated, they are difficult. Some of them involve questions of judgement and almost philosophy, I mean, approach to life.⁶

The extensive research into the psychological processes of human decision making undermines the assumption that decision making is under complete conscious control. Indeed, psychologists have highlighted the importance of subconscious mental processes and the factors that may influence these processes in decision making. This thesis empirically examines one potential influence on judicial decision making, personal values.

Although, there are many jurisprudential, philosophical and sociological discourses on the relationship between values and the law, this thesis draws on the psychological role of values as a potential subconscious influence on judicial decision making rather than entering into a debate on the role, legitimacy or justification of values in judicial decisions.⁷ In this context, this thesis draws upon theories and techniques from psychology to address the socio-legal question ‘how do judges decide hard cases?’ The research relates themes of legal thought to psychological theory and employs empirical, experimental and qualitative methods to start to develop a psychological model of the role of values in judicial decision making. The aim of this methodological approach is not to develop a normative theory of values in judicial decisions, but rather to provide an empirical insight into the role of values in judicial

⁶ Lord Dyson speaking in an interview for the Guardian celebrating the second anniversary of the opening of the UK Supreme Court <<http://www.guardian.co.uk/law/video/2011/oct/25/supreme-court-deliver-justice-video?INTCMP=SRCH>>accessed 20.1.2012

⁷HLA Hart, *The Concept of Law* (Oxford University Press 1961); LL Fuller, *The Morality of Law*, vol 152 (Yale University Press 1977); R Dworkin, 'Political Judges and the Rule of Law' (1978) 64 *The Proceedings of the British Academy* 259; S Jørgensen, *Values in Law: Ideas, Principles and Rules* (Juristforbundet 1978); J Rohr, *Ethics for Bureaucrats: An Essay on Law and Values*, vol 36 (CRC Press 1988); Segal JA and Spaeth HJ, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002); R Dworkin, *Justice in Robes* (Harvard University Press 2006); B Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press 2009); R Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011)

decisions in the context of the psychology of decision making. Adopting this methodology provides an original inter-disciplinary approach to the literature surrounding judicial decision-making.

This thesis has a particular focus on the role of values in the exercise of judicial discretion. Judicial discretion is an element of the legal system which enables flexibility in the application of the law to achieve justice in a particular case. The psychological dual process theory of decision making, used in this thesis, views the exercise of discretion within the context of a choice which involves both conscious reasoning and judgement and subconscious influences.⁸ The dual process of decision making encompasses system 1, a relatively unconscious quick instinctive response, and system 2, a more conscious reasoned deliberative approach. Both systems are activated in decision making and the instinctive system 1 response is either affirmed, rejected or modified by system 2 reasoning. Where system 2 reasoning does not provide a clear answer, the decision remains anchored in the initial system 1 response.⁹ As such where the judicial choice is clearly dictated by legal rules and principles, the exercise of discretion and system 1 influences are limited. However, where the outcome is not clearly dictated, uncertainty remains and judicial discretion and the influences on the exercise of judicial discretion play a greater role in the decision making process.¹⁰ It is argued in this thesis that the influence of values in legal judgments is mediated through these system 1 influences which are facilitated by the perception of uncertainty and that psychology provides a framework for understanding this process.

⁸ D Kahneman and A Tversky, *Choices, Values and Frames* (Cambridge University Press 2000)

⁹ D Kahneman, P Slovic and A Tversky, *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge University Press 1982)

¹⁰ EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press 2005)

This research draws on cases where there is uncertainty in the law to examine the role of values in judicial decisions and identify the relationship between value preferences and judicial decisions (the value: decision paradigm). It is difficult to quantify the level of uncertainty in any case, but this thesis takes as a starting point those cases which closely divide judicial opinion, which are by definition hard cases, “cases in which the result is not clearly dictated by statute or precedent”.¹¹ “Hard cases” within this context, are viewed on a continuum of uncertainty, from those cases that closely divide judicial opinion, to cases where a single Supreme Court Justice views the outcome as uncertain, to cases which achieve consensus on the outcome but differ in the underpinning reasoning. This thesis draws on the continuum of hard cases, framing divided judicial opinion within the context of uncertainty, to further refine the role of values in judicial decisions and identify the limits of the value: decision paradigm.

In 1978, Dworkin described discretion as “like the hole in a doughnut, it does not exist except as an area left open by a surrounding belt of restriction.”¹² In doing so, Dworkin recognised that the exercise of discretion is constrained, not least by precedent, legal principles and the judicial process.¹³ The psychological systems theory of decision making also recognises the external and internal constraints on decision making.¹⁴ The law both frames and constrains the decisions but other more intrinsic factors may also constrain the decision making process and the influence of personal values.¹⁵ To start to investigate the constraints on the role of values in legal decisions, the thesis analyses the values of Supreme Court Justices. In doing so, it recognises the judge as an individual who is making a contextual decision within a

¹¹ R Dworkin, 'Hard Cases' (1974 - 1975) 88 Harvard Law Review 1057, page 1057.

¹² R Dworkin, *Taking Rights Seriously*, vol 136 (Harvard University Press 1978), page 31

¹³ MA Bailey and F Maltzman, *The Constrained Court. Law, Politics and Decisions Justices Make*. (Princeton University Press, Princeton. 2011)

¹⁴ D Kahneman and A Tversky, *Choices, Values and Frames* (Cambridge University Press 2000)

¹⁵ RA Posner, *How Judges Think* (Harvard University Press 2008)

collective decision making process and assumes that in judgments, where discretion is exercised and values are expressed, that the reasoning is a reflection not only of the context but also the individual.

The value: decision paradigm has significant implications for many debates surrounding judicial decision making and the role of the judiciary. Within the confines of this thesis, I have chosen to address one, the implications of the value: decision paradigm for judicial diversity. This was selected as it was central to many of the academic and popular debates surrounding the judiciary at the time of writing.¹⁶

This thesis draws on the psychology of decision making to reveal the influence of values on judicial decision making and starts to develop a model of judicial decision making grounded in both psychology and law. The value: decision paradigm has significant implications for how we understand judicial decision making and provides a foundational tool for future debate and critique in this important area of research.

¹⁶ K Malleon, 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36 *Journal of Law and Society* 376; R Hunter, C McGlynn and E Rackley, *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010); A Paterson and C Paterson, 'Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary' (2012) Centre Forum <<http://www.centreforum.org/assets/pubs/guarding-the-guardians.pdf>> accessed 28.07.2015; E Rackley, *Women, Judging and the Judiciary. From Difference to Diversity* (GlassHouse, Routledge 2013)

Chapter 1

Judicial Decision Making

Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame.... But we do not believe in fairy tales anymore.¹⁷

It is widely accepted that judges in the final courts of appeal have a considerable amount of discretion. The exercise of this discretion plays a significant role in judicial decision making particularly where the law is uncertain. It is the factors that influence this discretion which are the subject of this thesis. The overarching hypothesis is that the exercise of judicial discretion and ultimately judicial decisions are influenced by personal values. Drawing on theories and techniques from psychological research, this thesis examines the role of personal values in judicial decision making and reflects on the implication of such a role on wider debates surrounding judicial diversity and judicial selection. A novel method was developed to systematically identify, code and analyse personal values as espoused in legal judgments. Although personal values have been theoretically related to the exercise of judicial discretion and legal judgments, this is the first study to use a psychological framework to empirically assess this relationship. The introductory chapter sets out the theoretical frame of reference

¹⁷ Lord Reid, 'The Judge as Law Maker' (1972 - 1973) 12 Journal of the Society of Public Teachers of Law 22 , 22

for this thesis, reviewing judicial discretion and the psychology of personal values and decision making. These areas are discussed in depth in the later chapters.

1.1 Judicial discretion

Judicial discretion can be defined in a number of ways. It is defined in this thesis within the context of legal realism which situates discretion within the context of decision making. As highlighted by Oliver Wendall Holmes, judicial decision making is the embodiment of ‘the preference of a given body in a given place and time.’¹⁸ A judicial decision is a contextual choice and the judge exercises discretion within the context of the choice.¹⁹ Judicial discretion in this context acknowledges that the law cannot anticipate every individual circumstance to which it may be applied and discretion must be used to achieve a result. This contextual definition of discretion has been previously used by Robertson to analyse decisions in the House of Lords.²⁰ This is qualified by the definition set out by Lord Bingham who suggests that discretion is only exercised when a decision is unclear:

[I]f, being governed by no (clear) rule of law, its resolution depends on the individual judge’s assessment (within such boundaries as have been laid down) of what is fair and just to do in a particular case....But when, having made any necessary finding of fact and any necessary ruling of

¹⁸ GE White, 'The Integrity of Holmes Jurisprudence', *Intervention and Detachment: Essays in Legal History and Jurisprudence* (Oxford University Press 1994).

¹⁹ K Llewellyn, 'Some Realism about Realism- Responding to Dean Pound' (1931) 44 *Harvard Law Review*, 1237. This discretion differs from the discretion of the Hart/Dworkin debate which centres on judicial discretion in creating law not applying law.

²⁰ D Robertson, *Judicial Discretion in the House of Lords* (Clarendon Press 1998), page 8. Lord McCluskey also supports this analysis of judicial decision making in the Appeal Courts. McCluskey. *Law, Justice and Democracy. The Reith Lectures 1986* (Sweet and Maxwell Ltd, London 1987).

law, he has to choose between different courses of action, orders, penalties or remedies he then exercises discretion.²¹

Lord Bingham's quote highlights that the exercise of discretion is not without constraint. Indeed, it is accepted, as highlighted by Lord Dyson, as Master of the Rolls, in the letter at the start of this thesis, that all judges are constrained by the judicial oath, which ensures fairness, impartiality and independence.²² The decision must also be exercised within the bounds of statutory and common law.²³ Yet, the law is uncertain, as Cardozo suggests, 'as I have reflected more and more on the nature of the judicial process, I have become reconciled with uncertainty, because I have grown to see it as inevitable.'²⁴ This uncertainty is inherent in the process of 'reducing the general to the particular' and when the law is uncertain, judicial discretion plays a greater role in the decision making process.²⁵

The exercise of judicial discretion has been studied in many contexts.²⁶ This thesis examines the exercise of judicial discretion within the context of the UK Supreme Court.

The UK Supreme Court opened in October 2009 and replaced the appellate committee of the

²¹ T Bingham, *The Business of Judging* (Oxford University Press 2000), page 36

²² Letter from Simon Carr, Assistant Private Secretary to the Master of the Rolls, Lord Dyson, page 18.

²³ Several factors have been proposed as constraints on judicial discretion in the USA. These factors include possibility of reversal. RA Posner, 'What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)' (1993) 3 *Supreme Court Economic Review* 1; Higgins *et al* argue that reversal is not the only factor which limits discretion, but the authors do not identify other factors. RS Higgins and PH Rubin, 'Judicial Discretion' (1980) 9 *Journal of Legal Studies* 129. Knight and Epstein argue that discretion is rigidly limited by precedent. J Knight and L Epstein, 'The Norm of Stare Decisis' (1996) 40 *American Journal of Political Science* 1018. Songer and Lindquist suggest that precedent substantially influences the Supreme Court Justices policy positions. DR Songer and SA Lindquist, 'Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making' (1996) 40 *American Journal of Political Science* 1049. More generally, judicial discretion must be exercised within the bounds of fairness, impartiality and judicial independence and the limits imposed by the judicial code.

²⁴ B Cardozo and A Kaufman, *The Nature of the Judicial Process* (Quid Pro Books 2010), pages 166-167;

²⁵ EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press 2005)

²⁶ RD Cooter and T Ginsburg, 'Comparative Judicial Discretion: An Empirical Test of Economic Models.' (1996) 16 *International Review of Law and Economics* 295; T Bingham, *The Business of Judging* (Oxford University Press 2000); JF Reinganum, 'Sentencing Guidelines, Judicial Discretion and Plea Bargaining' (2000) *The RAND Journal of Economics* 62; SD Bushway and A Morrison Piehl, 'Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing' (2001) 35 *Law and Society Review* 733; RA Posner, *How Judges Think* (Harvard University Press 2008).

House of Lords. It serves as the final court of appeal for all UK civil cases and criminal cases from England, Wales and Northern Ireland and only hears appeal on arguable points of law of greatest public and constitutional importance.²⁷

1.2 Hard cases and close calls

Although it has been argued that judicial discretion plays an important role in every legal judgment, the influence of judicial discretion is more apparent in a ‘hard’ case.²⁸ ‘Hard’ cases were defined by Ronald Dworkin as ‘cases in which the result is not clearly dictated by statute or precedent’.²⁹ In these cases interpretation of legitimate legal reasons, including precedent and prior statutory interpretation, lead to two opposing decisions.³⁰ As such ‘hard cases’ are causally indeterminate, in that the outcome cannot be dictated from legitimate legal sources alone.³¹ Indeed, Paterson argues in these cases, there is real uncertainty about the legal rules that should be applied as ‘many cases do not have right answers which the Law Lords could divine if only they were sufficiently discerning.’³²

By definition, all cases that reach the Supreme Court are hard cases. Both parties have valid arguments demonstrating that the balance of societal interests rests in their favour and have precedent or the intention of Parliament to support their cases. Such cases cannot be simply decided on the strict application of the law. To reach a decision the Supreme Court Justices must interpret the law and exercise discretion.

²⁷ The UK Supreme Court <<https://www.supremecourt.uk/about/the-supreme-court.html>>accessed 21.04.2015

²⁸ J Baldwin, *Small Claims in the County Courts in England and Wales: The bargain basement of civil justice*. (Oxford University Press 1997); D Cowan and others, 'District Judges and Possession Proceedings' (2006) 33 *Journal of Law and Society* 547

²⁹ R Dworkin, 'Hard Cases' (1974 - 1975) 88 *Harvard Law Review* 1057, page 1057

³⁰ The term ‘legitimate legal reasons’ is taken from the work of Brian Leiter who suggested that these reasons are the basis of a positivist approach to law. B Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007).

³¹ B Leiter, 'Legal Indeterminacy' (1995) 1 *Legal Theory* 481, *ibid.*

³² A Paterson, *The Law Lords* (Macmillan Press 1982), pages 194 – 195

1.3 Discretion and division

In Lord Reid's seminal paper in 1972, 'The Judge as a Law Maker' (quoted above), he dispelled the myth that judicial decision making is simply the application of the law and highlighted the important role of judicial discretion. Indeed, it is argued that the division in the courts of appeal provides empirical evidence of the exercise of discretion. Common law final courts of appeal worldwide are rife with minority and dissenting opinions.³³ Although less than the US Supreme which has a rate of division of 57%, almost one quarter of cases (23%) decided in the first four years of the UK Supreme Court divided judicial opinion, of which 8% were close calls.³⁴

The rate of division in the Supreme Court is unsurprising as Lord Dyson acknowledges;

I am not surprised that there are differing opinions, that is inevitable at this level, with the nature of the cases that we hear. They are complicated, they are difficult. Some of them involve questions of judgement and almost philosophy, I mean, approach to life.³⁵

It is in these divided cases, where strict application of the law does not provide a clear result, that the exercise of discretion and the factors that may influence it are discernible.

³³ Segal JA and Spaeth HJ, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002), page 26; A Paterson, Final Judgment. The Last Law Lords and the Supreme Court (Hart Publishing 2013)A Paterson, Final Judgment. The Last Law Lords and the Supreme Court (Hart Publishing 2013); C Hanretty, 'Comparative Judicial Dissent' European Consortium of Political Research <<http://new.ecpr.eu/Filestore/PaperProposal/eb76e6a8-2911-4d3c-8fcf-e61920b03e81.pdf>> accessed 21.4.14

³⁴ Division in the UK Supreme court is discussed in detail in Chapter 4.

³⁵ Lord Dyson speaking in an interview for the Guardian celebrating the second anniversary of the opening of the UK Supreme Court <<http://www.guardian.co.uk/law/video/2011/oct/25/supreme-court-deliver-justice-video?INTCMP=SRCH>> accessed 12.3.14

There is a subset of cases within the Supreme Court where the impact of judicial discretion plays a critical role. These are the cases that Brice Dickson refers to as the ‘close calls’, cases where the judges are closely divided and the final outcome rests on the exercise of discretion of an individual Supreme Court Justice.³⁶ As Lord Reid suggests ‘the law is what the judge says it is’, in close call decisions of the Supreme Court, the influence of the exercise of discretion by an individual Supreme Court Justice will have a significant impact not only on the parties involved but on society as a whole.³⁷ In such cases the Supreme Court Justice as an individual becomes central to the decision as Lord Phillips acknowledges when he stated ‘if you sit five out of twelve judges on a panel and reach a decision 3:2 it is fairly obvious if you have a different five you might reach a decision 2:3 the other way’.³⁸

Judicial discretion is not limited to cases which closely divide judicial opinion. There are many forms of judicial division, from those closely divided cases to cases which achieve consensus on the final outcome but not in the underpinning reasoning. In these cases too judicial discretion plays a role and as with the close call cases, the importance of an individual cannot be underestimated. In recognising the individual, this research moves from the general to the particular and examines the importance of personal factors that might influence their decision making process.

³⁶ This term was used by Brice Dickson. B Dickson, 'Close Calls in the House of Lords' in James Lee (ed), *From House of Lords to Supreme Court; Judges, Jurists and the Process of Judging* (Hart Publishing 2011).

³⁷ Lord Reid, 'The Judge as Law Maker' (1972 - 1973) 12 *Journal of the Society of Public Teachers of Law* 22, page 22.

³⁸ 'The Highest Court in the Land: Justice Maker', (BBC4, 27 January 2011) <<http://www.bbc.co.uk/programmes/p00dhn8n>> accessed 3.08.2015

1.1 Factors which influence judicial discretion.

It is accepted that even decisions in hard cases are constrained by the facts, the applicable law, institutional norms and customs.³⁹ Despite these constraints, the judiciary have recognised that individual intrinsic factors may also play a role in the exercise of discretion as Lady Hale suggests:

[The] business of judging, especially in the hard cases, often involves a choice between different conclusions, any of which it may be possible to reach by respectable legal reasoning. The choice made is likely to be motivated at a far deeper level by the judge's own approach to the law, to the problem under discussion and to ideas of what makes a just result.⁴⁰

Lady Hale is not alone. Many judges suggest that in hard cases non-legal characteristics of personality play a role in judicial decision making, particularly in the final courts.⁴¹ The personal characteristics that influence the exercise of judicial discretion have been a source of much academic debate. The vast majority of work in this area is doctrinal with some empirical work, largely carried out in the USA.⁴² The personality traits which have been associated with judicial decision making fall into two categories, elements which can be perceived as a conscious positioning such as activism and political ideology and those which play a more subconscious role including moral principles, demographics, instincts and

³⁹ The constraints on decision making both external and internal are discussed in detail in Chapters 4 and 5. RA Posner, *How Judges Think* (Harvard University Press 2008); MA Bailey and F Maltzman, *The Constrained Court. Law, Politics and Decisions Justices Make*. (Princeton University Press, Princeton. 2011)

⁴⁰ Lady Hale, 'A Minority Opinion' (2008) 154 Proceedings of the British Academy 319

⁴¹ T Bingham, *The Business of Judging*. (Oxford University Press, Oxford 2000); EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press 2005); RA Posner, *How Judges Think* (Harvard University Press 2008)

⁴² David Robertson has carried out an empirical study on judicial discretion in the House of Lords. Robertson D, *Judicial Discretion in the House of Lords* (Clarendon Press 1998). A good review of other empirical work on judicial decision making in the UK is found in the paper by Rosemary Hunter in R Hunter, 'Can Feminist Judges Make a Difference?' (2008) 15 International Journal of the Legal Profession 7

personal values.⁴³ These characteristics are not independent of each other, for example moral principles may influence political ideology which in turn has been related to judicial activism.⁴⁴

1.1.1 Role orientation and judicial activism

In psychology, role orientation is an attitude toward a given situation and is defined by the range of appropriate behavioural alternatives in that situation. It is related to attitudes in as such that an attitude will only be expressed in behaviour if that behaviour is appropriate to the situation (role orientation). Role orientation is typically viewed in a legal context as an element of the judicial personality which encourages a conscious positioning of the legal decision. Early judicial studies classified role orientation in two different ways. The first was defined in the late-1960s by Glick and Vine.⁴⁵ The authors identified four different role orientations related to the judicial perception of the purpose of the law. These were the ritualist, the adjudicator, the policy maker and the administrator. The second classification was related to the decision with the role orientations of law-maker, law interpreter and pragmatist.⁴⁶ Studies using both classifications identified a relationship between role

⁴³ JA Segal, 'Predicting Supreme Court Decisions Probabilistically: The Search and Seizure Cases 1962- 1981' (1984) 78 *American Political Science Review* 891; JC Smith, 'Action Theory and Legal Reasoning' in Ken Cooper-Stephensephenson and Elaine Gibson (eds), *Tort Theory* (1st edn, Captus University Publications 1993) 116; B Dickson, *Judicial Activism in Common Law Supreme Courts* (Oxford University Press 2007)

⁴⁴ For example a study by John Schreb and others identified an interaction between role orientation and ideology. JM Shreb III, TD Unga and AL Hayes, 'Judicial Role Orientations, Attitudes and Decision Making: A Research Note' (1989) 42 *The Western Political Quarterly* 427

⁴⁵ HR Glick and KN Vines, 'Law-Making in the State Judiciary: A Comparative Study of the Judicial Roles in Four States.' (1969) 2 *Polity* 142

⁴⁶ JT Wold, 'Political Orientation, Social Backgrounds, and the Role Perceptions of State Supreme Court' (1974) 27 *The Western Political Quarterly* 239. There are also other role orientations which have been proposed and have been shown to influence judicial decision making such as the public orientated and precedent orientated model proposed by Victor Flango *et al.* This model has not been validated by others. VE Flango, 'Two Surveys of Stimulated Judicial Decision Making: Hawaii and the Phillipines.' in Glendon Schubert and Daniel J Danelski (ed), *Comparative Judicial Behaviour* (Oxford University Press 1969)

orientation and judicial discretion.⁴⁷ One empirical study also identified an interaction between role orientation and attitudes in the judicial decisions on sentencing.⁴⁸

Although these early conceptualisations of role orientation were well regarded, the classifications were difficult to reproduce and validate empirically. Subsequent role orientation research has focussed on a refined classification which identified two forms of judicial role orientation, the ‘activist’ versus the ‘non-activist or restraintist’ orientation.⁴⁹ There are several different definitions of these terms however the definition by Gibson in 1981 is most frequently adopted. Gibson defined ‘restraintism’ as the following of precedents, strict construction of the constitution and deference to legislative intent. He defined ‘activism’ as subordination of precedents, statutes and deference to the judge’s personal attitudes, values and goals.⁵⁰

One of the key proponents of judicial activism is the retired Justice of the High Court of Australia, Hon Justice Michael Kirby.⁵¹ He argues that judges do make law and have the right to be judicial activists.⁵² Although there has been a tendency to equate judicial activism with political ideology, linking ‘activism’ with liberal ideology and ‘restraintism’ with conservative ideology, research by Cass Sunstein and others has demonstrated that there is no

⁴⁷ JL Gibson, 'The Role Concept in Judicial Research' (1981) 3 Law & Policy Quarterly 291

⁴⁸ JL Gibson, 'Judges Role Orientations, Attitudes and Decisions: An Interactive Model' (1978) 71 The American Political Science Review 911

⁴⁹ For an excellent review see JL Gibson, 'From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behaviour.' (1983) 5 Political Behaviour 7

⁵⁰ JL Gibson, 'The Role Concept in Judicial Research' (1981) 3 Law & Policy Quarterly 291

⁵¹ LAH Johns, 'Justice Kirby, Human Rights and the Exercise of Judicial Choice' (2001) 27 Monash University Law Review 290 at page 17 – 18

⁵² For an excellent review see Justice Michael Kirby, 'A Darwinian Reflection on Judicial Values and Appointments to Final National Courts' in James Lee (ed), *From House of Lords to Supreme Court* (Hart Publishing 2011), Justice Michael Kirby, 'The Australian Use of International Human Rights Norms; From Bangalore to Balliol - A view from the Antipodes.' (1993) 16 University of South Wales Law Journal 363

such direct connection in the US Supreme Court.⁵³ Although there is no direct connection, there is a significant interaction between role orientation and political ideology on the decision making process with liberal activists more likely to reverse an appeal than conservative activists.⁵⁴

Judicial activism is not confined to the realms of the US Supreme Court. In his seminal book '*The Politics of the Judiciary*' JAG Griffiths identified judicial activism within the UK legal system.⁵⁵ In 2005 Michael Howard openly criticised what he identified to be judicial activism in the House of Lords.⁵⁶ The activism that worried the government had a broader definition, which extended beyond the exercise of discretion.⁵⁷ The critical work in this area is by Brice Dickson who identifies judicial activism as

an approach to adjudication which seeks to locate the particular decision in the context of a wider legal framework, pointing out what the consequences of the decision are likely to be for fact situations which are different from those currently before the court and explaining how the reasoning underlying the decision fits with the reasoning underlying other

⁵³ EA Young, 'Judicial Activism and Conservative Politics' (2002) 73 *University of Colorado Law Review* 1139; C Sunstein, *Radicals in Robes: Why Extreme Right Wing Courts are Wrong for America* (Basic Books 2005); FB Cross and SA Lindquist, 'The Scientific Study of Judicial Activism' (2006) 91 *Minn L Rev* 1752

⁵⁴ JM Shreb III, TD Unga and AL Hayes, 'Judicial Role Orientation, Attitudes and Decision Making: A Research Note' (1989) 42 *The Western Political Quarterly* 427. Young also argued that activism reflects judicial ideology and has a significant influence on judicial decisions. EA Young, 'Judicial Activism and Conservative Politics' (2002) 73 *University of Colorado Law Review* 1139

⁵⁵ JAG Griffiths, *The Politics of the Judiciary* (4th edn, Fontana Books 1991),

⁵⁶ Matthew Tempest 'Howard Warns Against Judicial Activism'. *The Guardian* (London, 10 August 2005). Lord Bingham of Cornhill suggested that the government's use of activism in this context was not very meaningful. He instead argued that such decisions are not activist but simply good judgment. Lord T Bingham, 'The Judges: Active or Passive' (2005) 139 *Proceedings of the British Academy* 55

⁵⁷ B Dickson, *Judicial Activism in Common Law Supreme Courts* (Oxford University Press 2007), *ibid*

related rules and principles already set down by Parliament or by previous judges.⁵⁸

Using this definition, Dickson suggested that judges in the House of Lords could be differentiated based on their propensity to activism and their preparedness to justify their personal view of the law. However, he does not empirically assess the influence on the decisions they reach. Judicial activism is not limited to final courts of appeal, Cowan identified activism within the District Court system, and although he hypothesised that this may impact on the outcome of cases, he could not substantiate this argument in the small scale study.⁵⁹

1.1.2 Attitudes and ideology

An ideology is a shared (not unanimously) system of beliefs, opinions, and values of an identifiable group or society.⁶⁰ Political ideology locates the system of beliefs in “the proper order of society and how it can be achieved.”⁶¹ In contrast, a political attitude is an expression of favour or disfavour to a specific object. In the context of legal discourse, both terms are used to convey a political position, either generally or related to a specific issue. Extensive work has been carried out in the USA examining the relationship between political attitudes and judicial decisions. The work stems from seminal work by Glendon Schubert who applied psychometric scaling techniques to identify political attitudinal influences at

⁵⁸ *ibid*, page 370

⁵⁹ D Cowan and others, 'District Judges and Possession Proceedings' (2006) 33 *Journal of Law and Society* 547

⁶⁰ T Parsons, *The Social System* (Free Press 1951), M Freedon, *Reassessing Political Ideologies* (Routledge 2001); JT Jost, CM Federico and JL Napier, 'Political Ideology: It's Structure, Functions and Elective Affinities' (2009) 60 *Annual Review of Psychology* 307

⁶¹ R Erikson and K Tedin, *American Public Opinion* (Longman 2003), page 64

work in the US Supreme Court.⁶² The most commonly studied political influence is the conflict between liberalism and conservatism and Schubert was one of the first to empirically demonstrate the association between these political ideological positions and legal decisions in the US Supreme Court.⁶³ These associations have subsequently been identified throughout the world.⁶⁴

Segal and Spaeth have conducted several studies either independently or together examining the influence of judicial political attitudes, defined as instrumental (change orientated) policy preferences, on the way the Justices' vote in the US Supreme Court.⁶⁵ The authors identified that Justices who espouse liberal policy positions are more likely to favour the criminally accused and the civil liberties/rights claimant and oppose the government in due process and privacy litigations.⁶⁶ Furthermore, Segal and Cover could effectively predict an individual's decisions on civil liberty and economic cases based on the Supreme Court Justices' ideological positions.⁶⁷ Segal and Spaeth proposed that attitudes explained the

⁶² GA Schubert, *The Judicial Mind: Attitudes and Ideologies of Supreme Court Justices, 1946 - 1963* (Northwestern University Press 1965); GA Schubert, *The Judicial Mind Revisited. Psychometric Analysis of Supreme Court Ideology* (Oxford University Press 1974)

⁶³ *ibid*

⁶⁴ DJ Danelski, 'The Supreme Court of Japan: An Exploratory Study' in Glendon Schubert and David Danelski (eds), *Comparative Judicial Behaviour* (Oxford University Press 1969); S Hitlin and JA Piliavin, 'Values: Reviving a Dormant Concept.' (2004) 30 *Annual Review of Sociology* 359; C. Ostberg, and M Wetstein. *Attitudinal Decision Making in the Supreme Court of Canada*. (UBC Press, 2007); R. Smyth, 'The Role of Attitudinal, Institutional and Environmental Factors in Explaining Variations in the Dissent Rate on the High Court of Australia.' (2005) 40 *Australian Journal of Political Science* 519

⁶⁵ JA Segal JA, 'Predicting Supreme Court Decisions Probabilistically: The Search and Seizure Cases 1962-1981' (1984) 78 *American Political Science Review* 891; JA Segal and A Cover, 'Ideological Values and the Votes of Supreme Court Justices' (1989) 83 *American Political Science Review* 557; JA Segal and others, 'Ideological Values and the Votes of the U.S. Supreme Court Revisited' (1995) 57 *The Journal of Politics* 812; JA Segal and HJ Spaeth, 'The Influence of Stare Decisis on the Votes of the United States Supreme Court Justices' (1996) 40 *American Journal of Political Science* 971 . Initially, the authors determined the ideology from the case law however in a paper in 1989, Segal and Cover sought to identify ideological positions from independent sources including newspaper articles.

⁶⁶ JA Segal and HJ Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1993); JA Segal and HJ Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002)

⁶⁷ Segal and Cover used a very limited ideological analysis, simply categorising the Justices as unanimously conservative, moderate or unanimously liberal. Of note, although there was a strong correlation between the ideology of modern Justices, the Segal and Cover attitudinal measurements were not as precise for historical Justices as seen in the paper, JA Segal and others, 'Ideological Values and the Votes of the U.S. Supreme Court

decisions of the Supreme Court and created what they called the ‘attitudinal model’ of legal theory. This model held ‘that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the Justices.’⁶⁸

Indeed, the authors argue that Supreme Court Justices in the USA exercise judicial discretion to give effect to an individual Justice’s policy preference. This discretion extends through the process from case selection to the ultimate decision. Smyth demonstrated that judicial political attitudes also influence judicial decisions in the Australian Supreme Court.⁶⁹ A recent empirical study identified the attitudinal model of decision making at work in the Supreme Court of Israel.⁷⁰

Lord Hope describes the UK Supreme Court Justices as ‘strong-minded people,with views ranging from most conservative to most liberal’.⁷¹ Although Lord Hope recognised that different Justices have different ideology, he did not attempt to link this ideology with the exercise of judicial discretion and decision making. Indeed, unlike the US Supreme Court Justices, the individual political ideology of the UK Supreme Court Justices is largely unknown. Although not centred on individual ideology, the work of Alan Paterson provides some insight into the decision making and judicial personalities in the House of Lords and the Supreme Court.⁷²

Revisited' (1995) 57 *The Journal of Politics* 812. Songer and Linquist criticise the coding technique of Segal and Spaeth, however even using different coding the authors also identified a significant influence of political policy preferences on legal decisions. Songer DR and Lindquist SA, 'Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making' (1996) 40 *American Journal of Political Science* 1049

⁶⁸ Segal JA and Spaeth HJ, *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1993), page 1036 (footnote no. 1)

⁶⁹ R Smyth, 'The Role of Attitudinal, Institutional, and Environmental Factors in Explaining Variations in the Dissent Rate on the High Court of Australia' (2005) 40 *Australian Journal of Political Science* 519, page 65

⁷⁰ K Weinshall-Margel, 'Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel' (2011) 8 *Journal of Empirical Legal Studies* 556

⁷¹ Lord Hope, 'Do We Really Need a Supreme Court?' (Newcastle Law School, Newcastle, 25 November 2010)

⁷² A Paterson, *The Law Lords* (Macmillan Press 1982); A Paterson, *Final Judgment. The Law Lords and the Supreme Court* (Hart Publishing 2013)

Robertson applied modified jurimetrics to decision making in the House of Lords.⁷³ He classified judicial decisions based on ‘egalitarianism’ which he defined as ‘the view that the courts do justice by acting as a counterbalance to social imbalance’ or whether they supported a weak claimant or the strong litigant. For example in constitutional cases, the strong litigant would be the State, the weak claimant the individual. Robertson demonstrated, using this classification, that judicial decisions could be predicted based on which judges were on the panel. His work highlights the influence of judicial discretion on legal decisions in the final court of appeal, in a limited subset of cases.

1.1.3 Morals

‘[We are] ...concerned with hard facts not moral judgements’⁷⁴

‘ The law of the land effectively constitutes the collective moral code.’⁷⁵

These conflicting quotes reflect the extensive debate surrounding the influence of judicial morals on legal decisions. Moral judgements are typically not a conscious process, but a product of the innate moral faculty whose optional parameters and exceptions are determined by our culture.⁷⁶ As such a moral judgement, on the rightness or wrongness of a specific behaviour, reflects both the innate characteristics of an individual and the norms of the society in which they are situated. The philosophical arguments surrounding the role and validity of moral judgements in judicial decision making is the crux of Hart and Dworkin

⁷³ D Robertson, *Judicial Discretion in the House of Lords* (Clarendon Press 1998)

⁷⁴ Lord Justice Neuberger in *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, [169]

⁷⁵ A Paterson, 'Does Advocacy Matter in the Lords?' in James Lee (ed), *From House of Lords to Supreme Court Judges, Jurists and the Process of Judging* (Hart Publishing 2012), page 12.

⁷⁶ MD Hauser, *Moral Minds: How Nature Designed Our Universal Sense of Right and Wrong* (Ecco 2006)

debate.⁷⁷ The central tenet of Dworkin's thesis is that legal judgments in hard cases have a moral core and that the gaps in the law evident in hard cases are filled with moral decisions.⁷⁸ This is in contrast with the positivist approach in which it is argued that legality is not determined by morality but by legal social practice.⁷⁹ Although, Hart and others recognise that moral theory is a force in ordinary life, they argue that judges should ignore it, because they have better 'devices' available to inform their decision making.⁸⁰ This is disputed by Dworkin and others who argue that moral judgement underpins legal reasoning and judicial difference in hard cases and that division reflects divergence of views on the moral rights of the parties.⁸¹ Dworkin argues that the moral component is not a reflection of the morality of the community as a whole, although that may influence judicial decisions, but a reflection of the personal moral convictions of the judge.⁸² Therefore, in cases where moral judgements prevail, judges are exercising discretion to give effect to an intrinsic personal characteristic, their moral convictions.

1.1.4 Demographics

If judicial personal traits have an impact on Supreme Court legal judgments, then individual judges become critical to the decision and this raises arguments about judicial demographic

⁷⁷ HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) Harvard Law Review 593; Hart HLA, *The Concept of Law* (Oxford University Press 1961); HLA Hart, 'Social Solidarity and the Enforcement of Morality' (1967) The University of Chicago Law Review 1 ; R Dworkin, 'The Original Position' (1973) The University of Chicago Law Review 500; Dworkin R, *Taking Rights Seriously*, vol 136 (Harvard University Press 1978); HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983); M Kramer, 'How Morality Can Enter the Law' (2000) 6 Legal Theory 83 . For an excellent review of the Hart-Dworkin debate see SJ Shapiro, 'The "Hart-Dworkin" Debate: A Short Guide to the Perplexed' Public Law and Legal Theory Working Paper Series <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968657> accessed 4.7.15

⁷⁸ R Dworkin, 'The Judge's New Role: Should Personal Convictions Count?' (2003) 1 Journal of International Criminal Justice 4, page 5.

⁷⁹ HLA Hart , *The Concept of Law* (Oxford University Press 1961)

⁸⁰ RA Posner, *The Problematics of Moral and Legal Theory* (Harvard University Press 2002)

⁸¹ R Dworkin, 'The Elusive Morality of Law' (1965) 10 Villanova Law Review 631; S Stoljar, *Moral and Legal Reasoning* (Trade Cloth 1980); S Stoljar, *Moral and Legal Reasoning* (Trade Cloth 1980); R Dworkin, 'Political Judges and the Rule of Law' (1978) 64 The Proceedings of the British Academy 259

⁸² R Dworkin, 'The Judge's New Role: Should Personal Convictions Count?' (2003) 1 Journal of International Criminal Justice 4, page 8

diversity. Debates rage around the importance of diversity on the bench.⁸³ The debates have fuelled the reform of the judicial appointments process which has served to encourage a wider range of applicants.⁸⁴ Despite this the Supreme Court bench remains the domain of public school educated white males who have graduated from Oxbridge.

It has been argued that enhanced diversity of the judicial bench will influence judicial decision making and that diversity would lead to better decision making because women and minorities bring something different to the decision making process.⁸⁵ The majority of this work has focused on the female judge and suggests that females, as a result of biological and social differences will judge differently from males.⁸⁶ Indeed, this view was shared by many female judges in the US and New Zealand and suggested by Lady Hale when discussing her decision in *Radmacher v Granatino* [2010].⁸⁷ Empirical evidence is varied in its support of the 'different voice' theory. There is some evidence of an association between gender and decision making in cases which have a gendered element including sexual discrimination cases.⁸⁸ There is little empirical work examining the influence of gender on judicial decisions in the UK. A survey of a small subset of female judges in the UK revealed that

⁸³ Both in the USA, L Epstein, J Knight and AD Martin, 'The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the US Supreme Court' (2003) 91 California Law Review 903 and the UK, K Malleon, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 Journal of Law and Society 126

⁸⁴ Judicial appointments are now made by the Judicial Appointments Commission.

⁸⁵ This is discussed in more detail in Chapter 6. A review of this work can be found in K Malleon, 'Justifying Gender Equality on the Bench: Why Difference Won't Do.' (2003) 11 Feminist Legal Studies 1; S Goldman, 'Should There be Affirmative Action for the Judiciary' (1979) 62 Judicature 488

⁸⁶ C Gilligan, *In a Different Voice: Psychological Theory and Womens Development* (Harvard University Press 1982); E Martin, 'The Representative Role of Women Judges' (1993) 77 Judicature 126; J Resnik, 'Asking about Gender in Courts' (1996) 21 Signs 952; H Barwick, J Burns and A Gray, *Gender Equality in the New Zealand Judicial System: Judges' Perceptions of Gender Issues* (Joint Working Group on Gender Equity, 1996).

⁸⁷ Lady Hale was the sole voice of dissent in *Radmacher v Granatino* [2010] UKSC 42. In this case, Lady Hale dissented against the decision to formalise the importance of a pre-nuptial agreement in divorce proceedings; Hunter R, 'Can Feminist Judges Make a Difference?' (2008) 15 International Journal of the Legal Profession 7

⁸⁸ G Gryski, E Main and W Dixon, 'Models of State High Court Decision Making in Sex Discrimination Cases.' (1986) 48 Journal of Politics 143; S Davis, S Hair and D Songer, 'Voting Behaviour and Gender on the US Courts of Appeals' (1993) 77 Judicature 129 ; D Feenan, 'Women Judges: Gendering Judging, Justifying Diversity.' (2008) 35 Journal of Law and Society 490

almost 38% of judges thought that female judges had a different approach to judging.⁸⁹ The study did not investigate whether this difference influenced the judgments reached.

The influence of other demographic variables on judicial decision making has been assessed but to a lesser degree. Welch *et al* suggested that ethnicity influences judicial decision making with the black judge more even-handed with white and black defendants than the white judge who tended to treat the white defendant more leniently in criminal cases.⁹⁰

Leslie Moran undertook a series of interviews with lesbian and gay members of the judiciary and legal professionals in Australia, England, Wales and South Africa. The interviews revealed that judges did not feel that their sexuality had any impact on judicial decisions.⁹¹ One small study, carried out in the USA, did identify that religion played a role in judicial perception of role orientation. In a survey of 22 judges, Wold identified that Protestant judges tended to adopt a more restraintist position than Catholic or Jewish judges.⁹²

1.2 Judicial discretion and subconscious influences.

The exercise of judicial discretion is not wrong. Indeed the Honorable Rosemary Barkett, a United States Circuit Judge, argues that judicial discretion serves to lead to greater fairness and equality in legal decision making.⁹³ Many others agree, indeed, some would argue that judicial discretion it is inevitable in the Supreme Court, however, despite the importance of

⁸⁹ This was a very small subset of the female judiciary. 18 interviewees were included in the analysis.

⁹⁰ S Welch, M Combs and J Gruhl, 'Do Black Judges Make a Difference?' (1988) 32 *American Journal of Political Science* 126.

⁹¹ LJ Moran, 'Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings' (2006) 28 *Sydney Law Review* 565J

⁹² JT Wold, 'Political Orientation, Social Backgrounds, and the Role Perceptions of State Supreme Court' (1974) 27 *The Western Political Quarterly* 239

⁹³ R Barkett, 'Judicial Discretion and Judicious Deliberation' (2007) 59 *Florida Law Review* 905

discretion, it is rarely articulated.⁹⁴ The use of neutral technical language in judgments serves to mask the other influences; as suggested by Dickson:

Contrary to public belief, ... judges have considerable discretion to decide disputes in accordance with personal predilection. It is just that most of them are adept at clothing their conclusion in legal language which disguises their personal preferences.⁹⁵

Indeed, Lord Justice Balcombe went further and suggested that 'English judges in their judgments rarely seek to explain the particular thought processes which have led them to reach their decisions.'⁹⁶ Various reasons have been promulgated for the notable absence. Segal and Spaeth, discussing the US Supreme Court, argue that the mythology of judging is fuelled by the finality and importance of the Supreme Court decision.⁹⁷ They argued that public confidence requires that the outcome be dictated by the law or constitution. The authors suggested that judges 'to ensure that facts do not becloud the myth,... adopt the ostrich posture.'⁹⁸ Indeed Gold suggested that 'judges may act under a delusion, deciding cases on the basis of different reasons from the reasons they themselves perceive.'⁹⁹

These authors suggest an intentional hiding or masking of decisional influences, however, Smith argued that the masking of the factors that influence legal judgments is not intentional. He suggested that judicial decisions take place within the context of the 'deep structure' of

⁹⁴ Bingham T, *The Business of Judging* (Oxford University Press 2000); RA Posner, *How Judges Think* (Harvard University Press 2008)

⁹⁵ B Dickson, *Judicial Activism in Common Law Supreme Courts* (Oxford University Press 2007), page 14.

⁹⁶ Lord Justice Balcombe, 'Judicial Decisions and Social Attitudes.' (1993) 84 Proceedings of the British Academy 209, page 229.

⁹⁷ Segal JA and Spaeth HJ, *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1993)

⁹⁸ Segal JA and Spaeth HJ, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002), page 26.

⁹⁹ AS Gold, 'A Moral Rights Theory of Private Law.' (2011) 52 William and Mary Law Review 1873, page 1884.

external debates which are on-going. In reaching their decisions, judges tap into this system of knowledge at various levels of analysis and cognition ranging from automatic and intuitive mental processes to full conscious awareness.¹⁰⁰ Indeed, Smith argued that many of the judicial external and internal influences are not reflected in judgments, as the influence is acting at a subconscious level. In recent years there has been extensive research into the influence of psychological processes on human behaviour and decision making. This research has served to undermine the assumption that decision making is intentional and under complete conscious control. Although an element of conscious control remains in some decisions, psychologists have identified the limits of this control and have highlighted the importance of subconscious mental processes in decision making. The internal processes and influences that drive decision making in a choice situation, where the outcome is not clearly dictated provides important insight into the potential role of subconscious factors judicial decision making.

1.3 The psychology of decision making

The prevailing understanding of decision making within the domain of psychology focusses on dual process accounts of reasoning and decision making (system 1 and system 2). Both dual process systems are identified and characterised by three different areas of psychology, a) reasoning, b) decision and judgement and c) social cognition. All three are important in the understanding of judicial decision making. The paradigm case for a dual process account in deductive reasoning is the belief-bias effect.¹⁰¹ In examining the influence of prior belief on conclusions, the belief-bias experiments sought to create a conflict between responses

¹⁰⁰ Smith JC, 'Action Theory and Legal Reasoning' in Cooper-Stephensephenson K and Gibson E (eds), *Tort Theory* (1st edn, Captus University Publications 1993), page 117

¹⁰¹ JStBT Evans, JL Barston and P Pollard, 'On the Conflict between Logic and Belief in Syllogistic Reasoning.' (1983) 11 *Memory Cognition* 295

based on the process of logical reasoning and those derived from prior belief.¹⁰² The experimental data revealed that in reaching decisions, intelligent populations were consistently influenced by both the prior believability of the conclusion (belief based reasoning) as well as logic based arguments.¹⁰³ The influence of belief based reasoning was enhanced in conditions which exert severe time pressure and significant concurrent memory load (highly complex reasoning).¹⁰⁴ The presence of two processes of reasoning (belief and logic) and the shift towards belief based reasoning in specific conditions is supported by evidence from neuropsychological studies of brain activity. Using fluorescent magnetic resonance imaging (MRI), a technique which can distinguish regions of brain activity, it has been shown that resolution of such conflict problems (reasoning) in favour of either logic or belief was associated with neurological activity in different areas of the prefrontal cortex.¹⁰⁵ This scientific evidence supports two distinct processes of reasoning (belief and logic).

This dual process systems account was extended to judgement and decision making by Daniel Kahneman and Amos Tversky.¹⁰⁶ Of note, judgement within the context of the psychology of decision making reflects the act or process of balancing evidence to form an opinion and the final decision. The publication of the Nobel prize winning speech as the book '*Thinking Fast and Slow*' by Daniel Kahneman brought the dual process or two stage theory of decision making to public attention. Both stages are systems, or a collection of processes which are distinguished by their speed and controllability. The first stage, system

¹⁰² In the standard paradigm, people are given syllogisms and asked to evaluate their logical validity.

¹⁰³ JStBT Evans, JL Barston and P Pollard, 'On the Conflict between Logic and Belief in Syllogistic Reasoning.' (1983) 11 Memory Cognition 295. Of note, the ability to resolve such a conflict in favour of logic declines with age. AS Gilinsky and BB Judd, 'Working Memory and Bias in Reasoning across the Life-Span.' (1994) 9 Psychological Aging 356

¹⁰⁴ W De Neys, W Schaeken and G d'Ydewalle, 'Working Memory and Everyday Conditional Reasoning: Retrieval and Inhibition of Stored Counter-examples' (2005) 11 Thinking & Reasoning 349

¹⁰⁵ V Geol and RJ Dolan, 'Explaining Modulation of Reasoning by Belief.' (2003) 87 Cognition 11

¹⁰⁶ Amos Tversky a leader in cognitive science and collaborator with Daniel Kahneman died in 1996. Daniel Kahneman received the Nobel prize in Economics in 2011.

1, is intuitive, occurs spontaneously and does not require a high level of cognition.¹⁰⁷ It is in this stage of the process, that prior beliefs, heuristics (mental short cuts) and emotions are generally thought to have the most influence.¹⁰⁸ The second stage, system 2, is more deliberative and involves mental operations which require effort, motivation, concentration and the execution of learned rules. System 2 decision making is a deliberate, effortful and slow process. It is rule based and relies on well-articulated reasons and more fully developed evidence. This is the form of reasoning described as 'logic'. System 1 and system 2 reasoning function together and both are involved when the stakes are high and the issue uncertain. System 2 conscious reasoning is supported by subconscious processes in system 1 which deliver other cognitions including perceptions, memories and associations.¹⁰⁹ The key characteristics of the two stage decision making process are highlighted below.

Kahneman and Frederick posit that judges initially make intuitive judgements (system 1) which they might or might not over-ride with deliberation (system 2). Indeed, the authors suggest that the intuitive judgement is expressed overtly only if it is endorsed by system 2 as 'system 1 quickly proposes intuitive answers to judgement problems as they arise, and system 2 monitors the quality of these proposals which it may endorse, correct or override.'¹¹⁰

¹⁰⁷ The language of system 1 and system 2 was used in the earlier Stanovich and West paper. KE Stanovich and RF West, 'Individual Differences in Reasoning: Implications for the Rationality Debate' (2000) 23 *Behaviour and Brain Science* 645

¹⁰⁸ JStBT Evans, 'Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition.' (2008) 59 *Annual Review of Psychology* 255

¹⁰⁹ *ibid*

¹¹⁰ D Kahneman and S Frederick, 'Representativeness Revisited: Attribute Substitution in Intuitive Judgment' in Gilovich T, Griffin D and Kahneman D (eds), *Heuristics and Biases: The psychology of Intuitive Judgment* (Cambridge University Press 2002), page 51

Table 1: Characteristics of system 1 and system 2 decision making processes.

Adapted from Guthrie *et al* (2007)¹¹¹ and Kahneman and Frederick (2008)¹¹²

| Characteristic | System 1 | System 2 |
|----------------------------------|---------------------------|---------------------------------|
| | Intuitive | Reflexive |
| Cognitive style | Automatic | Systematic - controlled |
| Cognitive awareness | Effortless | Effortful |
| Conscious control | Low - associative, opaque | High – deductive, self-aware |
| Automaticity | High – rapid, parallel | Low – slow, serial |
| Effort | Low | High |
| Emotional Valence ¹¹³ | High | Low |

Indeed, Haidt argues that decisions are neither wholly system 1 nor system 2, he argues that decision making is a combination of both systems and neither exists independently of the other.¹¹⁴ System 1 and system 2 processes can be active concurrently, the automatic and controlled cognitive operations compete for the control of the explicit or overt response but deliberate judgements are likely to remain anchored in the initial impression or intuitive judgement developed though system 1.¹¹⁵ Although, the higher the intellect the better the ability to resist the contextualisation of problems within prior knowledge and belief, in

¹¹¹ C Guthrie, JJ Rachlinski and AJ Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93 Cornell Law Review 101

¹¹² D Kahneman and S Frederick, 'Representativeness Revisited: Attribute Substitution in Intuitive Judgment' in Gilovich T, Griffin D and Kahneman D (eds), *Heuristics and Biases: The psychology of Intuitive Judgment* (Cambridge University Press 2002)

¹¹³ The concept of emotional valence is the amount emotions can influence the system.

¹¹⁴ J Haidt, *The Righteous Mind: Why Good People are Divided by Politics and Religion* (Vintage 2012)

¹¹⁵ D Kahneman and S Frederick, 'Representativeness Revisited: Attribute Substitution in Intuitive Judgment' in Gilovich T, Griffin D and Kahneman D (eds), *Heuristics and Biases: The psychology of Intuitive Judgment* (Cambridge University Press 2002)

uncertain decisions the final judgement is likely to remain anchored in the intuitive response driven by system 1, a system that is influenced by heuristics and prior beliefs.¹¹⁶

1.3.1 System 1 - Heuristics and subconscious or implicit bias

Cognitive heuristics are short-cuts, rules of thumb which serve as anchors for decision making. The most common example of a heuristic is the *availability heuristic* where individuals estimate the frequency of an event or the likelihood of its occurrence by the ease with which instances or associations come to mind.¹¹⁷ Heuristic judgements are intuitive and unintentional and typically associated with system 1 thinking. However, heuristics influence both system 1 and system 2 thinking. Heuristics can be initiated spontaneously by system 1 but system 2 can deliberately adopt a heuristic.¹¹⁸ This means that a system 1 spontaneous reaction to a problem can influence the logical reasoning (system 2) and a decision may be reached which reflects the initial system 1 response. This is more likely to occur if systematic reasoning fails to yield a clear result and the decision remains uncertain.

There is a wide range of heuristics which do not work in isolation and any one decision may draw on a variety of heuristics. However, a key heuristic in decision making, which may play role in judicial decision making, is the *affect heuristic*. The affect heuristic operates when you have an immediate positive or a negative reaction to some idea, proposal, person, object or argument and occurs outside awareness or subconsciously.¹¹⁹ In social cognition theory this is commonly known as the 'gut reaction', and sets up an initial orientation in the

¹¹⁶ JStBT Evans, 'In Two Minds: Dual Process Accounts of Reasoning.' (2003) 7 Trends in Cognitive Sciences 454

¹¹⁷ Of note, this process can be subconsciously primed by providing examples prior to asking a question.

¹¹⁸ G Gigerenzer and DG Goldstein, 'Reasoning the Fast and Frugal way: Models of Bounded Rationality' (1996) 103 Psychological Review 650

¹¹⁹ D Kahneman and S Frederick, 'Representativeness Revisited: Attribute Substitution in Intuitive Judgment' in T Gilovich, D Griffin and D Kahneman (eds), *Heuristics and Biases: The psychology of Intuitive Judgment* (Cambridge University Press 2002)

decision maker, positive or negative, toward the object. The response occurs rapidly and automatically, typically without conscious thought.¹²⁰ This ‘gut reaction’ provides an anchor for system 2 reasoning and serves to orientate mechanisms of decision making and subsequently guide information processing and judgement.¹²¹ Indeed, the affect heuristic or gut reaction is an important element in rational decision making when the decision is complex or uncertain.¹²²

It takes substantial system 2 reasoning to overcome a powerful affective response to an idea. This process between reasoning and the affect heuristic was characterised aptly by Finucane and others who use the metaphor of ‘the dance between affect and reason’.¹²³ The strength of the affect heuristic is such that the majority of judgements are likely to remain anchored in the initial impression or ‘gut reaction’ and this influence will be enhanced where the system 2 reasoning can lead to two competing but equally plausible possible outcomes, such as hard cases.¹²⁴ It is important to note that in uncertain judgements, information which could serve to supplement or correct the heuristic is not neglected or underweighted, but simply not available.¹²⁵

¹²⁰ P Slovic and others, 'Rational Actors or Rational Fools: Implications of the Affect Heuristic for Behavioural Economics' (2002) 31 *Journal of Socio-Economics* 329

¹²¹ RB Zajonc, 'Feeling and Thinking: Preferences Need No Inferences' (1980) 35 *American Psychologist* 151

¹²² Slovic P and others, 'Rational Actors or Rational Fools: Implications of the Affect Heuristic for Behavioural Economics' (2002) 31 *Journal of Socio-Economics* 329

¹²³ M Finucane, E Peters and P Slovic, 'Judgment and Decision Making: The Dance of Affect and Reason' in Sandra L Schneider and James Shanteau (eds), *Emerging Perspectives on Judgment and Decision Research* (Cambridge University Press 2003)

¹²⁴ D Kahneman and S Frederick, 'Representativeness Revisited: Attribute Substitution in Intuitive Judgment' in T Gilovich, D Griffin and D Kahneman(eds), *Heuristics and Biases: The psychology of Intuitive Judgment* (Cambridge University Press 2002)

¹²⁵ *ibid*

1.4 How do psychological models of decision making relate to judicial decision making?

Judicial decision making has traditionally been divided into two broad models, the formalist and realist models. The basic premises underpinning these contrasting models can be in part related to the psychological models of decision making. Legal formalists suggest that judges apply the law in a mechanical, deliberate logical fashion. In this context, it is argued that judicial decision making is system 2 thinking and the subconscious intrinsic elements of the decision making, characterised by system 1 thinking have no role to play. The overarching theme of legal realism is that the judges follow more intuitive process of cognition, reaching an intuitive decision and rationalising the decision later. Although, the two categories remain in textbooks, for many jurisprudential thinking has moved on, and more recent theorists argue that the clear divide between realism and formalism no longer exist, if indeed they ever did.¹²⁶

The importance of judicial discretion, in cases where the decision is neither prescribed nor prohibited, is increasingly recognised by legal theorists. Discretion creates ‘a sphere of judicial freedom’, albeit constrained by the context, which leaves open a choice between two possibilities that often reflect competing and conflicting interests.¹²⁷ Although, legal theorists focus on the justification of judicial discretion, they recognise epistemic discretion, discretion which centres on intuition, as an essential element of decision making particularly in the higher courts.¹²⁸ In recognising the role of intuition, legal theorists recognise the role of system 1 psychological processes. Indeed, modern theories of judicial decision making

¹²⁶ B Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press 2009)

¹²⁷ W Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning.' (1913) 23 *Yale Law Journal* 16; R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002), page 310

¹²⁸ M Klatt, 'Taking Rights Less Seriously: A Structural Analysis of Judicial Discretion' (2007) 20 *Ratio Juris* 506

suggest that judges rely both on intuition and reasoning to reaching a decision. Judges initially have a gut reaction, a system 1 response, as to what is 'right' or 'fair' in response to the stimulus of the facts of the case and the legal arguments.¹²⁹ The instinct can be affirmed, over-ruled or adjusted by system 2 reasoning.

Guthrie, Rachlinski and Wistrich, in their paper 'Blinking on the Bench', demonstrated both processes at work in trial judge decision making.¹³⁰ In several experimental empirical studies of judicial decision making, the authors examined the role of system 1 responses which propose an intuitive answer and the role of system 2 reasoning to monitor the quality of the system 1 answer and either endorse, correct or override it. Using psychometric instruments, the authors demonstrated that the pattern of decision making of trial judges was subject to the same cognitive processes. It is recognised that judges exercise greater care when ruling in court than responding to a psychometric test at an educational day, and that trial judges have different external pressures, particularly time pressures, than Supreme Court Justices, however the studies revealed system 1 responses at work in judicial decision making. Indeed although judges are 'experienced, well trained and highly motivated decision makers', the legal decision making cognitive process is not unique and follows the pattern of highly educated adults.¹³¹ Judges are not as susceptible to framing effects (how a question is stated) and representative heuristics (ignoring important statistical information in favour of individuating information) as unsophisticated decision makers, however the evidence suggests that judges are as susceptible as any decision maker to other cognitive processes.¹³²

¹²⁹ Leiter B, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007)

¹³⁰ C Guthrie, JJ Rachlinski and AJ Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93 Cornell Law Review 101

¹³¹ C Guthrie, JJ Rachlinski and AJ Wistrich, 'Inside the Judicial Mind' (2006) 86 Cornell Law Review 777

¹³² B English, T Mussweiler and F Strack, 'Playing Dice with Criminal Sentence: The Influence of Irrelevant Anchors on Experts Judicial Decision Making.' (2006) 32 Personality and Social Psychology Bulletin 188

Judicial decision making takes place within a framework of uncertainty, which may serve to enhance the influence of certain heuristics and although experience reduces the effect it does not eliminate it.¹³³ Bainbridge and Gulati examined highly complex security fraud class actions and argued that in such cases, federal judges relied on heuristics to determine the outcome.¹³⁴ The authors argued that reliance on heuristics is due to institutional and intellectual constraints which require judges who are not experts in the area to reach a decision.¹³⁵ Indeed, these influences may be enhanced within the Supreme Court where by definition the cases heard are difficult and uncertain. Although the data by Guthrie *et al* was experimental there is a suggestion from UK Supreme Court Justices that the affect heuristic, ‘gut reaction’ which is evoked through the system 1 process, serves to anchor the decision making.¹³⁶ This was articulated by Lord Neuberger who recognised the impact of ‘gut instinct’ on his decision making and how this instinct formed the lens through which the decision is viewed.

I almost always have an idea of what I want to find either because it instinctively feels right or it seems to go with the merits or my feeling is that it is line with the principles as I think they are.¹³⁷

Psychological studies would suggest that it takes significant system 2 reasoning to shift a decision from that the initial ‘gut reaction’. This is evident in a quote by Lord Sumption in discussion of the outcome of cases:

¹³³ C Guthrie, JJ Rachlinski and AJ Wistrich, 'Inside the Judicial Mind' (2006) 86 Cornell Law Review, page 800

¹³⁴ SM Bainbridge and GM Gulati, 'How Do Judges Maximise? (The Same Way Everybody Else Does - Boundedly): Rules of Thumb in Securities Fraud Opinions.' (2002) 51 Emory Law Journal

¹³⁵ Bainbridge and Gulati are not arguing that judges are intellectually inferior, instead they highlight that a complete understanding of the complexities of the case would require ‘a level of expertise about the workings or markets and organisations, that in some areas, not even the most sophisticated researchers in financial economics and organisational theory, have reached.’ *ibid*, page 84

¹³⁶ C Guthrie, JJ Rachlinski and AJ Wistrich, 'Inside the Judicial Mind' (2006) 86 Cornell Law Review 777

¹³⁷ An interview with Paterson in A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013), page 196.

Yes, I do have an instinctive feeling. I think everybody does. How hard it is to shift me on it, depends entirely on what sort of case it is and how much I know about the subject matter... How often I am persuaded by my initial instinct is just completely wrong in principle, well probably not very often. When it happens it tends to be in cases on subject areas which I am not so familiar with as some of my colleagues.¹³⁸

Paterson's book provides significant evidence of the 'intuition-override model' in operation in the Supreme Court with extensive discussion of 'changes of mind.' Lord Clarke suggests that the 'override' or system 2 reasoning serves to change the decision 'more often than people may think' even in cases which divide judicial opinion, specifically 'close call' cases. Indeed in *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS*, Lord Phillips indicates that he changed his mind in reaching his final conclusion:

Initially I found Lord Pannick's argument persuasive, but on reflection I have concluded that it is fallacious. The fallacy lies in treating current membership of a *Mandla* ethnic group as the exclusive ground of racial discrimination.¹³⁹

Similarly, Lord Hope suggests that a change of mind can occur at any point in the judicial process:

¹³⁸ Quote from an interview with Paterson, *ibid* at page197.

¹³⁹ *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* [2009] UKSC 15, [33]; S Mancini, 'To Be or Not to Be Jewish: The UK Supreme Court Answers the Question; Judgment of 16 December 2009; *R v The Governing Body of JFS*, UKSC 15 (Case Comment)' (2010) 6 *European Constitutional Law Review* 481; M Connolly, 'Racial Groups, Sub-groups, the Demise of the But For Test and the Death of the Benign Motive Defence' (2010) 39 *Industrial Law Journal* 183

What, you might well ask, would have happened if Lord Rodger and I had disagreed in *Grainger* – which, as it happened, seemed both during the hearing (to the obvious alarm of Professor Reid, who was listening to the argument) and in our discussion afterwards to be a very real possibility? The judgment would then have lain in the hands of the other judges.¹⁴⁰

Although, the psychological theory of decision making centres on individual decisions, these decisions take place within the context of the court. As such, these decisions are subject to contextual constraints and influences. It is accepted that even decisions in hard cases are constrained by the facts, the applicable law, institutional norms and customs.¹⁴¹ The exercise of discretion is therefore constrained by these external boundaries. However, even within these constraints, personal intrinsic factors, central to self, may play a role in individual decision making.

1.4.1 Instinct-override and judicial values

Despite evidence of override in some cases, there remains a significant role for system 1 and heuristics and particularly the ‘affect’ heuristic in judicial decision making. Judicial decision making is subject to the same psychological influences as other decision making processes including heuristics and ‘gut instinct’ which serve to anchor judicial decisions. This aligns with Bartel’s ‘top-down’ model of judicial decision making. Bartel argues that judicial decisions are ‘theory’ driven, in as such that judicial decisions are made through the lens of ‘a set of beliefs, based on a directional predisposition that becomes the individual story of

¹⁴⁰ Lord Hope, 'Scots Law Seen from South of the Border' (Scottish Young Lawyers Association, Glasgow, 1 April 2011), page 21

¹⁴¹ RA Posner, *How Judges Think* (Harvard University Press 2008); MA Bailey and F Maltzman, *The Constrained Court. Law, Politics and Decisions Justices Make*. (Princeton University Press, Princeton. 2011). The constraints on decision making both external and internal are discussed in detail in chapters 4 and 5.

how the world works or ought to work' or system 1 reasoning.¹⁴² He argues that this 'theory' is automatically triggered and serves to influence the decision making process and the perception of subsequent information. Bartels set of directional beliefs are values which serve to provide the lens through which decision making is framed. The role of values is not limited to system 1 responses, indeed values operate at three different levels from a systems largely subconscious level to the conscious level of making choices that align with values.¹⁴³ The initial affect response and the values that underpin that response may be affirmed or rejected by the more conscious system 2 response and a conscious affirmation or rejection of the values position. However, in all decisions the initial value response is at the systems level, which may be mediated through the 'affect' heuristic, the 'gut reaction' which anchors decision making and drives a positive or a negative reaction to an argument.

1.5 Values and judicial decisions

The psychological systems theory of decision making suggests that personal factors influence decision making. As highlighted by the opening letter from the Master of the Rolls, Lord Dyson, there is significant resistance to the view that individual characteristics influence judicial decisions.¹⁴⁴ Indeed, this concept was firmly rejected by Lord Phillips who suggests that the Justices of the UK Supreme Court are immune to this influence stating 'judges are doing their best to apply the law and do not decide cases according to personal predilections.'¹⁴⁵

¹⁴² BL Bartels, 'Top-Down and Bottom-Up Models of Judicial Reasoning' in David Klein and Gregory Mitchell (eds), *The Psychology of Judicial Decision Making* (Oxford University Press 2010), page 43

¹⁴³ GR Maio, 'Mental Representation of Social Values' in Mark P Zanna (ed), *Advances in Experimental Social Psychology*, vol 42 (Academic Press 2010).

¹⁴⁴ Letter from Simon Carr, assistant private secretary to Lord Dyson, Master of the Rolls, on page 18 of this thesis.

¹⁴⁵ Lord Phillips, 'Terrorism and Human Rights' (University of Hertfordshire Law Lecture, 19 October 2006), page 4

However, other judges from the highest courts suggest that personal characteristics may have an influence on judicial reasoning. For example, Lady Hale suggests that facets of the individual may occasionally influence the perceptions of the facts:

[F]rom time to time one's own particular approach to concepts of justice and fairness, comes in as does one's own particular background and experiences may lead one to look at a particular factual situation in a different way...¹⁴⁶

A Justice of the High Court of Australia, Hon Michael Kirby goes further and suggests that values may influence decisions stating that 'appointees to a final national court necessarily bring with them values that influence their judicial decisions.'¹⁴⁷ In a candid series of lectures Lord McCluskey, a retired judge in the Scottish Court of Session and High Court of Justiciary, articulated a series of inherent factors which may influence judicial decisions:

It is difficult to escape from the conclusion that the choices, which the system leaves the judge free to make, are influenced by the judge's personality, his instincts and preferences, his accumulated social and philosophical make-up...¹⁴⁸

Lord McCluskey associated the influence of these intrinsic personal factors and system 1 responses with judicial decisions, where the law does not provide a clear answer, where the judge has a choice and judicial discretion is exercised. Indeed, the psychology of decision making supports this position as stated by Guthrie *et al* in the conclusion of their paper:

¹⁴⁶ Lady Hale in 'The Highest Court in the Land: Justice Maker', (BBC4, 27 January 2011) <<http://www.bbc.co.uk/programmes/p00dhn8n>> accessed 3.08.2015

¹⁴⁷ Justice Michael Kirby, 'A Darwinian Reflection on Values and Appointments in Final National Courts' (Society of Legal Scholars, London, 5 November 2009)

¹⁴⁸ Lord McCluskey served as a Senator of the College of Justice (Scotland) from 1984 to 2004. Lord McCluskey, *Law, Justice and Democracy. The Reith Lectures 1986* (Sweet and Maxwell Ltd 1987), page 8

[J]udges attempt to reach their decisions utilising facts, evidence and highly constrained legal criteria, while putting aside their personal biases, attitudes, emotions, and other individuating factors. Despite their best efforts, however, judges like everyone else, have two cognitive systems for making judgments – the intuitive and the deliberative and the intuitive system appears to have a powerful effect on judicial decision making.¹⁴⁹

Where legal rules and principles do not provide a clear answer and the decision requires the exercise of judicial discretion, it is argued in this thesis that personal values serve as a lens through which judicial decisions are made by individual judges.

1.5.1 What are personal values?

It is clear that values and value judgments are used in legal literature to cover a variety of concepts. Indeed, the term has been used to refer to interests, pleasures, likes, preferences, duties, desires, wants, goals, needs, attractions and other kinds of selective orientations.¹⁵⁰ Within the context of legal judgments, the term ‘values’ has been used to cover a range of concepts and has been used synonymously with moral obligations. Although morals are derived from values, the two are not the same. Morals are concerned with the “rightness or wrongness” of a specific action. In contrast, values are ‘enduring beliefs that a specific mode of conduct is personally or socially preferable to an opposite or converse mode of conduct or end state of existence.’¹⁵¹

¹⁴⁹ C Guthrie, JJ Rachlinski and AJ Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93 Cornell Law Review 101, page 141

¹⁵⁰ M Rokeach, *Understanding Human Values. Individual and Societal* (Free Press 1979)

¹⁵¹ *ibid*, page 5.

This definition was further refined by Schwartz and Bilsky who identified five formal features which are common to most psychological definitions of values. Values are (1) concepts or beliefs which (2) pertain to desirable end states or behaviours, (3) transcend specific situations, (4) guide selection or evaluation of behaviour and events and (5) are ordered by relative importance.¹⁵²

Values act as guides for the evaluation of the social world and influence decisions and behaviour. Feather argues that we appraise objects, actions, situations and people in relation to our values, but do so with very little cognitive effort.¹⁵³ This suggests that although we can be conscious of our values, in decision making values can be engaged without conscious effort. As such, values frame our decision making and Tetlock suggests that this influence is universal and our personal values are engaged in every judgement.¹⁵⁴

1.5.2 The influence of values on decision making

We judge objects and situations according to our value standards through an intuitive process with little cognitive effort.¹⁵⁵ Values, mediated through this process, function quickly and often subconsciously. Therefore although an individual when directly questioned can generally identify some of the key values important to them, they may have very little insight

¹⁵²SH Schwartz and W Bilsky, 'Toward a Psychological Structure of Human Values' (1987) 53 *Journal of Personality and Social Psychology* 550; SH Schwartz and W Bilsky, 'Toward a Theory of the Universal Content and Structure of Values: Extensions and Cross-Cultural Replications' (1990) 58 *Journal of Personality and Social Psychology* 878; SH Schwartz, 'Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 countries' (1992) 25 *Advances in Experimental Social Psychology* 1

¹⁵³ NT Feather, 'Values, Valences and Choice: The Influence of Values on the Perceived Attractiveness and Choice Alternatives.' (1995) 68 *Journal of Personality and Social Psychology* 1135; A Bardi and SH Schwartz, 'Values and Behaviour: Strength and Structure of Relations' (2003) 29 *Personality and Social Psychology Bulletin* 1207

¹⁵⁴ PE Tetlock, 'A Value Pluralism Model of Ideological Reasoning' (1986) 50 *Journal of Personality and Social Psychology* 819, page 5

¹⁵⁵ GR Maio and others, 'Ideologies, Values, Attitudes and Behaviour' in J DeLamater (ed), *Handbook of Social Psychology* (Plenum 2003); A Bardi and SH Schwartz, 'Values and Behavior: Strength and Structure of Relations' (2003) 29 *Personality and Social Psychology Bulletin* 1207

into their value hierarchy and the influence of those values on their decision making.¹⁵⁶ Decision making, within psychology, is framed in the context of a choice and Feather argues that all choices between alternatives, whether personal, policy or political, involve a decision between two or more competing values.¹⁵⁷ Indeed, empirical studies have confirmed this belief and competing personal values have been shown to influence decisions in a variety of realistic situations.¹⁵⁸ A decision between competing values frequently results in the affirmation of one value set above another. For example, political policies, which Dickson refers to as ‘values backed up with plans’, often satisfy one value while sacrificing another.¹⁵⁹ In the debate regarding detainment without trial, the competing values might be those of *security* and *self-direction* which encompasses liberty.¹⁶⁰ In supporting detainment, the decision maker is elevating the values encompassed in *security* over those encompassed in *self-direction*. However, the role of values in decision making is more complex than a simple decision between two alternatives. It requires a more nuanced balancing and prioritising of sets of competing values, this occurs at a systems level of decision making. These responses may be affirmed or rejected by more conscious processes not least the conscious evaluation of particular value positions. Indeed, value based decisions are subject to several other psychological influences which may constrain the influence of personal values and may play a particularly important role in judicial decision making and the exercise of judicial discretion.¹⁶¹

¹⁵⁶ M Rokeach, *The Nature of Human Values* (Free Press 1973)

¹⁵⁷ SH Schwartz, 'Value Priorities and Behaviour: Applying a Theory of Integrated Value Systems' in C Seligman, J M Olsen and M P Zanna (eds), *Values: The Ontario Symposium*, vol 8 (Erlbaum 1995)

¹⁵⁸ PE Tetlock, 'A Value Pluralism Model of Ideological Reasoning' (1986) 50 *Journal of Personality and Social Psychology* 819; NT Feather, 'Values, Valences and Choice: The Influence of Values on the Perceived Attractiveness and Choice Alternatives.' (1995) 68 *Journal of Personality and Social Psychology* 1135

¹⁵⁹ NT Feather, 'Values, Valences and Choice: The Influence of Values on the Perceived Attractiveness and Choice Alternatives.' (1995) 68 *Journal of Personality and Social Psychology* 1135, 401

¹⁶⁰ Terrorism Act 2006 as amended by the Protection of Freedoms Act 2012.

¹⁶¹ Discussed in detail in Chapter 5

The first is the psychological concept of trade-off, where a decision maker will reach a decision which is in conflict with their personal values but achieves an alternative agenda. With the setting of judicial decisions, a value-based decision may be traded for collegiality, consensus, support in another decision or future benefits. Although theoretically trading can happen with any value, Baron and Spranca have identified that some individuals have specific values that resist trade-off with other values.¹⁶² The authors named these values 'protected values'.¹⁶³ The authors identified that resistance to trade-off existed even when the subjects could not tell experimenters which values they were responding to.¹⁶⁴ Typically, people want protected values to trump any decision involving a conflict between a protected value and a compensatory value.¹⁶⁵ These are 'core values' the values that are so central to self that they are resistant to trade-off.

Other factors can also influence the competing value decision making process. Feather argues that value choices are also influenced by valence or the subjective attractiveness of specific objects or events within the immediate situation. Valence unlike values is specific to a time and context. It centres on the attractiveness of a specific outcome of the choice, at a specific time, in a specific context. For example, in a legal context it may be that a judge will forsake a cherished value to avoid destabilising the current law at that time.¹⁶⁶

¹⁶² J Baron and M Spranca, 'Protected Values' (1997) 70 *Organisational Behaviour and Human Decision Processes* 1

¹⁶³ *ibid*, page 1.

¹⁶⁴ *ibid*, page 1.

¹⁶⁵ NT Feather, 'Values, Valences and Choice: The Influence of Values on the Perceived Attractiveness and Choice Alternatives' (1995) 68 *Journal of Personality and Social Psychology* 1135

¹⁶⁶ GR Maio and others, 'Ideologies, Values, Attitudes and Behaviour' in DeLamater J (ed), *Handbook of Social Psychology* (Plenum 2003)

Maio *et al* have also demonstrated that situational forces can overwhelm values.¹⁶⁷ For example a series of studies have shown that the presence of bystanders may prevent people helping in an emergency even when they consider helpfulness important.¹⁶⁸ Similarly, in a judicial setting, it is foreseeable that a judge sitting on a panel could forsake a highly rated value under the pressure for consensus.

Values act as an influence on the decision making process, and although this influence can be modified by psychological responses to external and internal factors, there is a strong theoretical argument that values may play a role in judicial decision making and the exercise of judicial discretion in cases where the law is uncertain. Indeed, personal values have been demonstrated to influence or be influenced by many of the personal characteristics associated with the exercise of judicial discretion.

1.6 Values and the exercise of judicial discretion.

As discussed, legal and political academics have identified several characteristics of the judicial personality which are associated with the exercise of judicial discretion. Psychological research suggests that personal values underpin each of the intrinsic judicial factors identified.

Personal values are informed and formed by life experiences and values reflect demographic difference. For example, the values of a population of men and women differ. Empirical population studies by Schwartz revealed that men more than women attribute particular

¹⁶⁷ M Rokeach, *Understanding Human Values: Individual and Societal* (Free Press 1979); GR Maio and others, 'Addressing Discrepancies between Values and Behaviour: The Motivating Effect of Reasons' (2001) 37 *Journal of Experimental Social Psychology* 104

¹⁶⁸ B Latane and J Darley, *Help in a Crisis. Bystander Response to an Emergency* (General Learning Press 1976)

importance to *power* values. They also rate values encompassed within *achievement*, *hedonism*, *stimulation* and *self-direction* highly. In contrast, women, at a population level, attribute more importance than men to *benevolence*, *universalism*, *conformity* and *security* values.¹⁶⁹ Personal values are developed through human experience. They influence conceptions of justice and fairness, indeed, an individuals' morals, attitudes, ideology and role orientation are underpinned by the values that an individual holds to be important.

Values are by definition abstract, but are applied by people to concrete situations. The psychological functioning of values operates at three different levels, a systems level, an "abstract" level and an instantiation level.¹⁷⁰ The most subconscious level is the systems level which reflects the internal hierarchy of values, the motivational tensions in decision making and the activation of values by a choice situation. This systems level of values underpins the "abstract" level, where values are related to the feelings and the emotion the values and choice elicit. The form of emotion depends on the values' roles as ideal versus ought self-guides.¹⁷¹ The instantiation level is the outcome level, the consequence that results from value choices, typical value instantiations increase value-affirming behaviour. The influence of personal values is processed through a pathway from the systems level to behaviour through the abstract level and instantiation level.

Judicial discretion is influenced by moral reasoning, a mental process which culminates in a judgement of the 'rightness' or 'wrongness' of a decision. Values and moral reasoning are

¹⁶⁹ SH Schwartz and others, 'Extending the Cross-Cultural Validity of the Theory of Basic Human Values with a Different Method of Measurement' (2001) 5 *Journal of Cross-Cultural Psychology* 519

¹⁷⁰ GR Maio, 'Mental Representation of Social Values' in Mark P Zanna (ed), *Advances in Experimental Social Psychology*, vol 42 (Academic Press 2010).

¹⁷¹ *ibid*

intimately linked.¹⁷² Moral reasoning forms the bridge between personal values and behaviour, at the abstract value level, which links values with the emotions and perceptions of rightness or wrongness they engender.¹⁷³ Values therefore underpin moral reasoning and serve to anchor the moral position. Skitka and Mullen argue that self-expressive moral positions, at the instantiation level, are a selective expression of a core value or values.¹⁷⁴

Values are also reflected, at the instantiation level, in the more conscious influences on judicial decision making including political ideology and role orientation. Psychological studies have demonstrated that values underpin political ideologies and attitudes and the resultant value affirming behaviours.¹⁷⁵ Feather demonstrated an association between political ideology and personal values at a systems level, with respondents high conservatism scores affirming values encompassed in *security* and *obedience* and rating values such as *equality*, *freedom* and *independence* of relatively lower importance.¹⁷⁶ Barnea and Schwartz confirmed these findings, demonstrating that individuals who espousing conservative ideology hold *security* and *tradition* in higher regard than those who support liberal ideologies.¹⁷⁷ In contrast to many political scientists and legal academics, psychological

¹⁷² J Weber, 'Exploring the Relationship between Personal Values and Moral Reasoning' (1993) 46 Human Relations 435

¹⁷³ J Weber, 'Exploring the Relationship between Personal Values and Moral Reasoning' (1993) 46 Human Relations 435 ; LJ Skitka and E Mullen, 'Understanding Judgments of Fairness in a Real-World Political Context: A Test of the Value Protection Model of Justice Reasoning' (2002) 28 Personality and Social Psychology Bulletin 1419, page 127.

¹⁷⁴ LJ Skitka and E Mullen, 'Understanding Judgments of Fairness in a Real-World Political Context: A Test of the Value Protection Model of Justice Reasoning' (2002) 28 Personality and Social Psychology Bulletin 1419

¹⁷⁵ GR Maio and JM Olson, 'Value-Attitude-Behaviour Relations: The Moderating Role of Attitude Functions' (1994) 33 British Journal of Social Psychology 301; GS Morgan, E Mullen and LJ Skitka, 'When Values and Attributions Collide: Liberals and Conservatives' Values Motivate Attribution for Alleged Misdeeds' (2010) 36 Personality and Social Psychology Bulletin 1241

¹⁷⁶ NT Feather, 'Value Correlates of Conservatism.' (1979) 37 Journal of Personality and Social Psychology 1617. These ideologies are associated with judgments of blame attribution and voting patterns in political elections.

¹⁷⁷ MF Barnea and SH Schwartz, 'Values and Voting' (1998) 19 Political Psychology 17

studies would suggest that liberalism and conservatism is a value disposition rather than an aggregate of responses to contemporary political issues.¹⁷⁸

Judicial discretion is also influenced by role orientation which reflects values. Indeed, Gibson argues that although ‘role orientation’ may stem from role expectations, it is more likely that it represents a synthesis of perceptions of expectations and the occupants own values.¹⁷⁹ Spini and Doise demonstrated an association between role orientation and values at a systems level in students. Students identified as activist prioritised values associated with *self-direction* and *universalism* while restraintist students prioritised values associated with *power* and *tradition*.¹⁸⁰

It is widely accepted that legal rules are rooted in values and that changes in cultural values have a key role in changing the law. In reaching a decision, values are ordered when they come into conflict and moral justificatory practices and practical reasons are developed to support the value choice. In society, these justifications and reasons can then be generalised into policies to justify the imposition of a value structure. It is this value based structure that is reflected in statute and legal doctrine. Indeed, the retired President of the UK Supreme Court, Lord Phillips recognises the central role of values in Parliamentary law making, highlighting that ‘the laws tend to reflect the motives, beliefs, attitudes and prejudices of those who make the law.’¹⁸¹

¹⁷⁸ V Braithwaite, 'The Value Orientations Underlying Liberalism - Conservatism' (1998) 25 Personality and Individual Differences 575

¹⁷⁹ JL Gibson, 'The Role Concept in Judicial Research' (1981) 3 Law & Policy Quarterly 291

¹⁸⁰ D Spini and W Doise, 'Organising Principles of Involvement in Human Rights and their Social Anchoring in Value Priorities' (1998) 28 European Journal of Social Psychology 603

¹⁸¹ Lord Phillips 'Equality before the law' (East London Muslim Centre, London, 3 July 2008)

This thesis moves from the general role of values in law and society, to the specific role of values in judicial decision making and the exercise of discretion. The facets of judicial personality, identified by legal and political academics, which potentially influence the exercise of judicial discretion are underpinned by personal values. The systems based psychology of decision making suggests that in uncertain decisions, where a judge exercises discretion, values may play a role. This is endorsed by legal theorists including MacCormick who argues that a judge in reaching a decision between conflicting precedents is exercising discretion and expressing a preference and there must be some value or values on which this preference is founded.¹⁸² The psychology of decision making provides a framework to assess this potential influence of personal values on judicial decisions, where legal rules do not provide a clear answer.

1.7 Hypothesis

In 1969, Prof. Danelski wrote that ‘the concept of values is central to the explanation of judicial decision making.’¹⁸³ The potential influence of values is enhanced in hard cases, where the result is not dictated by statute or precedent.¹⁸⁴ In these cases, where the law is uncertain, the exercise of judicial discretion plays an important role in the final decision and it is through the exercise of discretion that the values may have influence. Although legal and political academics have recognised the theoretical importance of facets of personality on judicial decision making, to date there have not been any studies which empirically examine the role of values in this context. The psychology of decision making and the role of values

¹⁸² N MacCormick, 'Discretion and Rights' (1989) 8 Law and Philosophy 23

¹⁸³ DJ Danelski, 'Values as Variables in Judicial Decision Making: Notes toward a Theory' (1965) 19 Vanderbilt Law Review 721, page 722.

¹⁸⁴ R Dworkin, 'Hard Cases' (1974 - 1975) 88 Harvard Law Review 1057

within this process provide a framework to start to understand the role of values in judicial decision making.

The central hypothesis of this thesis is that in reaching a legal decision, the law provides the basis for framing and constraining judicial discretion, but where uncertainty exists, the personal values of an individual judge, influences how judicial discretion is exercised and that in turn may influence the way in which law develops. This thesis will test this hypothesis and address the critical legal question ‘How do judges decide hard cases?’ through a psychological lens.

This thesis will adopt an empirical approach to assess the influence of individual Supreme Court Justice’s personal values on legal decisions. It will examine the role of personal values through qualitative and quantitative content analysis of judicial decision making and experimental examination of the role of personal values in legal decisions. These studies will contribute to the debate on the role of judicial discretion in legal decisions and the factors that influence it. The findings will also contribute to debates regarding judicial diversity and judicial selection. If personal values influence judicial decisions, then debates surrounding judicial selection and judicial diversity need to move beyond demographic diversity.

The thesis is set out as follows; Chapter 2 discusses the psychology of values and will detail the novel method developed for the systematic content analysis of legal judgments to identify the values contained within them. Chapter 3 tests the hypothesis that judicial division is reflected by differential value expression and will detail an experimental study to confirm the association between values and legal decisions. Chapters 4 and 5 examine the limits of the value: decision paradigm in cases heard in the Supreme Court and starts to develop a theory

of association between the judicial perception of uncertainty and the expression of values. Chapters 6 and 7 turn the focus from the cases heard in the Supreme Court to the Supreme Court Justices as individuals. Chapter 6 subjects the judgments of four Supreme Court Justices to detailed analysis, revealing potential internal and external influences which serve to constrain the expression of values in legal judgments. Finally, Chapter 7 discusses the findings of the association of values with judicial decisions in the context of debates surrounding judicial diversity.

Chapter 2

Content Analysis: A Method for the Empirical Study of Values in Legal Judgments

[A]ny legal philosophy worthy of the name should fast begin to concentrate its attention upon the precise analysis of the social, political and ideological values existent throughout the syntactic and discursive processes of law.¹⁸⁵

Extensive research in the USA has shown that factors such as political ideology and attitudes may play a heuristic role in the decision making process. Although there is some evidence that inherently personal factors may also influence judicial decision making in the UK, there is comparatively little empirical evidence to support this position.

Psychological research demonstrated that personal values underpin decision making in a variety of contexts.¹⁸⁶ There is also significant evidence that personal values influence many facets of the judicial personality which have been demonstrated to play a role in judicial decision making in the USA.¹⁸⁷ There is, therefore, a strong theoretical argument that personal values may play a role in judicial decision making. Prior to the empirical analysis of the influence of personal values on legal judgments, two critical questions had to be answered. Firstly whether it was possible to identify personal values within the context of a written legal judgment and secondly whether the values identified could be codified according to a psychological model for empirical analysis.

¹⁸⁵ P Goodrich, 'The Role of Linguistics in Legal Analysis' (1984) 47 *Modern Law Review* 523, page 534

¹⁸⁶ Discussed in chapter 1, 56 - 58

¹⁸⁷ Discussed in chapter 1, 59 – 62

2.1 Psychological models of personal values

The selection of the psychological model for study of values is an important element of this thesis and this chapter will set out the models available for this analysis and the rationale behind the selection of the Schwartz model.

2.1.1 Defining values

As previously discussed, values are latent constructs that refer to the way in which people evaluate activities or outcomes and act as ‘standards or criteria to guide not only action but also judgement, choice, attitude, evaluation, argument, exhortation, rationalisation and attribution of causality’.¹⁸⁸ One of the earliest definitions of values is that by Kluckhohn (1951) who defined values in relation to actions and highlighted the potentially implicit nature of values.¹⁸⁹

A value is a conception, explicit or implicit, distinctive of an individual or characteristic of a group,...which influences the selection from available modes, means and ends of action.¹⁹⁰

This definition was refined by Milton Rokeach, in 1973, who identified values as central to personhood and firmly placed values within the framework of decision making;

[Values are] enduring beliefs that a specific mode of conduct or end-state of existence is personally or socially preferable to an opposite or converse mode of conduct or end-state of existence.¹⁹¹

¹⁸⁸ M Rokeach, *The Nature of Human Values* (Free Press 1973), page 2

¹⁸⁹ C Kluckhohn, 'Values and Value-Orientations in the Theory of Action' in T Parsons and EA Shils (eds), *Toward a General Theory of Action* (Harper 1951)

¹⁹⁰ *ibid*, page 361

Although Rokeach's definition remains the most commonly used, Shalom Schwartz, in 1992, developed a more rigorous definition of values. Schwartz defined values as

[A] belief pertaining to desirable states, objects, goals or behaviours, transcending specific situations and applied as normative standards to judge and to choose among alternative modes of behaviour.¹⁹²

In expressing values as goals, Schwartz highlights the motivational goal underpinning a value and distinguishes values from attitudes. Attitudes are defined as beliefs about specific objects or situations, in comparison, values are abstract and not centred in specific objects or situations.¹⁹³ Indeed, values, unlike attitudes, tend to be shared socially within larger communities and serve as trans-situational goals rather than goals focussed on a single object.

Although morals are underpinned by values, values are not morals. Morals are a set of rules which differentiate right from wrong based on the belief system of a culture, society or religion. Morals therefore are socially situated influences and centre on the 'rightness or wrongness' of a specific outcome compared to a standard set by society. In contrast values are personal and universal and provide an internal reference rather than an external reference for decision making.

Values are always positive, in favour of something. Personal values function as internal standards for judging and justifying action and judging others' and one's own behaviour.'¹⁹⁴

As discussed, values can serve as a motivation underpinning action, giving it direction and

¹⁹¹M Rokeach, *The Nature of Human Values* (Free Press 1973), page 5

¹⁹² SH Schwartz, 'Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries' (1992) 25 *Advances in Experimental Social Psychology* 1

¹⁹³ RA Roe, 'Values and Work: Empirical Findings and Theoretical Perspective.' (1999) 48 *Applied Psychology: An International Review* 1

¹⁹⁴S Hitlin S and JA Piliavin, 'Values: Reviving a Dormant Concept.' (2004) 30 *Annual Review of Sociology* 359, page 361

emotional intensity.¹⁹⁵ Indeed, personal values have been associated with facets of decision making across all aspects of life including job choices, political preferences, perceptions of well-being and decisions on cooperation.¹⁹⁶ Values are acquired both through socialisation to dominant group values and through the unique learning experiences of individuals, although largely formed prior to adulthood values can change throughout life associated with life experiences.¹⁹⁷

2.1.2 The psychological models of values. Why Schwartz?

Values were originally philosophical concepts which were inextricably tied to virtuous living and morality.¹⁹⁸ Contemporary theories of values are more diverse and vary based on their conceptual emphasis.¹⁹⁹ This diversity of value theory has led to a diversity of value models each with a different emphasis.²⁰⁰ For example behavioural theorists have examined values

¹⁹⁵ RA Roe, 'Values and Work: Empirical Findings and Theoretical Perspective.' (1999) 48 *Applied Psychology: An International Review* 1 ; B Verplanken and R Holland, 'Motivated Decision Making: Effects of Activation and Self-Centrality of Values on Choices and Behaviour' (2002) 82 *Journal of Personality and Social Psychology* 434. Discussed in chapter 1, pages 55 – 59

¹⁹⁶ T Judge and R Bretz, 'Effect of Work Values on Job Choice Decisions' (1992) 77 *Journal of Applied Psychology* 261; L Sagiv and SH Schwartz, 'Value Priorities and Readiness for Out-Group Social Contact' (1995) 69 *Journal of Personality and Social Psychology* 437; T Garling, 'Value Priorities, Social Value Orientations and Cooperation in Social Dilemmas.' (1999) 38 *British Journal of Social Psychology* 397; L Sagiv and SH Schwartz, 'Value Priorities and Subjective Well-Being: Direct Relations and Congruity Effects' (2000) 30 *European Journal of Social Psychology* 177; A Bardi and SH Schwartz, 'Values and Behavior: Strength and Structure of Relations' (2003) 29 *Personality and Social Psychology Bulletin* 1207; GV Caprara and others, 'Personality and Politics: Values, Traits and Political Choice.' (2006) 27 *Political Psychology* 1

¹⁹⁷ SH Schwartz, 'Are There Universal Aspects in the Structure and Content of Human Values?' (1994) 50 *Journal of Social Issues* 19; DE Giles and J Eyer, 'The Impact of a College Community Service Laboratory on Students' Personal, Social, and Cognitive Outcomes' (1994) 17 *Journal of Adolescence* 327; T Kasser and others, 'The Relations of Maternal and Social Environments to Late Adolescents' Materialistic and Prosocial Values' (1995) 31 *Developmental Psychology* 907; JE Grusec and LE Kuczynski, *Parenting and Children's Internalization of Values: A Handbook of Contemporary Theory* (John Wiley and Sons Ltd 1997); KS Cameron and RE Quinn, *Diagnosing and changing organizational culture: Based on the competing values framework* (John Wiley & Sons 2011)

¹⁹⁸ GB Perry, *General Theory of Value* (Longmans Green 1926)

¹⁹⁹ A good example is D Elzur and others, 'The Structure of Work Values: A Cross Cultural Comparison.' (1991) 12 *Journal of Organizational Behaviour* 21

²⁰⁰ GW England, 'Personal Value Systems of American Managers' (1967) 10 *Academy of Management Journal* 53; JM Liedtka, 'Value Congruence: The Interplay of Individual and Organizational Value Systems' (1989) 8 *Journal of Business Ethics* 805; JA Chatman, 'Improving Interactional Organizational Research: A Model of Person-Organization Fit' (1989) 14 *Academy of Management Review* 333; I Borg, 'Multiple Facetisations of Work Values' (1990) 39 *Applied Psychology* 401; D Elzur and others, 'The Structure of Work Values: A Cross Cultural Comparison.' (1991) 12 *Journal of Organizational Behaviour* 21; JJ Dose, 'Work Values: An Integrative

within the context of work situations and developed the Work Values Questionnaire which reflects values related to the work environment such as convenient hours of work, a good supervisor who is a fair and a considerate boss. The Work Values Questionnaire structures work related values in relation to work related outcomes such as bonuses.²⁰¹ This model studies values within the limited context of work.

The empirical analysis of judicial values within legal judgments requires a model which is not situational and identifies universal values, not simply values related to a specific context. As discussed, in reaching a decision between competing values, the decision maker will elevate one value above another and it is this value hierarchy that is psychologically important.²⁰² Therefore the model selected for the analysis of judicial values should provide a method to identify and empirically analyse values within a structured framework which reveals the relationship between values.²⁰³

Early non-situational value models focussed on values which differentiate between cultures.²⁰⁴ The most widely used cultural model is that of Kluckhohn and Strodtbeck which was developed to identify the values used by societies to address public issues.²⁰⁵ Kluckhohn and Strodtbeck proposed that there are a limited number of common human problems to which society must find a solution and the preferred solution would serve to identify the

Framework and Illustrative Application to Organizational Socialization' (1997) 70 Journal of Occupational and Organizational Psychology 219

²⁰¹ D Elzur and others, 'The Structure of Work Values: A Cross Cultural Comparison.' (1991) 12 Journal of Organizational Behaviour 21

²⁰² Discussed in chapter 1, pages 152 – 153.

²⁰³ A non-situational model will facilitate a wide range of applications, including the application to legal decision making.

²⁰⁴ F Kluckhohn and F Strodtbeck, *Variations in Value Orientations* (Greenwood Press 1961). The value categorisations were human nature (good and bad), human position towards nature (subjugation- mastery), time (past and future) activity (being and doing) and rationality (linearity and universalism).

²⁰⁵ *ibid*

values endorsed by a society at a specific time.²⁰⁶ Although this remains a useful model, the categorisation was used to examine values at a societal level not an individual level.²⁰⁷

Parsons and Shils linked individual values with societal value patterns examining values as a function of the normative agreements that make social order possible.²⁰⁸ The authors argued that in order to give meaning to any situation actors had to resolve basic existential dilemmas, which the authors categorised into five pattern variables.²⁰⁹ For example in reaching decisions the actor must decide whether the result should benefit the individual or society as a whole (self versus collective orientations).²¹⁰ Parson and Shils suggested that institutionalisation of values in a social group would achieve the 'perfect' effect and if the value based rules were followed, all actors in a society would live in perfect harmony. This model although important in its time has lacked empirical support.²¹¹

The first model which attempted to differentiate values at the individual system level and developed a psychometric test to measure such values was that of Allport, Vernon and Lindzey.²¹² The model created scales for six different value types, theoretical (discovery of truth), economic (what is most useful), aesthetic (form, beauty, and harmony), social (seeking

²⁰⁶ MD Hill, 'Kluckhohn and Strodbeck's Value Orientation Theory. ' Online Readings in Psychology and Culture Unit 4 <<http://scholarworks.gvsu.edu/orpc/vol4/issue4/3>>

²⁰⁷ KW Russo, *Finding the Middle Ground: Insights and Applications of the Value Orientations Method* (Intercultural Press 2000)

²⁰⁸ C Kluckhohn C 'Values and Value-Orientations in the Theory of Action' in Parsons T and Shils E (eds), *Toward a General Theory of Action* (Harper 1951). This work is excellently reviewed by James Spates in JL Spates, 'The Sociology of Values' (1983) 9 Annual Review of Sociology 27

²⁰⁹ The five pattern variables are self /collective orientations, universalism /particularism, ascription /achievement, specificity/diffuseness and affectivity/affective neutrality

²¹⁰ C Kluckhohn , 'Values and Value-Orientations in the Theory of Action' in Parsons T and Shils E (eds), *Toward a General Theory of Action* (Harper 1951), chapter 3, pages 159 – 189

²¹¹ Some of these limitations include the degree of abstraction associated with the values. The model also required that individuals choose one or other value and although it acknowledges that the values 'hung' together the authors did not attempt to relate the different polar pairs to each other. The limitations of this model are well reviewed in JL Spates , 'The Sociology of Values' (1983) 9 Annual Review of Sociology 27

²¹² GW Allport, PE Vernon and G Lindsey, *A Study of Values* (Houghton Mifflin 1961)

love of people), political (power), and religious (unity).²¹³ The model of values does not restrict values to cultural origins and starts to identify universal values. The model also provided a psychometric test which facilitated empirical analysis of values. When it was first developed, this model was a very popular method of assessing values but fell out of favour due to its archaic language.²¹⁴

One of the most limiting facets of all the early psychological assessments of values was the limited range and universality of values identified. This was resolved by Milton Rokeach in 1973 when he developed the Rokeach Value Survey (RVS). Two elements are critical to Rokeach's theory of values. Firstly, that some values are highly conserved between populations and transcended specific objects and situations. Rokeach suggests that there are a number of human values which are the same the world over, although abstract ideals, these values represent the same concept to each person. Secondly, as discussed there is a relationship between values. It is the relative importance of individual values in comparison to other values (value hierarchy) which varies between individuals and it is this that is of psychological importance rather than the importance of a single value alone.

The RVS is a psychometric instrument underpinned by the two key elements of Rokeach's theory. It consists of a list of 36 highly conserved value based words. These words were derived from respondents' descriptions of their values and examination of value words in the

²¹³ The following is a clearer definition of value types. Theoretical: Interest in the discovery of truth through reasoning and systematic thinking. Economic: Interest in usefulness and practicality, including the accumulation of wealth. Aesthetic: Interest in beauty, form and artistic harmony. Social: Interest in people and human relationships. Political: Interest in gaining power and influencing other people. Religious: Interest in unity and understanding the cosmos as a whole.

²¹⁴ TC Harford, CH Willis and HL Deabler, 'Personality Correlates of Masculinity-Femininity' (1967) 21 Psychological Reports 881; RA Hunt, 'The Interpretation of the Religious Scale of the Allport-Vernon-Lindzey Study of Values' (1968) Journal for the Scientific Study of Religion 65. Kopelman *et al* updated the Allport-Vernon-Lindzey scale in 2003. It has not however revived the scale as a model of values. RE Kopelman, JL Rovenpor and M Guan, 'The Study of Values: Construction of the Fourth Edition' (2003) 62 Journal of Vocational Behaviour 203

English language.²¹⁵ The value lists were created by reducing the values identified in literature and interviews to a set of values that were maximally conceptually different and minimally correlated empirically.²¹⁶ This list included values which both centred on the individual and society. These words were divided into two groups of values; terminal values which refer to desirable end-states of existence and instrumental values which refer to preferable modes of behaviour. Terminal values include a comfortable life, equality, self-respect and instrumental values include forgiving, polite, logical and broad-minded. The RVS instrument requires that respondents arrange these words in order of importance to them. It is accepted that the RVS encompasses the majority of highly conserved values and that the values are clearly defined and reproducible.²¹⁷ The RVS continues to be one of the most popular methods to assess personal values.²¹⁸

Although the RVS is a suitable method for empirical analysis and it has been widely used and has been independently validated, the RVS has two key limitations.²¹⁹ Firstly, the RVS represents a series of unconnected value words with no underlying value system structure. It

²¹⁵ Rokeach surveyed 100 inhabitants of an American city and a limited number of graduated students. He also included values from several hundred identified by others and from the dictionary.

²¹⁶ A critique of this methodology can be found in VA Braithwaite and HG Law, 'Structure of Human Values: Testing the adequacy of the Rokeach Value Survey' (1985) 49 *Journal of Personality and Social Psychology* 250

²¹⁷ JM Munson and BZ Posner, 'Concurrent Validation of Two Value Inventories in Predicting Job Classification and Success for Organizational Personnel' (1980) 65 *Journal of Applied Psychology* 536; VA Braithwaite, 'The Structure of Social values: Validation of Rokeach's Two-Value Model' (1982) 21 *British Journal of Social Psychology* 203. Braithwaite and Law identified four omissions from Rokeach's value words, these included well-being (such as good health), individual rights (such as privacy, dignity), thriftiness (taking advantage of opportunities) and carefreeness (acting on impulse). VA Braithwaite and HG Law, 'Structure of Human Values: Testing the adequacy of the Rokeach Value Survey' (1985) 49 *Journal of Personality and Social Psychology* 250

²¹⁸ J Finegan 'The Impact of Personal Values on Judgments of Ethical Behaviour in the Workplace' (1994) 13 *Journal of Business Ethics* 747; AP Brief and others, 'What's Wrong with the Treadway Commission Report? Experimental Analyses of the Effects of Personal Values and Codes of Conduct on Fraudulent Financial Reporting' (1996) 15 *Journal of Business Ethics* 183; McDonald and Gandz (1991) created a modified Rokeach survey for the analysis of values within an organisational context. This modified model was used by Joan Finegan to examine the relationship between personal and organisational values. P McDonald and J Gandz, 'Identification of Values Relevant to Business Research' (1991) 30 *Human Resource Management* 217, JE Finegan, 'The Impact of Person and Organizational Values on Organizational Commitment' (2000) 73 *Journal of Occupational and Organizational Psychology* 149

²¹⁹ WL Rankin and JW Grube, 'A Comparison of Ranking and Rating Procedures for Value System Measurement' (1980) 10 *European Journal of Social Psychology* 233

is widely accepted that alteration of one value priority may influence other related value priorities, however in the absence of an underlying structure it is difficult to understand such response patterns. Secondly, the RVS is an ipsative or 'forced choice' model which requires that the participant order the values, thus requiring that no value word has the same priority.²²⁰ In doing so, the subjects are required to make a false choice between values they may hold in equal regard. Work by Maio *et al* suggests that ranking values can force illegitimate distinctions which will distort the empirical analysis.²²¹

The limitations of the RVS are largely overcome by the model created by Shalom Schwartz in 1992.²²² In developing the model, Schwartz analysed a total 25,863 value questionnaires completed by students and teachers in 20 countries.²²³ Schwartz mapped 56 values, including those identified by Rokeach, using smallest space analysis.²²⁴ Based on this analysis, Schwartz argued that there was no evidence to support the distinction between terminal and instrumental values. In contrast, he demonstrated that all values fit into ten different groupings and these groupings can be related to overarching motivations. The motivations are driven by three universal requirements, firstly the needs of individuals as biological organisms, secondly the requirements of co-ordinated social interaction and finally the requirements for the smooth functioning and survival of groups.²²⁵ One of the key advantages of the Schwartz model, over the RVS, is that it demonstrates not only how an

²²⁰ The ipsative choice model yields scores such that each score for an individual is dependent on his own scores for other variables but is independent of and not comparable with the scores of other individuals.

²²¹ GR Maio and others, 'Rankings, Ratings and the Measurement of Values: Evidence for the Superior Validity of Ratings' (1996) 18 *Basic and Applied Social Psychology* 171

²²² SH Schwartz, 'Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 countries' (1992) 25 *Advances in Experimental Social Psychology* 1; Schwartz SH, 'Are There Universal Aspects in the Structure and Content of Human Values?' (1994) 50 *Journal of Social Issues* 19

²²³ SH Schwartz, 'Are There Universal Aspects in the Structure and Content of Human Values?' (1994) 50 *Journal of Social Issues* 19

²²⁴ Smallest space analysis allows values to be represented as points in a two dimensional space. The proximity of points represents the correlation between the values, for example if there is a small distance between value points then the values are closely related, in contrast if there is a large distance then there is little correlation between the values.

²²⁵ SH Schwartz, 'Are There Universal Aspects in the Structure and Content of Human Values?' (1994) 50 *Journal of Social Issues* 19, page 21

individual's values relate to each other but also presents a higher order of motivational goals which identifies how these values relate to the basic motivations that arise from our needs as individuals and as members of a larger society. Schwartz proposed that there were ten key motivational values which can be organised into dimensions, in a circular model, based on relative motivations.²²⁶ This theoretical circular model of values has subsequently been subjected to statistical testing, using modified confirmatory factor analysis and analysis of two independent sets of 23 samples from 27 countries encompassing 10,857 questionnaires, which supported the proposed circular model and the motivational continuum of values.²²⁷

2.2 Schwartz model of values²²⁸

The ten key motivational goals, which encompass the universal values, are *self-direction*, *stimulation*, *hedonism*, *achievement*, *power*, *security*, *conformity*, *tradition*, *benevolence* and *universalism*.²²⁹ Schwartz identified and defined each of these ten primary motivational goals and used examples of the individual values that the goal encompasses.²³⁰

1. *Self Direction*: The motivational objective of self-direction is independent thought and action. The values contained within this motivational type include freedom, creativity, independence, curiosity and self-respect. Those who seek self-direction enjoy being independent and outside the control of others.

²²⁶ This is represented in Figure 2.2-1 on page 79

²²⁷ SH Schwartz and K Boehnke, 'Evaluating the Structure of Human Values with Confirmatory Factor Analysis' (2004) 38 *Journal of Research in Personality* 230

²²⁸ Of note Schwartz referred to this model as the quasi-circumplex model of values. 'Quasi' because in the first model *tradition* lay outside *conformity* at the same degree. For the purposes of this thesis, this model will be simply referred to as the circular model, a simplistic terminology used by many authors.

²²⁹ SH Schwartz, 'Are There Universal Aspects in the Structure and Content of Human Values?' (1994) 50 *Journal of Social Issues* 19

²³⁰ SH Schwartz, 'Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries' (1992) 25 *Advances in Experimental Social Psychology* 1

2. *Stimulation*: The motivational objective is excitement, novelty and challenge in life. The values contained within this motivational goal include an exciting life, a varied life and daring.
3. *Hedonism*: The defining motivational goal is pleasure or sensuous gratification for oneself and includes the values of pleasure and enjoying life.
4. *Achievement*: The motivational objective is personal success through demonstrating competence according to social standards. Achievement values emphasise competence in terms of the prevailing social standards, thereby obtaining social approval. The values encompassed by this motivational goal include ambition, success, capability, influence, intelligence and self-respect.
5. *Power*: The motivational objective is the attainment of social status and prestige and control or dominance over people and resources. The values contained within this motivational goal include social power, wealth, authority, public image and social recognition. Those who value power highly will seek to control others and resources.²³¹
6. *Security*: The motivational goal is safety, harmony and stability of society, relationships and oneself. The values contained within the motivational goal reflect security of both individual and society and include social order, family security, national security, reciprocity of favours, cleanliness, sense of belonging and health.
7. *Conformity*: The motivational objective is the restraint of actions, inclinations and impulses likely to upset or harm others and violate social expectations or norms and to inhibit actions which upset the smooth running of social groups. The values contained within this motivational goal include obedience, self-discipline, politeness, honouring parents and elders.

²³¹ Both *achievement* and *power* are motivated by social esteem but in different ways. *Achievement* emphasises the active demonstration of competence within a social structure whereas *power* emphasises attainment or preservation of a dominant position within the social structure.

8. *Tradition*: The motivational goal is respect, commitment and acceptance of the customs and ideas that one's culture or religion impose on an individual. This goal encompasses the values of respect for tradition, humility, devotion, acceptance of life and moderation.²³² Those who value *tradition* will place cultural customs and ideals above personal interests.
9. *Benevolence*: The motivational goal of *benevolence* is the preservation and enhancement of the welfare of people with whom one is in frequent personal contact. This goal encompasses values such as helpfulness, loyalty, forgiveness, honesty, responsibility, true friendship and mature love.
10. *Universalism*: The motivational goal is understanding, appreciation, tolerance and protection of the welfare of all people and nature. This includes respect for human rights. The values encompassed by this motivational goal are equality, unity with nature, wisdom, a world of beauty, social justice, broad-minded, protecting the vulnerable and the environment and a world at peace.²³³ An individual who values *universalism* above other values will place the needs of society as whole above those of the individual.²³⁴

Although, Schwartz acknowledges that spirituality may be a motivational goal for many, he argues that is not highly conserved as it represents different values for different individuals. The lack of uniformity and consistency with the concept of spirituality prevents its use in the model of values. Although the motivation of spirituality is not directly assessed, several studies have demonstrated a relationship between religiosity (the quality of being religious)

²³² *Tradition* and *conformity* are linked, with *tradition* positioned outside *conformity*. This suggests that *tradition* and *conformity* share the same motivational goal of 'subordination of self in favour of socially imposed expectations'. However, the values are distinct with *conformity* representing values which entail subordination to persons with whom there is frequent contact and *tradition* entails subordination to abstract concepts, customs and ideals.

²³³ *Universalism* is contrasted with *benevolence* which focuses on the individual rather than society as a whole.

²³⁴ It is recognised in a legal context, that the court has a duty since the ratification of the European Convention of Human Rights to protect minorities against the morality of the majority. This is reflected in this *universalism* with the protection of the welfare of all people, equality and protection of the vulnerable. The needs of society do not reflect the needs of the majority rather the needs of every member of society rather than advocating personal interest.

and personal values.²³⁵ Religious people tend to favour values that promote conservation of social and individual order (*tradition, conformity* and to a lesser extent *security*) and values that allow for limited self-transcendence (*benevolence* but not *universalism*). In contrast, there is a negative association between religiosity and *hedonism* and to a lesser extent *achievement* and *power*.²³⁶ Of note, many of these effects are constant across religious denominations (Christians, Jews, and Muslims). Therefore, although religion and spirituality are not represented as individual values, it is clear that values are influenced by these factors.

The most important feature of Schwartz's model of values is that Schwartz identified a relationship between personal values. He created a circular schematic representation of this theoretical relationship. It is acknowledged by Schwartz that the theorised structure is not a perfect representation, but it is 'a reasonable approximation of the structure of relations among the ten value types in the vast majority of samples.'²³⁷ This schema facilitates the study of how values relate to each other and has found a great deal of empirical and cross-cultural support.²³⁸ The model is presented in Figure 2.2-1.

²³⁵ S Roccas and SH Schwartz, 'Church-State Relations and the Association of Religiosity with Values' (1997) 31 *Cross-Cultural Research* 356; S Dollinger, 'Religious Identity: An Autophotographic study' (2001) 11 *International Journal of the Psychology of Religion* 71

²³⁶ S Roccas and SH Schwartz, 'Church-State Relations and the Association of Religiosity with Values' (1997) 31 *Cross-Cultural Research* 356

²³⁷ SH Schwartz, 'Value Priorities and Behaviour: Applying a Theory of Integrated Value Systems' in Seligman C, Olsen JM and Zanna MP (eds), *Values: The Ontario Symposium*, vol 8 (Erlbaum 1995)

²³⁸ GR Maio, 'Mental Representation of Social Values' in Zanna MP (ed), *Advances in Experimental Social Psychology*, vol 42 (Academic Press 2010), SH Schwartz and A Bardi, 'Values and the Adaptation to Communist Rule' (1997) 18 *Political Psychology* 385; SH Schwartz and G Sagie, 'Value Consensus and Importance: A Cross-National Study' (2000) 31 *Journal of Cross Cultural Psychology* 465, page 35; SH Schwartz and T Rubel, 'Sex Differences in Value Priorities: Cross-Cultural and Multimethod Studies' (2005) 89 *Journal of Personality and Social Psychology* 1010

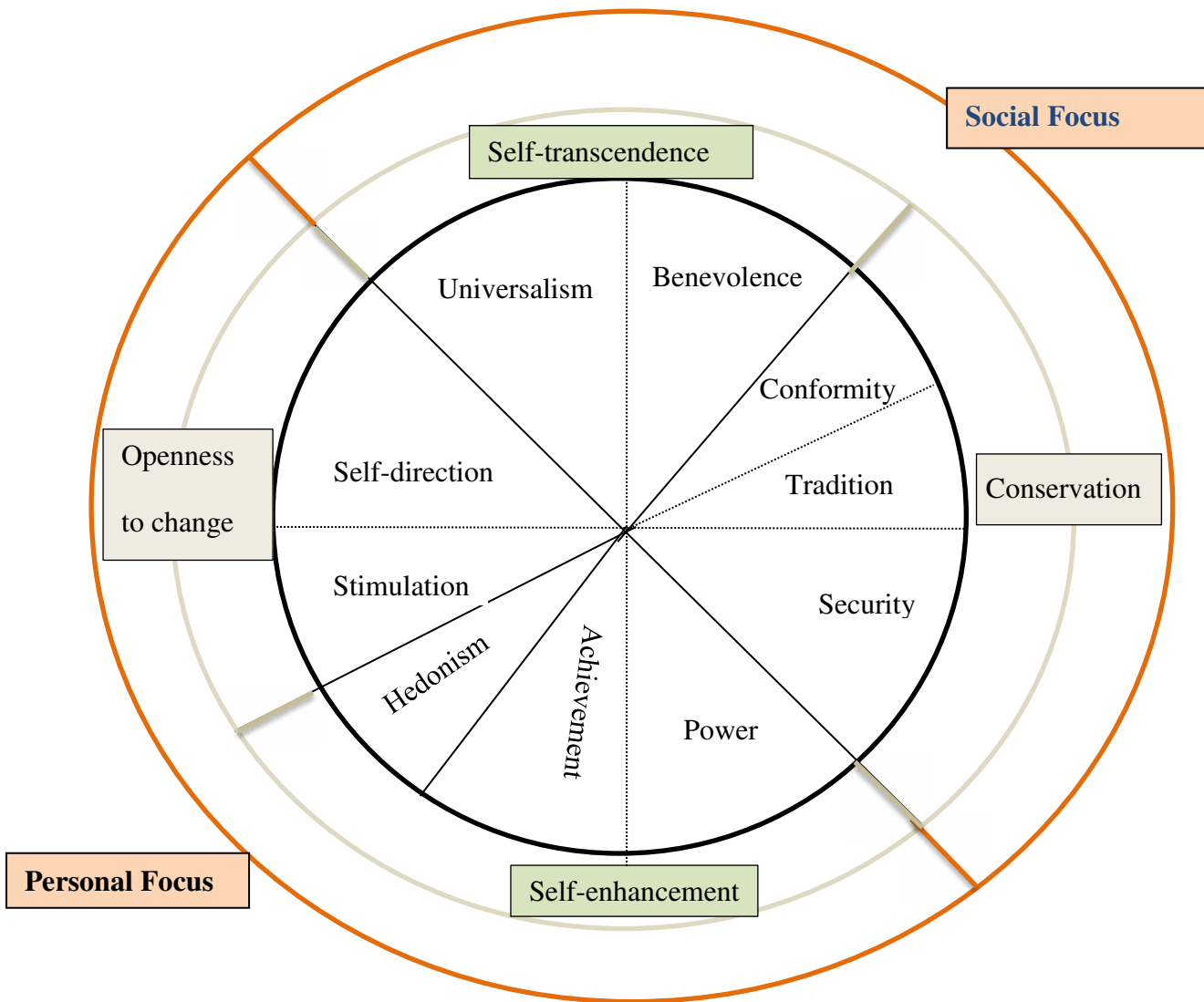


Figure 2.2.-1 The circular model of values adapted from Schwartz 2012

The central black circle identifies the relationship between the 10 key values and each other.²³⁹ Values that are closely related are adjacent (separated by a dotted line) for example *universalism* and *benevolence* and those which are opposed on the circle are less likely to be held in equal regard. The external circles clusters values based on broader concerns.

²³⁹ SH Schwartz and others, 'Refining the Theory Of Basic Individual Values' (2012) 103 Journal of Personality and Social Psychology 663

2.2.1 The relationship between values

Schwartz identified that adjacent values on the circular model share the same motivational emphasis for example *power* and *achievement* emphasise social superiority and esteem.²⁴⁰ Similarly *achievement* and *hedonism* both focus on self-centred satisfaction and *self-direction* and *universalism* both promote reliance on one's own judgement and derive comfort from diversity of existence. Other positive relationships include *stimulation* and *self-direction* which both involve intrinsic motivation for mastery and openness to change and *universalism* and *benevolence* are both concerned with enhancement of others and transcendence of selfish interests.²⁴¹ *Tradition* and *conformity* both stress self-restraint and submission,²⁴² *conformity* and *security* both emphasise protection of order and harmony in relations, and *security* and *power* both stress avoiding or overcoming the threat of uncertainty by controlling relationships and resources.

Schwartz also identified that values on opposing sides of the circle are negatively related. For example a person who has a high regard for *hedonism*, is also likely to perceive *achievement* and *self-direction* as important values but is unlikely to regard as highly values with an emphasis on collective interests, such as *conformity*. Indeed Schwartz identified clear conflicts between specific values for example values encompassed within *universalism* and *benevolence* conflict with those of *achievement* and *power*. *Universalism and benevolence* focus on acceptance of others as equals and concern for their welfare which interferes with the pursuit of one's own relative success and dominance over others, values

²⁴⁰ Of note, both *achievement* and *power* are motivated by social esteem but in two very different ways. *Achievement* emphasises the active demonstration of competence within a social structure whereas *power* emphasises attainment or preservation of a dominant position within the social structure.

²⁴¹ *Universalism* is contrasted with *benevolence* which focuses on the individual rather than society as a whole.

²⁴² *Tradition* and *conformity*, although distinct values, are closely related. They share the same overarching motivational goal of 'subordination of self in favour of socially imposed expectations'. The values however are distinct with *conformity* representing values which entail subordination to rules and *tradition* respect for abstract concepts, customs and ideals.

which are encompassed in *achievement* and *power*. Conflicts were also identified between *self-direction* and *stimulation* which conflict with *conformity*, *tradition* and *security* and *hedonism* versus *conformity* and *tradition*

Schwartz also suggested a higher order of motivational value types. These are represented outside the circle and are composed bipolar dimensions. One dimension opposes motives to promote self (self-enhancement) against motives that transcend personal interests to consider the welfare of others (self-transcendence). Self-enhancement includes the values that promote *achievement* and *power* and self-transcendence includes the values that promote *benevolence* and *universalism*. The second dimension opposes *tradition* and the need to follow the status quo (conservation) with pursuit of personal needs (openness). Conservation includes values that promote *tradition*, *conformity* and *security* and openness includes values that promote *self-direction* and *stimulation*. Of note, Schwartz suggests that *hedonism* can promote either self-enhancement or openness. He argues that *universalism* and *security* serve both types of interests and therefore should be located at the boundaries of these regions.

In a later paper, Schwartz added a second layer of higher motivations representing alternate conceptual frame and highlighting the continuum of values.²⁴³ Schwartz categorised the values encompassed in openness and self-enhancement as having a personal focus (outcomes which concern self). In contrast, those values encompassed in conservation and self-transcendence have a social focus and concern outcomes for others or for established

²⁴³ SH Schwartz and others, 'Refining the Theory Of Basic Individual Values' (2012) 103 Journal of Personality and Social Psychology 663

institutions. *Security* has both a personal and social focus.²⁴⁴ Schwartz proposed that values encompassed in self-transcendence, openness to change and *achievement*, express growth and self-expansion and more likely to motivate people when they are free from anxiety. In contrast, values encompassed in self-enhancement and conservation is directed towards protecting oneself from anxiety and threat.²⁴⁵

The psychological assessment instrument created to identify values by Schwartz is the Schwartz Values Survey (SVS). Unlike the RVS, the SVS provides subjects with a list of values which they must rate on a scale. This method of assessing values allows subjects to rate values equally and removes the forced choice bias. The SVS employs a nine point scale with labels of -1 (opposed to my values), 0 (not important at all), 3 (important), 6 (very important) and 7 (extremely important). The nine point scale has been demonstrated to facilitate more refined differentiation in the ratings and helps to improve prediction.²⁴⁶ The rating of the SVS was further refined by requiring that subjects rate their most and least important values first and then the other values in between. This form of rating has been demonstrated to result in more robust relations between the value ratings.²⁴⁷ Researchers have designed and successfully used four different variations of the psychometric instrument to measure the ten values.²⁴⁸ The most commonly used are the SVS and the Portrait Value Questionnaire (PVQ) a more limited but more accessible psychometric instrument.²⁴⁹

²⁴⁴ SH Schwartz and others, 'Extending the Cross-Cultural Validity of the Theory of Basic Human Values with a Different Method of Measurement' (2001) 5 *Journal of Cross-Cultural Psychology* 519

²⁴⁵ *ibid*

²⁴⁶ GR Maio and others, 'Rankings, Ratings and the Measurement of Values: Evidence for the Superior Validity of Ratings' (1996) 18 *Basic and Applied Social Psychology* 171

²⁴⁷ JA McCarty and LJ Shrum, 'The Measurement of Personal Values in Survey Research' (2000) 64 *Public Opinion Quarterly* 271

²⁴⁸ S Oishi and others, 'The Measurement of Values and Individualism-Collectivism' (1998) 242 *Personality and Social Psychology Bulletin* 1177; SH

Schwartz and others, 'Extending the Cross-Cultural Validity of the Theory of Basic Human Values with a Different Method of Measurement' (2001) 5 *Journal of Cross-Cultural Psychology* 519; JA Lee, G Soutar and J Louviere, 'An Alternative Approach to Measuring Schwartz Values: The Best-Worst Scaling Approach' in D Davies, G Fisher and R Hughes (eds), *Engaging the Multiple Contexts of Management* (ANZAM 2008); AK

Since publication, the SVS has been used to analyse the relationship between values in over 70 countries including data from 14,000 school teachers and 19,000 pupils and the data has supported the dynamic circular model of values proposed by Schwartz.²⁵⁰ Indeed, the model has been used in many psychological studies²⁵¹ including studies of personality²⁵² and well-being²⁵³ and population studies²⁵⁴ such the relationship between values and communist rule²⁵⁵, emigration²⁵⁶ and environmental attitudes²⁵⁷ The model has also been used in a wide range of behavioural studies²⁵⁸ many which centre on individual work and organisational

Doring and others, 'Assessing Values at an Early Age: The Picture-Based Value Survey for Children (PBVS-C)' (2010) 92 *Journal of Personality Assessment* 439

²⁴⁹ SH Schwartz and W Bilsky, 'Toward a Theory of the Universal Content and Structure of Values: Extensions and Cross-Cultural Replications' (1990) 58 *Journal of Personality and Social Psychology* 878; Schwartz and others, 'Extending the Cross-Cultural Validity of the Theory of Basic Human Values with a Different Method of Measurement' (2001) 5 *Journal of Cross-Cultural Psychology* 519

²⁵⁰ S Roccas and others, 'The Big Five Personality Factors and Personal Values' (2002) 28 *Personality and Social Psychology Bulletin* 789; A Bardi and SH Schwartz, 'Values and Behaviour: Strength and Structure of Relations' (2003) 29 *Personality and Social Psychology Bulletin* 1207; GR Maio and others, 'Changing, Priming, and Acting on Values: Effects via Motivational Relations in a Circular Model' (2009) 97 *Journal of Personality and Social Psychology* 699

²⁵¹ GR Maio and JM Olson, 'Values as Truisms: Evidence and Implications' (1998) 74 *Journal of Personality and Social Psychology* 294; MM Bernard, GR Maio and JM Olson, 'The Vulnerability of Values to Attack: Inoculation of Values and Value-Relevant Attitudes' (2003) 29 *Personality and Social Psychology Bulletin* 63; GR Maio and others, 'Changing, Priming, and Acting on Values: Effects via Motivational Relations in a Circular Model' (2009) 97 *Journal of Personality and Social Psychology* 699

²⁵² W Bilsky and SH Schwartz, 'Values and Personality' (1994) 8 *European Journal of Personality* 163; SH Schwartz; L Sagiv and K Boehnke, 'Worries and Values' (2000) 68 *Journal of Personality* 309; S Roccas and others, 'The Big Five Personality Factors and Personal Values' (2002) 28 *Personality and Social Psychology Bulletin* 789

²⁵³ L Sagiv and SH Schwartz, 'Value Priorities and Subjective Well-Being: Direct Relations and Congruity Effects' (2000) 30 *European Journal of Social Psychology* 177

²⁵⁴ SH Schwartz, *Beyond Individualism/Collectivism: New Cultural Dimensions of Values* (Sage Publications 1994); SH Schwartz and others, 'Value Priorities and Social Desirability: Much Substance, Some Style' (1997) 36 *British Journal of Social Psychology* 3; L Sagiv and SH Schwartz, 'Cultural Values in Organisations: Insights for Europe' (2007) 1 *European Journal of International Management* 176

²⁵⁵ A Bardi and SH Schwartz, 'Relations among Sociopolitical Values in Eastern Europe: Effects of the Communist Experience?' (1996) *Political Psychology* 525; SH Schwartz and A Bardi, 'Influences of Adaptation to Communist Rule on Value Priorities in Eastern Europe' (1997) 18 *Political Psychology* 385

²⁵⁶ E Tartakovsky and SH Schwartz, 'Motivation for Emigration, Values, Wellbeing, and Identification among Young Russian Jews' (2001) 36 *International Journal of Psychology* 88

²⁵⁷ WP Schultz and L Zelezny, 'Values as Predictors of Environmental Attitudes: Evidence for Consistency across 14 Countries' (1999) 19 *Journal of Environmental Psychology* 255; *ibid*

²⁵⁸ GR Maio and others, 'Addressing Discrepancies between Values and Behavior: The Motivating Effect of Reasons' (2001) 37 *Journal of Experimental Social Psychology* 101; T Devos, D Spini and SH Schwartz, 'Conflicts among Human Values and Trust in Institutions' (2002) 41 *British Journal of Social Psychology* 481

values²⁵⁹ but also wide ranging behaviours such as political choice²⁶⁰, parenting²⁶¹ and pro-social behaviour.²⁶²

Indeed, the more limited value survey the Portrait Value Questionnaire has been used as part of the European Social Survey, a bi-annual survey of the 'interaction between Europe's changing institutions and the attitudes, beliefs and behaviour patterns of its diverse populations'.²⁶³ This survey has been completed by 150,000 individuals over the first four rounds and provides a significant source of population values. As stated earlier, the empirical analysis of judicial values requires a model which is not situational, identifies universal values and provides a method to identify and empirically analyse individual's values within a structured framework. The Schwartz model and the SVS fulfil all of these criteria and overcomes many of the limitations of the RVS.

2.2.2 The limitations of the Schwartz model of values.

All models of values have limitations and one of the key limitations is abstraction. The central issue with abstraction is clearly articulated by Greg Maio;

²⁵⁹ M Ros, SH Schwartz and S Surkiss, 'Basic Individual Values, Work Values, and the Meaning of Work' (1999) 48 *Applied Psychology* 49; PB Smith, MF Peterson and SH Schwartz, 'Cultural Values, Sources of Guidance, and their Relevance to Managerial Behavior. A 47-Nation Study' (2002) 33 *Journal of Cross-Cultural Psychology* 188; MS Schwartz, 'Universal Moral Values for Corporate Codes of Ethics' (2005) 59 *Journal of Business Ethics* 27

²⁶⁰ GV Caprara and others, 'Personality and Politics: Values, Traits, and Political Choice' (2006) 27 *Political Psychology* 1

²⁶¹ A Knafo and SH Schwartz, 'Parenting and Adolescents' Accuracy in Perceiving Parental Values' (2003) 74 *Child Development* 595

²⁶² E Tartakovsky and SH Schwartz, 'Motivation for Emigration, Values, Wellbeing, and Identification among Young Russian Jews' (2001) 36 *International Journal of Psychology* 88; SH Schwartz, 'Basic Values: How They Motivate and Inhibit Prosocial Behavior' in Mario Mikulincer and Phillip R Shaver (eds), *Prosocial Motives, Emotions, and Behavior: The Better Angels of our Nature* (APA 2010)

²⁶³ European Social Survey <<http://www.europeansocialsurvey.org/>> accessed 23.08.13; SH Schwartz and others, 'Extending the Cross-Cultural Validity of the Theory of Basic Human Values with a Different Method of Measurement' (2001) 5 *Journal of Cross-Cultural Psychology* 519; E Davidov, P Schmidt and SH Schwartz, 'Bringing Values Back and the Adequacy of the European Social Survey to Measure Values in 20 Countries' (2008) 72 *Public Opinion Quarterly* 420

The abstract nature of values is vital for their conceptualisation, but complicates their assessment. For example, equality can entail equality of outcomes or opportunities and it could involve equality between races, genders, religions or more typical social categories (for example left-handers versus right-handers). Which instantiations do people have in mind when they speak about a value, think about acting on it or rate its importance in a survey?²⁶⁴

In an attempt to limit the problem of abstraction, the SVS offers synonyms to refine the meaning of the values, for example equality is equality of opportunity. Although this does reduce the impact of abstraction Maio suggests that this may be insufficient to prevent substantial differences in conceptualisation. This influence is more significant when evaluating values across cultures. However, the author agrees that despite this limitation ‘the Schwartz model provides a reasonable ‘prototype’ for modelling value relations’.²⁶⁵

All value instruments are also influenced by the respondent’s conscious theories of compatibility. In identifying the instrument as a ‘value’ survey, the respondents are influenced by their perceptions of what ‘ought’ to be their values as compared to what their values ‘are’. This response bias is a recognised problem with many surveys, especially those which centre on controversial issues.²⁶⁶ Although this cannot be entirely eliminated, the impact is minimised in the SVS, as the SVS presents respondents with 40 individual values and the final value analysis in SVS unlike other value instruments reflects the rating of the

²⁶⁴Maio GR, 'Mental Representation of Social Values' in Zanna MP (ed), *Advances in Experimental Social Psychology*, vol 42 (Academic Press 2010), page 7

²⁶⁵ *ibid*, page 8

²⁶⁶ JA Krosnick, 'Response Strategies Coping with the Cognitive Demands of Attitude Measures in Surveys' (1991) 5 *Applied Cognitive Psychology* 213

several values encompassed in each overarching motivation value.²⁶⁷ Despite these limitations, the SVS and the Schwartz model has been used extensively by both empirical and cross-cultural studies.²⁶⁸ The model provides a ‘structure of relations among the ten value types in the vast majority of samples.’²⁶⁹

The SVS provides a psychological tool to identify personal values and the relationship between these values which facilitates the empirical analysis of the influence of values on other factors. The Schwartz model and SVS therefore fulfil the criteria for selection as the model for assessment of personal values in legal judgments.

2.3 The identification of values in legal judgments

The Schwartz model provided this research with a structure for the analysis of values within legal judgments. This model related values to overarching motivations and provides a framework for analysis. To employ this framework to the empirical content analysis of the role of personal values in judicial decisions, one first needs to determine whether values can be identified in written legal judgments. The following sections detail the identification of values within legal judgments and the creation of a coding frame that relates values expressed in legal judgments to the Schwartz model.

²⁶⁸ Google Scholar April 22, 2012 lists 8,200 citations to the three major articles that introduced the theory. SH Schwartz and W Bilsky, 'Toward a Psychological Structure of Human Values' (1987) 53 *Journal of Personality and Social Psychology* 550; SH Schwartz, 'Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 countries' (1992) 25 *Advances in Experimental Social Psychology* 1; SH Schwartz and others, 'Refining the Theory Of Basic Individual Values' (2012) 103 *Journal of Personality and Social Psychology* 663

²⁶⁹ SH Shwartz, 'Are There Universal Aspects in the Structure and Content of Human Values?' (1994) 50 *Journal of Social Issues* 19, page 35

2.3.1 The identification of values in legal text: The theory

There is a long tradition of identifying values within written text which stems from the early studies by Lowenthal and Albrecht who examined mass-periodical fiction for evidence of values.²⁷⁰ The legal tradition is also a written tradition and this thesis sets out to develop a value based content analysis method to identify values within written text. To achieve this aim it is necessary to interpret the textual meanings of legal judgments. Although, it is not unusual to interpret legal text to identify the nuances of a legal decision, how these textual meanings are interpreted is the subject of debate.

Hart has long argued that legal language has a distinctive character and cannot be interpreted 'in terms of ordinary factual counterparts.'²⁷¹ It is true that legal judgments contain the language of law which seeks to adopt a uniquely objective stance. However, Goodrich and others argue that Hart's formalist approach to legal language is not compatible with semantics as a science.²⁷² Goodrich supports the approach of Fowler *et al* who argues that all language use inevitably bears the impress of social meaning:

'[T]here are social meanings in a natural languagewhich are articulated when we write or speak. There is no discourse that does not embody such meanings.'²⁷³

²⁷⁰ L Lowenthal, 'Biographies in Popular Magazines' in P F Lazarsfeld and F Stanton (eds), *Radio Research* (Columbia University Bureau of Applied Social Research 1944); MC Albrecht, 'Does Literature Reflect Common Values?' (1956) 21 *American Sociology Review* 722; I Wayne, 'American and Soviet Themes and Values' (1956) 20 *Public Opinion Quarterly* 314 cited in *The Sociology of Values*

²⁷¹ HLA Hart, 'Definition and Theory in Jurisprudence' (1954) 70 *Law Quarterly Review* 37, page 37

²⁷² P Goodrich, 'The Role of Linguistics in Legal Analysis' (1984) 47 *Modern Law Review* 523

²⁷³ R Fowler and others, *Language and Control* (Routledge & K. Paul 1979), page 185 cited in P Goodrich, 'The Role of Linguistics in Legal Analysis' (1984) 47 *Modern Law Review* 523

Indeed, the authors argue that legal language can be read with ordinary social meaning, therefore it should be possible using ordinary meaning to identify values within legal judgments.

Interpretation of text is not limited to semantics, context may also play an important role. Indeed, philosophers of language would argue that the content of linguistic communication is not always determined by the meaning of the words and the sentences uttered, and that the content is pragmatically enriched by other factors such as context and what is implied or implicated.²⁷⁴ This is certainly true of the spoken word, but less true of the written text. In a legal context, Marmor argues the contextual background does not typically play a major role in the interpretation of the meaning of legal documents.²⁷⁵ The arguments of both Goodrich and Marmor support the position that within the context of a legal judgment, the words used can reveal social meanings which are not dependant on contextual background. Therefore it is possible that legal judgments could reveal values.

It is accepted that written legal judgments reflect 'post hoc justifications of those writing a decision in a particular case and does not fully capture the judicial decision-making process.'²⁷⁶ As such the written judgment may not reveal all of the values that influence the decision making process or the values revealed may be modified to reflect the function, and audience to whom the judge is speaking. The main function of any judgment is to convey the decision and a justification of the decision reached but James Lee highlighted the variety of more nuanced functions including judgments that are written to support the lead judgment, or

²⁷⁴ This is area of linguistic research is known as 'pragmatics'.

²⁷⁵ A Marmor, 'The Pragmatics of Legal Language' USC Legal Studies Research Paper Series <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1130863>

²⁷⁶ S Gatowski and others, 'Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World.' (2001) 25 Law and Human Behaviour 433, page 434

to highlight differences or aimed at enhancing accessibility.²⁷⁷ Alan Paterson highlights another more subtle function, judgments written to “provide a way for the writer to seek to influence his or her colleagues without having the judgment dismissed as a dissent.”²⁷⁸ This more subtle function relates to the audience that the judge has in mind when writing the judgment. In 1960, Professor Walker Gibson asked 25 US Appellate Judges “To whom (or for whom) do you write your opinions?” He received a wide range of responses, including the legislature, for the writing judge to satisfy themselves that the decision is right, and to persuade other judges.²⁷⁹ Although dated, and situated in the US Appellate courts, there is little to suggest that the Supreme Court in the UK has different audiences in mind. Indeed, in the majority of cases which divide judicial opinion, persuasion may be central. It is accepted that the content analysis of judgments provide an indirect assessment of judicial decision making research and that the form, function and audience the judge has in mind may have a significant impact on the values expressed in the judgment. However as this study will demonstrate there is a consistency of value expression across a range of judgments which suggests that this form of analysis despite the inherent limitations provides an insight into the influence of values on legal judgments.

2.3.2 The identification of values in legal text: In practice

To assess whether values are evident in legal judgments, the judgments of eighteen sequential cases which divided the Supreme Court, were reviewed. Although, the majority of any legal judgment consists of facts and the law, with citations of excerpts of relevant cases, there were statements made by judges about their opinions which appeared to include value statements and the following is a sample of some of the value statements identified within legal

²⁷⁷ J. Lee, 'A Defence of Concurring Speeches' (2009) Public Law 30

²⁷⁸ A. Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013), 109

²⁷⁹ R. Leflar 'Some Observations Concerning Judicial Opinions' (1961) 61 Columbia Law Review 810.

judgments of the Supreme Court and how they relate to the value motivations identified by Schwartz.

One of the broadest value motivations identified by Schwartz is that of *universalism*, which has the overarching motivation of understanding, appreciation, tolerance and protection of the welfare of all people and nature and includes respect for human rights and environment. Some of the values encompassed by this motivational goal include equality and social justice. *Universalism* encompasses values which promote the benefit to society as a whole above that of the individual. In this excerpt from *R (on the application of Sainsbury Supermarkets Ltd) v Wolverhampton City Council* Lord Phillips supporting the majority decision positively espoused the benefit to society of ‘competitive planning’:

The fact that this may, in effect, involve an auction between the two developers for the benefit of the community does not seem to me to be inherently objectionable.²⁸⁰

In positively placing the benefit to the community above the planning issues, Lord Philips is espousing values contained within the overarching value motivation of *universalism*.

Universalism also encompasses the protection of vulnerable of society, a theme identified the dissenting opinion of Lady Hale in *A v Essex County Council*:

This is where the fact that, unlike the pupil in Lord Grey, the appellant has such very special educational needs comes into play. The effect of exclusion for ‘such pupils’ can be so much more serious than for other

²⁸⁰ Lord Phillips in *R (on the application of Sainsbury’s Supermarket Ltd) v Wolverhampton City Council* [2010] UKSC 20. [143]. ‘Competitive planning’ is the term used by Lord Hope in the same case.

children. A denial of access which would have no long term impact upon an ordinary pupil may be catastrophic for a pupil with special needs.²⁸¹

In emphasising the protection of the vulnerable in society, it can be argued that Lady Hale appears to have positively espoused the value of *universalism*.

Tradition is also a broad ranging value motivation which encompasses both legal and religious tradition. In this excerpt from in *R(on the application of E) v JFS Governing Body* Lord Brown appeared to be espousing the value *tradition* in his support of the Jewish religious tradition:

That, however, is not an issue which is, or ever could be, before the Court.

No court would ever intervene on such a question or dictate who, as a matter of orthodox religious law, is to be regarded as Jewish.²⁸²

Tradition and *conformity* share the same motivational goal of ‘subordination of self in favour of socially imposed expectations’. This excerpt from *R (on the application of Morge) v Hampshire County Council* positively promoted the values encompassed in conformity and compliance with the rules:

It is, of course, always important that the legal requirements are properly complied with, perhaps the more so in cases such as this, where the

²⁸¹ Lady Hale in *A v Essex County Council* [2010] UKSC 3, [102].

²⁸² Lord Brown in *R (on the application of E) v JFS Governing Body* [2009] UKSC 15, [239].

County Council is both the applicant for planning permission and the planning authority deciding whether it should be granted.²⁸³

These excerpts demonstrate that it is possible to identify values within the context of legal judgments and these values may be related to the value motivations identified by Schwartz.

2.4 Textual content analysis of values in legal judgments: Method

To systematically analyse the expression of values in legal judgments this study employs computer-aided content analysis of the text of judgments. The standard social science technique of content analysis requires the systematic, rule-guided reading of documents for consistent features and drawing inferences about their use and meaning.²⁸⁴ Content analysis is only one of the several forms of textual analysis used in social science research, but this method was selected as it is a key method for the identification within text of ‘indicators which point to the state of beliefs, values, ideologies’.²⁸⁵ This method enables quantitative analysis of concepts implied in text based on how often a concept occurs within a text. Concepts are defined as ‘a single idea, or ideational kernel regardless of whether it is represented by a single word or a phrase’.²⁸⁶ The difference in the frequency of expression of a concept provides insights into the similarity or difference of the content.²⁸⁷ The epistemological roots of content analysis lie in legal realism, providing a mechanism by

²⁸³ Lady Hale in *R (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, [35].

²⁸⁴ J Forman and L Damschroder, 'Qualitative Content Analysis' in Liva Jacoby and Laura A Siminoff (eds), *Empirical Methods for Bioethics: A Primer*, vol 11 (Advances in Bioethics, Elsevier 2008), page 1

²⁸⁵ Several forms of textual analysis have been developed including map analysis, semantic grammar and concordance analysis. Content analysis is the traditional form of textual analysis and is the most appropriate to this study. RP Weber, 'Computer-Aided Content Analysis: A Short Primer' (1984) 70 *Qualitative Sociology* 126

²⁸⁶ KM Carley, 'An Approach for Relating Sociological Structure to Cognitive Structure.' (1986) 12 *Journal of Mathematical Sociology* 137

²⁸⁷ For a detailed review of content analysis see KM Carley, 'Coding Choice for Textual Analysis: A Comparison of Content Analysis and Map Analysis' (1993) 23 *Sociological Methodology* 75

which the jurisprudential claims can be empirically assessed.²⁸⁸ Although similar to the doctrinal approach of legal scholarship, this method brings the rigour associated with social science and analysis of judgments creating a ‘distinctively legal form of empiricism.’²⁸⁹ Hall and Wright argue that content analysis works best, in a legal context, where patterns across cases matter more than a deeply reflective analysis of a single case and it is therefore suited to the analysis of values in legal judgments.²⁹⁰

Employment of this method in a legal context is not unique to this study. Indeed, content analysis of written judgments of the US Supreme Court was employed by Kort, Nagel and Ulmer from the late 1950’s.²⁹¹ In 1965, Glendon Schubert started to move away from a focus on prediction of outcome and used content analysis of judgments to start to reveal the attitudes that underpin legal judgments of the US Supreme Court.²⁹² Many of the techniques employed in content analysis are also present in the work of Robertson and Paterson and the work of many others in judicial studies.²⁹³

²⁸⁸ The limits of this claim and the importance and limitations of content analysis are comprehensively set out by Hall and Wright in MA Hall and RF Wright, ‘Systematic Content Analysis of Judicial Opinions’ (2008) 96 California Law Review 2

²⁸⁹ *ibid*

²⁹⁰ *ibid*

²⁹¹ F Kort, ‘Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the “Right to Counsel” Cases’ (1957) 51 American Journal of Political Science 1; S Ulmer, ‘The Analysis of Behaviour Patterns on the United States Supreme Court’ (1960) 22 Journal of Politics 629,

²⁹² G Schubert, ‘The 1960 Term of the Supreme Court: A Psychological Analysis’ (1962) 56 American Political Science Review 90; G Schubert, ‘Jackson’s Judicial Philosophy: An Exploration in Value Analysis’ (1965) 59 American Political Science Review 940; G Schubert, ‘Social Science Approaches to Judicial Process’ (1966) 79 Harvard Law Review 1551. Schubert referred to his findings as “values”, within a psychological framework these context specific responses directed at a specific object are more accurately referred to as attitudes.

²⁹³ MH Redish and KL Drizin, ‘Constitutional Federalism and Judicial Review: The Role of Textual Analysis’ (1987) 62 New York University Law Review 1; AR Amar, ‘Double Jeopardy Law Made Simple’ (1996) 106 The Yale Law Journal 1807; D Robertson, *Judicial Discretion in the House of Lords* (Clarendon Press 1998); WJ Michael, ‘The Original Understanding of Original Intent. A Textual Analysis’ (2000) 26 Ohio Northern University Law Review 201; Paterson A, *Final Judgment. The Law Law Lords and the Supreme Court* (Hart Publishing 2013)

2.4.1 Creation of a coding scheme for content analysis of legal judgments

Central to content analysis is the creation of a systematic, rule-based coding system. As Professor Charles Haar suggests that ‘the disciplined reading and analysis of cases required to code them for computer analysis eliminates casual meandering through factors on a case-by-case basis.’²⁹⁴ The defined coding system focusses attention more methodically on elements of the case and serves to limit against the conscious or unconscious search for predetermined positions.²⁹⁵ As such, content analysis requires a large number of choices which have to be made by a researcher.²⁹⁶ With all content analysis the choices made influence the results achieved and the interpretation of these results. The following sections detail and justify the choices made to facilitate content analysis of legal judgments.

2.4.1.1 Words or Concepts: Content analysis of text can be based on either the analysis of single words or phrases. Single word analysis is appropriate when a single word can be used to define the concept, for example a political party name. In contrast, phrases are more useful when the researcher wants to capture broad based concepts. Value motivations are broad based concepts and therefore this study relied on the coding of phrases rather than single words. Although values can be expressed in a text in more dimensions than simple acceptance and rejection, psychologists only categorise values based on positive espousal. Therefore for this study, it was only the positive espousal of values that was coded to facilitate analysis within the psychological model of values.

²⁹⁴ C Harr, 'Computer Power and Legal Reasoning. A Case Study of Judicial Decision Prediction in Zoning Ammendment Cases.' (1977) 2 American Bar Foundation Research Journal 651, page 742

²⁹⁵ MA Hall and RF Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 California Law Review 2

²⁹⁶ KM Carley, 'Coding Choice for Textual Analysis: A Comparison of Content Analysis and Map Analysis' (1993) 23 Sociological Methodology 75. This paper sets out a detailed discussion of the choices made in devising a coding scheme for content analysis. The framework identified in this paper was used to identify the choices within the context of the content analysis of values within legal judgments.

Only text that reflects a judicial view was coded, therefore text which simply sets out the facts of the case, excerpts of other judgments, books or statutes was excluded. This facilitates analysis which focuses solely on the individual Supreme Court Justice's values.²⁹⁷

2.4.1.2. *Generation of codes:* Coding schemes for textual analysis can be identified in two frameworks based on how the codes are derived. Firstly, the codes can be either deductive, where codes are derived from the theory which underpins the analysis, or inductive where codes are based on the data. Content analysis often combines both deductive and inductive coding, using deductive codes as a way of 'getting into' the data and an inductive approach to identify new codes and to refine or even eliminate deductive codes.²⁹⁸ The second framework of coding is pre-defined or emergent. Although pre-defined coding is essential to refine the coding process, strictly pre-defined coding limits the flexibility and depth of coding which can be achieved. This study combined both pre-defined and emergent coding which was rationalised to achieve a coherent coding system.

The highest order codes were based on the ten value motivations identified in the Schwartz value model.²⁹⁹ Inductive codes were derived based on legal concepts and principles which were underpinned by these value motivations. For example, legal traditions including adherence to precedent and respect for Parliamentary sovereignty were coded within the value *tradition*. Although many of the codes were pre-determined, emergent coding was also used to facilitate the addition of value based legal concepts which had not been foreseen prior to analysis. For example, during the course of the analysis a theme emerged which

²⁹⁷ An individual judge may select precedent which reflects their personal values. The assignment of precedent selection to value categories however requires interpretation of the precedent and the values affirmed by the selection therefore this is not included in the analysis.

²⁹⁸ J Forman J and L Damschroder , 'Qualitative Content Analysis' in Jacoby L and Siminoff LA (eds), *Empirical Methods for Bioethics: A Primer*, vol 11 (Advances in Bioethics, Elsevier 2008), page 48.

²⁹⁹ Deductive codes exist *a priori* and are identified or constructed from theoretical framework, in this case from the Schwartz model of values.

reflected the judicial desire to prevent uncertainty in the law. This theme was often articulated by Lord Dyson. For example:

But this uncertainty, generated by the difficulty of knowing where to draw the line in any given case, is inherently unsatisfactory, since the difficulty itself contains the seeds of potential litigation.³⁰⁰

The implications of awarding vindictory damages in the present case would be far reaching. Undesirable uncertainty would result.³⁰¹

This theme was not limited to Lord Dyson, Lord Hope in *Millar (Craig Martin) v HM Advocate*, a case which centred on the limits of devolved powers, also espoused the importance of preventing uncertainty in the law:

To draw a line between statutory offences relating to reserved matters and those relating to matters that were not reserved would have been even more confusing.³⁰²

Indeed, this theme of prevention of uncertainty went beyond the confines of uncertainty in the law, to the prevention of the uncertainty created by the court delivering a divided opinion as articulated by Lord Brown:

A court which speaks with two voices risks bringing the law into disrepute.³⁰³

³⁰⁰ Lord Dyson in *Jones v Kaney* [2011] UKSC 13, [105]

³⁰¹ Lord Dyson in *Walumba Lumba (Congo) v Secretary of State for the Home Department, Kadian Mighty (Jamaica) v Secretary of State for the Home Department*. [2011] UKSC 12, [101]

³⁰² Lord Hope in *Millar (Craig Martin) v HM Advocate (Scotland)* [2010] UKSC 10, [33]

³⁰³ Lord Brown in *Walumba Lumba (Congo) v Secretary of State for the Home Department; Kadian Mighty (Jamaica) v Secretary of State for the Home Department* [2011] UKSC12, [345]

The value underlying the prevention of uncertainty in the law is *conformity*. The underlying motivation of conformity is the requirement that individuals inhibit inclinations that might disrupt and undermine smooth interaction and group functioning. The emergent theme was therefore coded as *conformity*. Once the initial coding was completed, the coding system was reviewed and rationalised to create a defined coding framework for analysis.

2.5 The coding scheme for content analysis of legal judgments

A coding scheme was developed which facilitated several layers of analysis relating personal values to legal concepts and legal theories of judicial decision making. The final coding scheme is set out in Table 2.

2.5.1 Personal Values

The coding scheme reflected the ten value motivations identified by Schwartz. These values were *hedonism, self-direction, stimulation, benevolence, universalism, conformity, security, tradition, achievement* and *power*.

Table 2 Final coding scheme for the identification of values in legal judgments

| Schwartz's Values | Legal Representation of Values | Schwartz's Values | Legal Representation of Values |
|-------------------|--|-------------------|--|
| Hedonism | Enjoy life | Conformity | 1. Conforming with rule and obligations 2. Preventing uncertainty in the law |
| Self-Direction | 1. Freedom -autonomy - liberty 2. Independence - judicial independence 3. Limits on power | Security | 1. Family security 2. National security 3. Social order - limits on obligations - limited resources |
| Universalism | 1. Benefit to society (public interest) 2. Broadminded (tolerant of other ideas and beliefs) 3. Corporate responsibility 4. Individual responsibility 5. State responsibility 6. Environmental responsibility 7. Equality 8. Protection of the vulnerable 9. Social Justice (includes fairness) 10. Flexibility in law 11. Transparency in law | Tradition | 1. Respect for traditions of society (including religious) 2. Positivist application of law 3. Adherence to precedent 4. Adherence to statute 5. Adherence to the intentions of Parliament 6. Respect for parliamentary role in law making 7. Adherence to the hierarchy of the courts |
| Benevolence | 1. Helpfulness 2. Honesty | Achievement | 1. Success |
| Stimulation | Varied life (no coding) | Power | 1. Power 2. Authority |

2.5.1 Legal representations of personal values.

The codes were both pre-determined and emergent. Pre-determined codes were based on values which were used by Schwartz to generate his model for example *universalism* includes values such as equality and social justice and *tradition* included religious tradition. Codes based on legal concepts which could be linked to value motivations were also used these were either pre-determined or emergent. For example, pre-determined codes encompassed within *tradition* included respect for legal traditions including adherence to precedent, adherence to statute, adherence to the intentions of Parliament and adherence to the hierarchy of the courts.

Emergent codes were created based on themes which were identified during the initial coding. For example, a code was generated which reflected a recurrent theme of the 'limitation of power of governing bodies'. This code identified concepts which recognised the importance of limiting the power of State and regulatory bodies to encroach on individual and corporate autonomy. This was coded as the positive espousal of *self-direction* which includes independence and freedom. As the definitions by Schwartz of these values formed the basis of the '*a priori*' coding these will be reiterated in this section.

2.5.1.1 *Self Direction*

Schwartz defined the overarching motivation of *self-direction* as the approbation of independent thought and action. The values contained within this motivational type include freedom, creativity, independence, curiosity and self-respect. Expressions of this value within legal judgments include the affirmation of individual liberty for example in this extract from *Walumba Lumba (Congo) v Secretary of State for the Home Department* Lord Dyson espouses the value of liberty:

I acknowledge that the principle that statutory powers should be interpreted in a way which is least restrictive of liberty³⁰⁴

and autonomy

The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy.....³⁰⁵

The exercise of judicial freedom to disagree and reach an independent decision also reflects the values encompassed within *self-direction*. Evidence of judicial freedom from other judges include phrases which highlight disagreement such as,

The Court of Appeal was not accurate....³⁰⁶

I cannot agree.....³⁰⁷

As discussed, the limitation of power and authority, affirms values encompassed within *self-direction*, promoting freedom and independence. This code encompassed the limits on the power of the state, the courts, corporations and individuals. It is contrasted with the opposing values encompassed by *self-enhancement, power and authority*:

In conclusion on this issue, while there is considerable practical attraction in the notion that the court should be able to make the wide type of possession order which the Court of Appeal made in this case, following *Drury* [2004], I do not consider that the court has such power. It is

³⁰⁴ Lord Dyson in *Walumba Lumba (Congo) v Secretary of State for the Home Department; Kadian Mighty (Jamaica) v Secretary of State for the Home Department* [2011] UKSC12, [108]

³⁰⁵ Majority statement in *Radmacher v Granatino* [2010] UKSC 42, [114].

³⁰⁶ Lord Mance in *Baker v Quantum Clothing Limited* [2011] UKSC 17, [15].

³⁰⁷ Lord Dyson in *Jones v Kaney* [2011] UKSC 13, [107].

inconsistent with the nature of a possession order, and with the relevant provisions governing the powers of the court. The reasoning in the case on which it is primarily based, *Djermal* [1980], cannot sensibly be extended to justify the making of a wider possession order, and there are aspects of such an order which would be unsatisfactory.³⁰⁸

2.5.1.2 *Benevolence*

Benevolence was defined by Schwartz as the preservation and enhancement of the welfare of people with whom one is in *frequent personal contact*. This goal encompasses values such as helpfulness, loyalty, forgiveness, honesty, responsibility, true friendship and mature love. This value was coded infrequently and this may be due to the close personal contact nature of this value.

2.5.1.3 *Universalism*

The overarching motivation for the value of *universalism* is the understanding, appreciation, tolerance and protection of the welfare of all people and of nature. This is the broadest category of values and encompasses a wide range of values including those that respect human rights such as equality, social justice and those that respect the environment. This motivation also encompasses other values including broad-mindedness, tolerance and wisdom. Values identified by Schwartz as included in *universalism* such as equality and social justice can be identified in legal judgments. Equality was frequently coded in judgments. For example Lady Hale espoused the importance of equality in *R(on the application of E) v JFS Governing Body*:

³⁰⁸ Lord Neuberger in *Secretary of State for Environment, Food, and Rural Affairs v Meier* [2009] UKSC11, [77]

It [Parliament] ...adopted a model of formal equality, which allows only carefully defined distinctions and otherwise expects symmetry. A man must be treated as favourably as a woman, an Anglo-Saxon as favourably as an African Caribbean, a non-Jew as favourably as a Jew.³⁰⁹

and Lord Rodger in *HJ (Iran) (FC) v Secretary of State for the Home Department*;

No-one would proceed on the basis that a straight man or woman could find it reasonably tolerable to conceal his or her sexual identity indefinitely to avoid suffering persecution. Nor would anyone proceed on the basis that a man or woman could find it reasonably tolerable to conceal his or her race indefinitely to avoid suffering persecution. Such an assumption about gay men and lesbian women is equally unacceptable.³¹⁰

Protection of the vulnerable in society was also encompassed within *universalism*. For the purposes of this study protection of the vulnerable in society was distinguished from equality. Equality reflects equal rights under the law, racial equality, gender equality and the protection of the vulnerable in society reflects the duty of society to protect a party which is identified as vulnerable or weaker. For example in *A v Essex County Council*, which deals with the duty of a council to provide education for a severely disabled boy Lady Hale expressed the importance of protecting the most vulnerable in society.³¹¹ Schwartz also identified social justice as a value encompassed within *universalism*. For the purposes of this study social justice encompassed the principles of a society which is based on fairness. It included the

³⁰⁹ Lady Hale in *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* [2009] UKSC 15, [67].

³¹⁰ Lord Rodger in *HJ (Iran) (FC) v Secretary of State for the Home Department* [2010] UKSC31, [76]

³¹¹ Lady Hale in *A v Essex County Council* [2010] UKSC 3[102], quote on page 89.

concepts of equal rights and opportunities, fairness and moral rightness. Coding included key words such as ‘fair’, ‘justice’ ‘fairness’ ‘reasonableness’ and ‘balance.’

The expression of values encompassed in *universalism* in a legal context also includes expression of the importance of tolerance of others beliefs which is defined as a fair, objective and permissive attitude towards those whose opinions, beliefs, practices, race or religion differ from one's own. This value can be expressed either as espousal of the importance of religious tolerance in general or expressions of such tolerance for example in *R(on the application of E) v JFS Governing Body*, Lord Kerr espoused tolerance of religious customs:

In the present case, the reason why the school refused M admission was, if not benign, at least perfectly understandable in the religious context.³¹²

One of the core themes of the values encompassed in *universalism* is the duty to act for the greater good of society as a whole. This was evident in legal judgments as promoting the benefits to society or the public interest for example;

The fact that this may, in effect, involve an auction between the two developers for the benefit of the community does not seem to me to be inherently objectionable.³¹³

Within the notion of promoting the interests of society, was the concept of social responsibility which is defined as the obligation any individual or organisation has to act to

³¹² Lord Kerr in *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* [2009] UKSC 15), [118]

³¹³ Lord Phillips in *R (on the application of Sainsbury's Supermarket Ltd) v Wolverhampton City Council* [2010] UKSC 20, [143]

benefit society at large. This was coded under three different codes, corporate, individual and state responsibility. For example the duty of the State to care for those in military service was highlighted by Lord Hope in *R (on the application of Smith) v Secretary of State for Defence*:

But one must not overlook the fact that there have been many cases where the death of service personnel indicates a systemic or operational failing on the part of the State.³¹⁴

2.5.1.4 Conformity:

Schwartz defined conformity as the restraint of actions, inclinations and impulses likely to upset or harm others and violate social expectations or norms and to inhibit actions which upset the smooth running of social groups. The values contained within this motivational goal include obedience, self-discipline, politeness, honouring parents and elders. Legal representations of this value included the duty to conform to rules which is defined as an obligation of the individual or group to conform to the rules/regulations/laws governing society. For example;

It is, of course, always important that the legal requirements are properly complied with, perhaps the more so in cases such as this, where the County Council is both the applicant for planning permission and the planning authority deciding whether it should be granted.³¹⁵

³¹⁴ Lord Hope in *R (on the application of Smith) v Secretary of State for Defence* [2010] UKSC 29, [105]

³¹⁵ Lady Hale in *R (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, [35]

Conformity requires clear and certain laws and conformity was also expressed in the theme evident in many cases, that the court had a duty to prevent uncertainty in the law. For example, Lord Dyson in highlighted the importance of certainty in the law in *Walumba Lumba (Congo) v Secretary of State for the Home Department*:

The implications of awarding vindicatory damages in the present case would be far reaching. Undesirable uncertainty would result.³¹⁶

2.5.1.5 Security:

Security is defined by Schwartz as the safety, harmony and stability of society, relationships and oneself. The values contained within the motivational goal reflect security of both the individual and society and include social order, family security, national security, reciprocity of favours, cleanliness, sense of belonging and health. Values such as the importance of national security are evident in legal judgments. For example in *HM Treasury v Al-Ghabra* Lord Hope espoused the importance of national security:

The risk of serious and perhaps irreversible damage to efforts to defeat international terrorism in our case too must weigh heavily with this Court in deciding what it should do to meet the concerns that have been expressed by the Treasury. This is not simply a matter of meeting international obligations. The national interest in resisting threats to our own security is just as important.³¹⁷

The values encompassed in security also include social order and the importance of a stable society. Intrinsic to a stable society and social order is the concept that there must be a limit

³¹⁶ Lord Dyson in *Walumba Lumba (Congo) v Secretary of State for the Home Department; Kadian Mighty (Jamaica) v Secretary of State for the Home Department* [2011] UKSC12, [101]

³¹⁷ Lord Hope in *HM Treasury v Al-Ghabra* [2010] UKSC 2, [15]

of the obligations (both financial and societal) of the State which recognises that although the State has a duty to individuals, the duty must have defined boundaries. The State cannot accommodate limitless obligations. This includes reducing the cost to society as a whole induced by an event or policy. Costs include financial (time, money, resources) and societal (harmony, stability, etc.). For example, Lady Hale in *R (on the application of BA) (Nigeria) v Secretary of State for the Home Department* identifies the importance in limiting the number of claims an asylum seeker can make to the courts,

This country is not bound to allow people to make essentially the same claim time and time again as a way of staving off their departure.³¹⁸

Similarly, Lord Hope identifies the importance of limiting the wasting of public resources in *HM Treasury v Al-Ghabra*:

I agree that to prosecute would plainly be a waste of time and public money.³¹⁹

2.5.1.6 Tradition:

Schwartz defines *tradition* as respect, commitment and acceptance of the customs and ideas that one's culture or religion impose on an individual. This goal encompasses the values of respect for tradition, humility, devotion, acceptance of life and moderation. This value was coded in legal judgments as respect for traditions of society including the deferential regard for religious, social or legal traditions.³²⁰ Respect for legal tradition included the adherence to precedent, adherence to statute, adherence to the intentions of Parliament, strictly positivist

³¹⁸ Lady Hale in *R (on the application of BA) (Nigeria) v Secretary of State for the Home Department* [2009], UKSC 7, [43]

³¹⁹ Lord Hope in *HM Treasury v Al-Ghabra* [2010] UKSC 2, [20]

³²⁰ Traditions were defined for this thesis as inherited, established or customary patterns of thought, action or behaviour.

application of the law and adherence to the hierarchy of the courts. Finally, a separate code was created for respect for Parliament's role in law making and the acknowledgement of the separation of powers central to legal tradition. Examples included,

If Parliament had intended that the power to detain could be used for a purpose other than the making or effecting of a deportation order, it would have had to have said this expressly and it has not done so.³²¹

If there is a need to reform the law in this area, it would be better to leave it to be dealt with by Parliament following a further report by the Law Commission.³²²

2.5.1.7 Achievement

Schwartz defines achievement as personal success through demonstrating competence according to social standards. Achievement values emphasise competence in terms of the prevailing social standards, thereby obtaining social approval. The values encompassed by this motivational goal include ambition, success, capability, influence, intelligence and self-respect. This value was rarely coded in legal judgments.

2.5.1.8 Power

The defining goal here is the attainment of social status and prestige and control or dominance over people and resources. The values contained within this motivational goal include social power, wealth, authority, public image and social recognition. Legal

³²¹ Lord Hope in *Walumba Lumba (Congo) v Secretary of State for the Home Department; Kadian Mighty (Jamaica) v Secretary of State for the Home Department* [2011] UKSC12, [174].

³²² Lord Hope in *Jones v Kaney* [2011] UKSC 13, [173].

representations of this value included the positive espousal of the authority of the State and other governing bodies.

2.5.1.9 *Hedonism and Stimulation.*

There was no evidence of expression of these values within the cases analysed.

2.5.2 Limits of the coding scheme

This coding scheme, as with any qualitative research, is subject to interpretation. Albeit a structured scheme, it is acknowledged that the Schwartz model of values represents overarching motivations and the legal text may require interpretation to assign judicial statements to the value motivations. In many cases, the values underpinning the statements were clear, however situations did arise where the statements required interpretation. This was particularly true for the foundational tools of judicial argumentation which provide a framework for the balancing of competing positions in indeterminate cases, reasonableness and proportionality.³²³ Although it has been recognised that the exercise of discretion and the balancing required by the use of these tools is not “valueless”, the identification of the values requires interpretation.³²⁴

Reasonableness is recognised as a tool for balancing the ‘plurality of values’ which are evident in decisions where there are at least two competing reasons. This balancing

³²³ R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002); AS Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72; R Alexy, 'The Reasonableness of Law' in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds), *Reasonableness and Law* (Springer 2009)

³²⁴ GH Von Wright, *The Tree of Knowledge and Other Essays (Philosophy of History and Culture)* (Brill 1993); Alexy R, *A Theory of Constitutional Rights* (Oxford University Press 2002), page 179; R Alexy, 'The Reasonableness of Law' in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds), *Reasonableness and Law* (Springer 2009)

apportions relative weight to these competing interests in a context dependent way.³²⁵

Reasonableness tends to be a doctrine of deference and in the judgments analysed it was used as a conservative tool, to limit obligations or duties.³²⁶

The standard of reasonableness expressed in the qualification 'so far as is reasonably practicable'makes it more, rather than less, likely in my view that the concept of safety is itself to be judged,by reference to what would, according to the knowledge and standards of the relevant time, have been regarded as safe³²⁷

Similarly

In summary, safety must, in my view, be judged according to the general knowledge and standards of the times. The onus is on the employee to show that the workplace was unsafe in this basic sense.³²⁸

Proportionality, in contrast, was not a device of deference and conservation, indeed in the judgments analysed, proportionality was used to mitigate harshness and to achieve fairness, reflecting the values encompassed within *universalism*. For example,

Parliament plainly made the power to forfeit discretionary with the intention that the magistrates' court should discriminate between cases where forfeiture was warranted and cases where it was not. It seems to me natural to assume that Parliament intended the court to consider whether

³²⁵ N MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning (Law, State and Practical Reason)* (Oxford University Press 2005)

³²⁶ AS Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72

³²⁷ Lord Mance in *Baker v Quantum Clothing Limited*, (n 302), [78]

³²⁸ Lord Mance in *Baker v Quantum Clothing Limited*, (n 302), [80]

forfeiture was a proportionate response to the facts of the particular case.³²⁹

or

The issue on this branch of the case, therefore, is whether JFS can show that the policy had a legitimate aim and whether the way it was applied was a proportionate way of achieving it. The burden is on JFS to prove that this was so.³³⁰

In qualitative research, the researcher is not a completely ‘neutral observer’.³³¹ It is accepted in this thesis that qualitative research is partial and situated and influenced by the positioned researcher.³³² To this end, it is accepted within the context of this research, that decisions on coding are influenced by the researcher. It was not possible within the context of a PhD thesis to test the internal consistency of coding as this would require training other coders to statistically calculate inter-coder variation. In the absence of a cohort of coders, one other trained coder did code at the value level the judgments in two cases. There was, as expected, variation in the selection of statements for coding, but of those statements selected by both coders were consistent at the value level, such that the statements identified were attributed to the same value position. The absence of a

³²⁹ Lord Phillips in *R(on the application of the Electoral Commission) v Westminster Magistrates Court* [2010] UKSC 40, [36].

³³⁰ Lord Hope in *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* [2009] UKSC 15, [205].

³³¹ K Malterud, 'Qualitative Research: Standards, Challenges, and Guidelines' (2001) 358 *Lancet* 483

³³² D Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' in D Haraway (ed), *Simians, Cyborgs and Women: The Reinvention of Nature* (Routledge 1991) cited in K Malterud, 'Qualitative Research: Standards, Challenges, and Guidelines' (2001) 358 *Lancet* 483

statistical calculation of concordance does not undermine the findings of this thesis and the patterns of value expression identified which are validated by triangulation drawing on experimental psychometric testing and quantitative analysis.

The Schwartz value model provides a suitable framework for the analysis of personal values in legal judgments. Values can be identified within legal judgments and these values can be systematically codified within the value framework. The method, although detailed and time-consuming, provided data which is suitable for empirical analysis. Indeed, analysis of the judgments of the first 18 cases, which divided the Supreme Court since opening in October 2009, provided 2,932 paragraphs of text which contained 1,065 coded value statements. It is acknowledged that all content analysis is subject to influences of the researcher, these influences are minimised by the systematic, structured nature of the coding.

Chapter 3

Influence of Personal Values on Legal Judgments: A Case Analysis

[T]he impact of background and perspective on judicial decision making is particularly relevant in close cases where the legal principles themselves permit more than one acceptable answer- precisely the type of case that reaches the Supreme Court.³³³

This quote by Lady Hale highlights the importance of non-legal factors on the decisions in cases which divide legal opinion. The non-legal factors that influence the exercise of judicial discretion including ideology, activism, attitudes and demographics are underpinned by personal values. Indeed, it could be suggested that the ‘perspective’ that Lady Hale is discussing, in this excerpt, is influenced by personal values. The psychology of decision making suggests that the influence of personal values is heightened in uncertain decisions.

The most legally uncertain cases heard in the Supreme Court, are those cases which divide the judicial bench, hard cases where the result is “not clearly dictated by statute or precedent”.³³⁴ This chapter sets out to examine whether values can be identified in the judgments of one such case and seeks to demonstrate, through content and empirical analysis of a single close call case, how values are expressed in a case which divided judicial opinion.

³³³ A. Paterson and C. Paterson ‘We need to rethink how we define merit for Supreme Court appointments.’ Guardian, 26 March 2012 <www.guardian.co.uk/law/2012/mar/26/rethink-merit-supreme-court-appointments> accessed 3rd December 2013.

³³⁴ R Dworkin, 'Hard Cases' (1974 - 1975) 88 Harvard Law Review 1057 , page 1057

This chapter proposes a value : decision paradigm which is validated by a small experimental psychometric study which examines the relationship between personal values, assessed using a psychometric instrument, and legal decision making by legal academics.

3.1 Hard cases in the UK Supreme Court

This research is set within the context of the Supreme Court for a variety of reasons. Firstly, cases which reach the Supreme Court are ‘cases of the greatest public and constitutional importance.’³³⁵ The exercise of judicial discretion in such cases may have a significant impact on the law. The Supreme Court is the final court of appeal for both criminal and civil cases therefore the results of the analysis will apply to both areas of law. Finally, the cases which reach the Supreme Court cannot be easily decided by strict application of the law. For a case to reach the Supreme Court there must be valid arguments supporting both parties. Both parties must be able to show that the balance of societal interests rests in their favour and both parties have precedent or the intention of Parliament to support their position. Such cases cannot simply be decided on the routine application of the law and are by definition indeterminate hard cases.³³⁶ There is legal uncertainty regarding the outcome and this indeterminacy opens the door to judicial discretion and it is through the exercise of judicial discretion in these uncertain decisions that personal values may play a role.

3.2 Judicial discretion and uncertainty: case selection

To test the hypothesis that judicial values are reflected in legal judgments a single case was selected. Both academic commentators and the appellate judiciary agree that judges in the

³³⁵ Direct quote from the UK Supreme Court website on <http://www.supremecourt.gov.uk/about/role-of-the-supreme-court.html> accessed 01.08.2015

³³⁶ K Kress, 'Legal Indeterminacy' (1989) 77 California Law Review 283; Leiter B, 'Legal Indeterminacy' (1995) 1 Legal Theory 481

Supreme Court have a degree of discretion which is not determined by legal rules and only to a certain extent by legal principle. Although there is no consensus as to how many cases fall into this category, analysis of the cases heard between the opening of the Supreme Court in October 2009 to August 2014 revealed that the Supreme Court decided 243 cases, of which 57 (23%) divided judicial opinion. Using division as a reflection of legal uncertainty and the exercise of judicial discretion, it could be argued that in up to 23% of UK Supreme Court cases, where judicial interpretation of legitimate legal reasons results in two opposing decisions, the exercise of judicial discretion and judicial personal factors may play a role.

Within these data, are a set of cases which are 'close call' cases, cases in which a single judicial decision decides the case (divisions include 3:2, 4:3 and 5:4). This subset of cases account for 8% of cases heard and 34% of cases which divide judicial opinion. It is in these cases that the exercise of judicial discretion has the most overt impact. The psychology of decision making suggests that values influence decisions where there is real uncertainty. Although all cases heard in the Supreme Court are hard cases and uncertain, to test this hypothesis a case with real uncertainty, a close call case, was selected.

Alexy argues that a judicial decision may reflect a balancing between competing rules or principles.³³⁷ Alexy defined a rule as an all or nothing "ought", a legal imperative that has to be complied with fully or not at all. In contrast, a legal principle can be optimised to varying degrees. The inherent flexibility in a decision which balances competing principles facilitates the exercise of judicial discretion. This reasoning has been applied to human rights legislation with the suggestion that decisions which encompass fundamental human

³³⁷ R Alexy 'On the Structure of Legal Principles' (2002) 13 Ratio Juris 294. Alexy's arguments were focussed on constitutional principles and rules.

rights can also be framed in the context of balancing of principles.³³⁸ Indeed, it has been argued by several academics such legislation has further enhanced judicial discretion.³³⁹ It is for this reason that a case which centred on fundamental principles of human rights was selected.

Finally, it is the practice of the Supreme Court to sit in panels of seven or nine in cases of great public importance or where the court is being asked to depart from a previous decision.³⁴⁰ Such cases have the potential to be more difficult, emotive and uncertain and as such a case with a larger panel was selected.

3.3 The case for analysis: *R(on the application of E) v JFS Governing Body* [2009]

The case selected to present the value: decision paradigm is *R(on the application of E) v JFS Governing Body*, a case which was heard by nine Supreme Court Justices and closely divided judicial opinion.³⁴¹ The facts of the case were relatively simple. E challenged, through judicial review, the decision of the Jewish Free School to refuse admission to his son (M). The Jewish Free School is a State funded Jewish faith school with an excellent academic record which is consistently over-subscribed.³⁴² The school's admissions policy gave preference to children who were recognised as Orthodox Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth (the OCR).³⁴³ The OCR

³³⁸ AD Brady, *Proportionality and Defence under the UK Human Rights Act* (Cambridge University Press 2012)

³³⁹ RA Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 *The Modern Law Review* 859; C McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655

³⁴⁰ Lord Hope, 'The Creation of the Supreme Court – Was it Worth it?' (Barnard's Inn Reading, London, 24 June 2010), page 11

³⁴¹ *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* [2009] UKSC 15

³⁴² The Jewish Free School <http://www.jfs.brent.sch.uk> accessed 1.08.2015

³⁴³ This policy applied only when the school was oversubscribed.

defines Orthodox Jewishness through application of the matrilineal test. This test requires that the mother of the child is Jewish by birth or by Orthodox conversion. In this case, M's mother was not born Jewish and her conversion was not Orthodox but Masorti, a non-orthodox form of Judaism. On this basis, Boy M, who was a practicing Orthodox Jew, failed to meet the criteria of the matrilineal test and was refused admission.

As a faith school, its admissions policy was exempt from the prohibition against discrimination on the grounds of religion or belief under the Equality Act 2006. It was not exempt from prohibitions of race discrimination under the Race Relations Act 1976. The Act prohibits discrimination based on 'race or ethnic or national origins'.³⁴⁴ While it was accepted that the selection policy did discriminate, the key decision in this case was whether the policy was based on ethnic criteria (which would be prohibited under the Race Relations Act 1976) or simply a religious criteria (which is exempt under the Equality Act 2006) or both. The Court of Appeal held that the admission policy breached the Race Relations Act 1976 and discriminated on the grounds of ethnicity. The majority of the Supreme Court upheld the Court of Appeal decision and dismissed the appeal, stating that the policy directly discriminated on the basis of ethnicity.

The court was divided in its opinion. Five Supreme Court Justices (Lord Phillips, Lady Hale, and Lords Mance, Kerr and Clarke) supported the majority position. Four opposed the majority decision. Two (Lords Hope and Walker) found that there was evidence of indirect discrimination which was justifiable on the basis that it was a religious school and two Justices (Lords Rodger and Brown) found that there was no evidence of discrimination. The clear division in the court over the case begs the question as to what influenced the Supreme

³⁴⁴ Race Relations Act 1976, section 1, subsection 1A

Court Justices to decide the case in the way that they did. The central hypothesis of this thesis is that personal values play a role in judicial decision making and this chapter will present data which suggests that personal values may have played a role in the decision in this case.

3.3.1 The structure of analysis of the *JFS* case

This chapter consists of three elements of analysis of the judgments in the *JFS* case. The first is the qualitative examination of the judgments for the expression of values. The second is the quantitative analysis of values as espoused in these judgments. This analysis is facilitated by the systematic rule-based content analysis based on the Schwartz classification of values.³⁴⁵ The final part of this chapter is an experimental examination of the influence of values on legal decisions. This experiment uses a vignette of the *JFS* case and relates the decision in the case to personal values identified using a psychometric assessment of personal values.

3.4 Part I: Can personal values be identified in legal judgments?

This analysis relied on the underlying assumption that judicial judgments contain value statements. To address this assumption, a qualitative analysis of the *JFS* case is presented revealing values espoused within judgments.

The *JFS* case centred on the definition of ‘ethnicity’ and whether Orthodox Jews could be classified as an ethnic group or simply a religious subset of a larger ethnic group of ‘Jews’. In reaching their decision, the majority (Lord Phillips, Lady Hale and Lords Mance, Kerr and Clarke) decided that the Jewish Free School discriminated on the basis of genetic descent

³⁴⁵ Discussed in chapter 2

which was held to be direct racial discrimination prohibited under the Race Relations Act 1976. This was eloquently articulated by Lord Phillips at the opening of his judgment:

[I]t is possible to identify two different cohorts, or groups, with an overlapping membership, those who are descended by the maternal line from a Jew, and those who are currently members of the Jewish ethnic group. Discrimination against a person on the grounds that he or she is, or is not, a member of either group is racial discrimination. JFS discriminates in its admission requirements on the sole basis of genetic descent by the maternal line from a woman who is Jewish, in the *Mandla*, as well as the religious sense. I can see no escape from the conclusion that this is direct racial discrimination.³⁴⁶

Indeed, it was agreed that this form of discrimination could not be mitigated by the religious motivations of the parties nor the exception for conversion:

A person who discriminates on the ground of race, as defined by the Act, cannot pray in aid the fact that the ground of discrimination is one mandated by his religion.³⁴⁷

[M] was rejected because of his mother's ethnic origins, which were Italian and Roman Catholic. The fact that the Office of the Chief Rabbi would have over-looked his mother's Italian origins, had she converted to

³⁴⁶ Lord Phillips in *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* [2009] UKSC 15, [10]

³⁴⁷ *Ibid* [35]

Judaism in a procedure which they would recognise, makes no difference to this fundamental fact.³⁴⁸

Although the minority reached the opposite decision, the reasoning of both the majority and the minority in this case centred on conflict between two facets of law. The first was the prevention of discrimination and the promotion of equality which is encompassed in the value *universalism* and the second was the importance of conservation of religious tradition and the freedoms associated with it which is encompassed in the value *tradition*. Lord Philips, who supported the majority decision, identified that these two competing values were central to the case and in reaching his decision he supported equality and the value *universalism*:

This case cannot therefore be viewed as a mere disagreement between different Jewish denominations, for example about the criteria for conversion. It turns, more fundamentally, on whether it is permissible for any school to treat one child less favourably than another because the child does not have whatever ancestry is required, in the school's view, to make the child Jewish.³⁴⁹

Those who supported the majority found that the policy gave rise to discrimination and held that the policy created inequality that could not be justified by religious tradition. Indeed this was the central theme of all the majority judgments:

To treat as determinative the view of others, which an applicant may not share, that a child is not Jewish by reason of his ancestry is to give effect

³⁴⁸ Lady Hale in *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* [2009] UKSC 15), [69]

³⁴⁹ Lord Mance in *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* [2009] UKSC 15 , [86]

not to the individuality or interests of the applicant, but to the viewpoint, religiously and deeply held though it be, of the school applying the less favourable treatment. That does not seem to me either consistent with the scheme or appropriate in the context of legislation designed to protect individuals from discrimination.³⁵⁰

Many of the majority judgments acknowledged the importance of *tradition* as a competing value, Lord Clarke in contrast dismissed religious tradition as ‘irrelevant’ to the decision:

If that is so, as I see it, the fact that the discrimination was also on religious grounds is irrelevant, as are both the fact that the religious grounds have been adopted for thousands of years and the fact that the Chief Rabbi and the OCR (and therefore JFS) concentrated wholly on the religious questions.³⁵¹

All of the majority judgments espoused the importance of equality. Other values encompassed by *universalism* were also espoused. An individual who values *universalism* above other values will place the needs of society as a whole above those of the individual. This was reflected in the judgment of Lord Mance who identified the wider impact of the school admission policy and argued that the policy would have a detrimental effect not only on the individual affected but also on society as a whole:

The school's policy was formulated without considering the extent to which others professing the Jewish faith, but not in the Orthodox Jewish tradition, were separated by it from friends and from the general Jewish

³⁵⁰ *ibid* [90]

³⁵¹ Lord Clarke in *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* [2009] UKSC 15, [149]

community by the school's admissions policy, or about the extent to which this might cause grief and bitterness in inter- or intra-community relations – matters about which some evidence was tendered before the Court.³⁵²

The judgments of the majority centred on values encompassed by *universalism*. In contrast, those Supreme Court Justices (Lords Hope, Rodger, Walker and Brown) who held a minority position argued that the policy did not breach the Race Relations Act and espoused values encompassed in the opposing value, *tradition*. Lords Hope and Walker argued that there was evidence of indirect discrimination but the discrimination was justified. They focussed on the motivation underpinning the policy and argued that the motivation was religious not racial. In reaching this decision, the Supreme Court Justices promoted the importance of religious tradition which they argued served to justify the indirect discrimination:

I agree with Lord Brown that no court would ever dictate who, as a matter of Orthodox religious law, is to be regarded as Jewish.³⁵³

Jewishness based on matrilineal descent from Jewish ancestors has been the Orthodox religious rule for many thousands of years, subject only to the exception for conversion. To say that this ground was a racial one is to confuse the effect of the treatment with the ground itself. It does have the effect of putting M into an ethnic Jewish group which is different from that which the Chief Rabbi recognises as Jewish. So he has been discriminated against. But it is a complete misconception, in my opinion,

³⁵² Lord Mance in *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* [2009] UKSC 15, [101].

³⁵³ Lord Hope in *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* [2009] UKSC 15, [182]

to categorise the ground as a racial one. There is nothing in the way the OCR handled the case or its reasoning that justifies that conclusion.³⁵⁴

In reaching the same decision on the outcome, Lords Rodger and Brown relied on different reasoning. The Justices argued that there was no evidence of discrimination (direct or indirect). Indeed, the late Lord Rodger delivered a very strongly worded opinion which centred on the importance of the preservation of religious tradition:

Rather, the whole point of such schools is their religious character.The School's policy is to give priority to children whom the Orthodox Chief Rabbi recognises as Jewish. From the standpoint of Orthodoxy, no other policy would make sense. This is because, in its eyes, irrespective of whether they adhere to Orthodox, Masorti, Progressive or Liberal Judaism, or are not in any way believing or observant, these are the children – and the only children - who are bound by the Jewish law and practices which, it is hoped, they will absorb at the School and then observe throughout their lives.³⁵⁵

He criticised the courts' intervention in the 3,500 years of Jewish law and argued that such an intervention would undermine this historic tradition. Despite different reasoning, all the judgments of the Supreme Court Justices who reached the minority decision supported the values encompassed in *tradition*.

³⁵⁴ *ibid* [201]

³⁵⁵ Lord Rodger in *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* [2009] UKSC 15, [223]

This brief extract of the reasoning of both the majority and minority judgments suggested that the case centred on a decision between the dominant values encompassed in *universalism* and *tradition*.³⁵⁶ The Supreme Court Justices identified the competing values in their reasoning and in reaching a decision the judge balanced these competing values and promoted one value above another. In this context, the majority promoted values encompassed in *universalism*. In contrast, the Supreme Court Justices who supported the minority position promoted the values encompassed in *tradition*.

Qualitative content analysis of the judgments identified the values that underlie the key issues relevant to the decision. Indeed, the qualitative analysis revealed that the decision can be understood as reflecting competing sets of values with the majority favouring *universalism* and the minority favouring *tradition*. The qualitative analysis, although revealing, does not identify how frequently these values are discussed within the judgments and whether there was a quantitative difference in the expression of these values within competing judgments. The qualitative analysis also only served to identify the dominant values within the judgments, it does not address whether other values play a role. To address these questions, the judgments were subjected to quantitative content analysis within the NVivo programme.³⁵⁷

³⁵⁶ Other values including *self-direction*, *conformity* were expressed in the judgments. The values of *tradition* and *universalism* appeared more often than other values.

³⁵⁷ It is acknowledged that content analysis requires that the researcher decide on the coding scheme and value interpretation. Although the strict coding criteria were employed, it is possible that the researcher bias could not be completely eliminated. However, the conclusions from the content analysis were supported by the experimental survey which was not subject to the same potential bias. NVivo is a qualitative analysis data software package developed by QRS International. It facilitates the systematic analysis of complex text. The coding framework is detailed in chapter 2

3.5 Part II: Quantitative analysis of the values in the judgments of the *JFS* case

The judgments in the *JFS* case ran to 259 paragraphs. All nine Supreme Court Justices who sat on the bench wrote a judgment.³⁵⁸ Empirical analysis of the individual judgments revealed a stark contrast between the values expressed by the majority and those expressed by the minority.³⁵⁹ The results of the quantitative analysis are presented in Figure 3.5-1. The judgments varied in length and in the number of coded sections which expressed a value. Therefore the minority and majority coding for each value motivation was expressed as percentage of the total number of coded sections in either the combined minority or majority judgments. This form of analysis standardised the data and facilitated comparison of expression of individual values between minority and majority judgments.³⁶⁰ In presenting the data this way, it was standardised for the number and length of the minority/majority judgments and also the number of value codes per judgment.

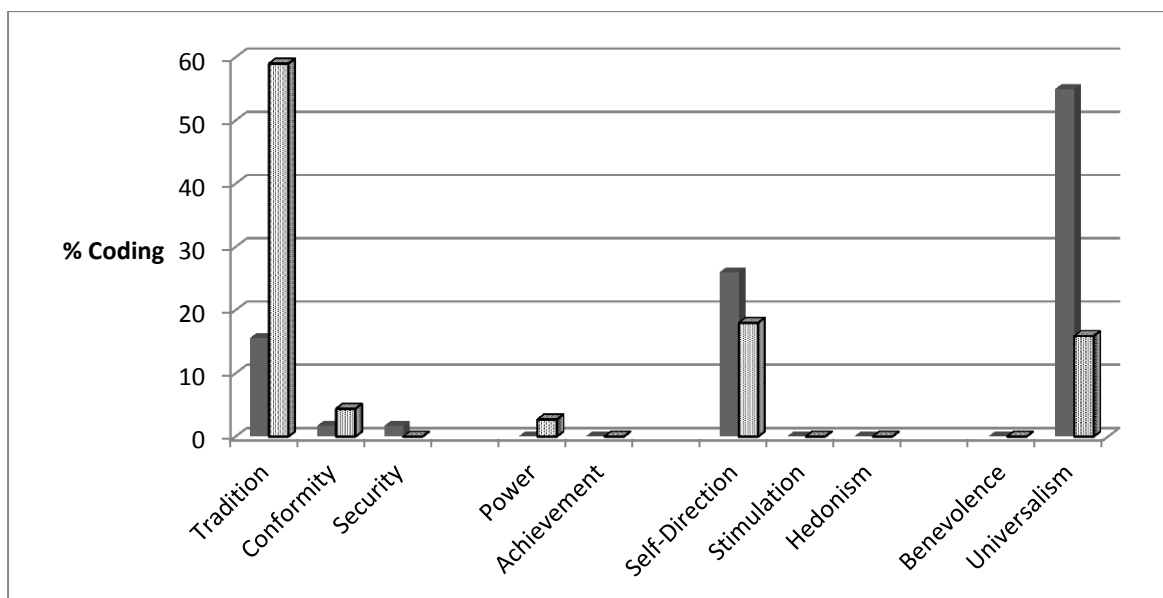


Figure 3.5-1 Quantitative analysis of the values expressed in the judgments of *R v JFS*.

³⁵⁸ Although all Supreme Court Justices delivered a judgment, the judgment of Lord Walker in support of the minority only ran to three paragraphs and did not contain any value coding.

³⁵⁹ 106 extracts were coded section.

³⁶⁰ The total coding for an individual value (eg *tradition*) was the numerator and the total coding for all values combined was the denominator expressed as a percentage.

Values espoused by the majority are presented in dark grey and those of the minority are presented in dotted grey. The individual values are represented on the X axis.

Stimulation, hedonism, achievement and *benevolence* were not coded in any opinion. *Power* was only coded in the opinion of Lord Hope and *security* was only coded in the opinion of Lady Hale. *Conformity* was coded three times in the opinion of Lord Hope and once in the opinion of Lord Phillips.

Over half the values espoused in majority judgments were encompassed within *universalism* which represented 55% of all coding in these judgments.³⁶¹ The majority also espoused values encompassed in *self-direction* (26% of all coding). Although the majority did espouse values encompassed in *tradition*, it only represented 16% of the total.

In contrast, the values espoused in the minority judgments were encompassed in *tradition* which represented 59% of the overall coding for the minority judgments. Although the values encompassed in *universalism* were coded in the minority judgments, the coding only represented 16% of the total. The values encompassed in *self-direction* were also coded, but the coding was less than the majority judgments at 18%.

Quantitative analysis of the values espoused in the judgments revealed a different pattern of value expression in the judgments of those supporting the majority decision and those judgments supporting the minority position. In the judgments of the majority, the preponderance of value coding was encompassed within *universalism*. This contrasted starkly with the judgments of the minority which were dominated by the values encompassed

³⁶¹ 58 sections were value coded in the majority judgments and 48 sections were coded in the minority judgments. The values are expressed as a percentage of the sum coding for the majority or minority judgments.

in *tradition*. The quantitative analysis of values expressed in the judgments supports the qualitative analysis.

Sub-analysis of the values content revealed further differences between the majority and minority judgments. In the majority judgments, 75% of the *universalism* coding was in the sub-category of ‘equality’.³⁶² This was in contrast to only 28% of the total coding in the minority judgments. The minority espoused *universalism* in the context of ‘tolerance of the belief of others’ and ‘social justice’ which accounted for 71% of total minority *universalism* coding.

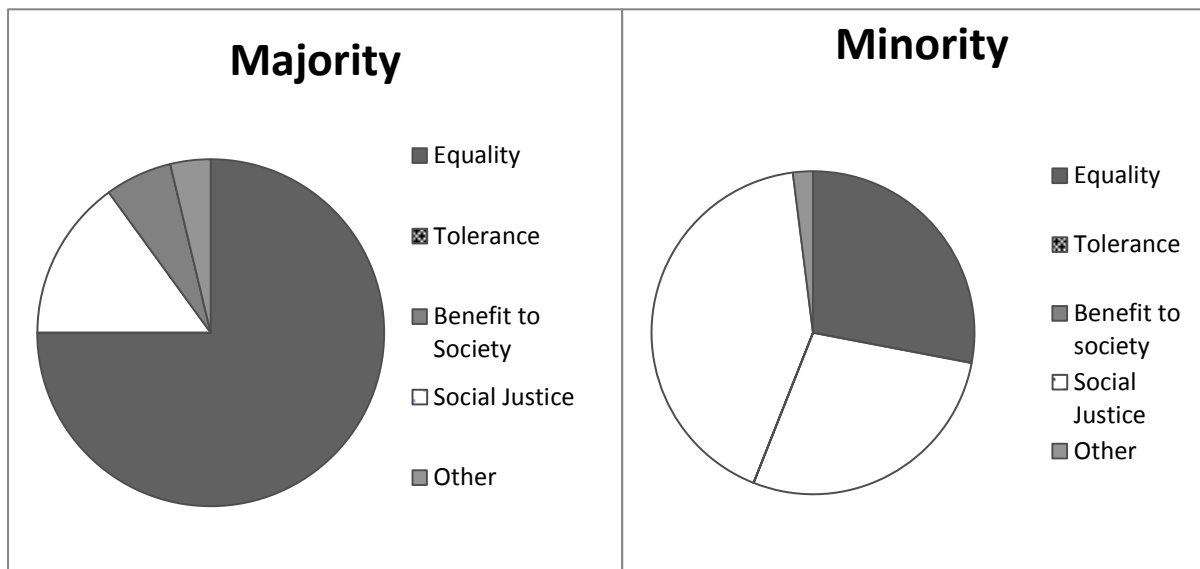


Figure 3.5-2 : Sub-analysis of values the encompassed in *universalism*

Similarly, sub-analysis of the value *tradition* revealed that 80% of the coding encompassed within *tradition* in the minority judgments was espoused in the context of ‘respect for traditions in society including religious tradition’. In contrast, although those who supported

³⁶² Coded statements were expressed as a percentage of the total coding for *universalism* in the majority judgments.

the majority position also espoused tradition in this context, it only accounted for 45% of the coding with 55% espoused within the context of ‘respect for legal tradition’.

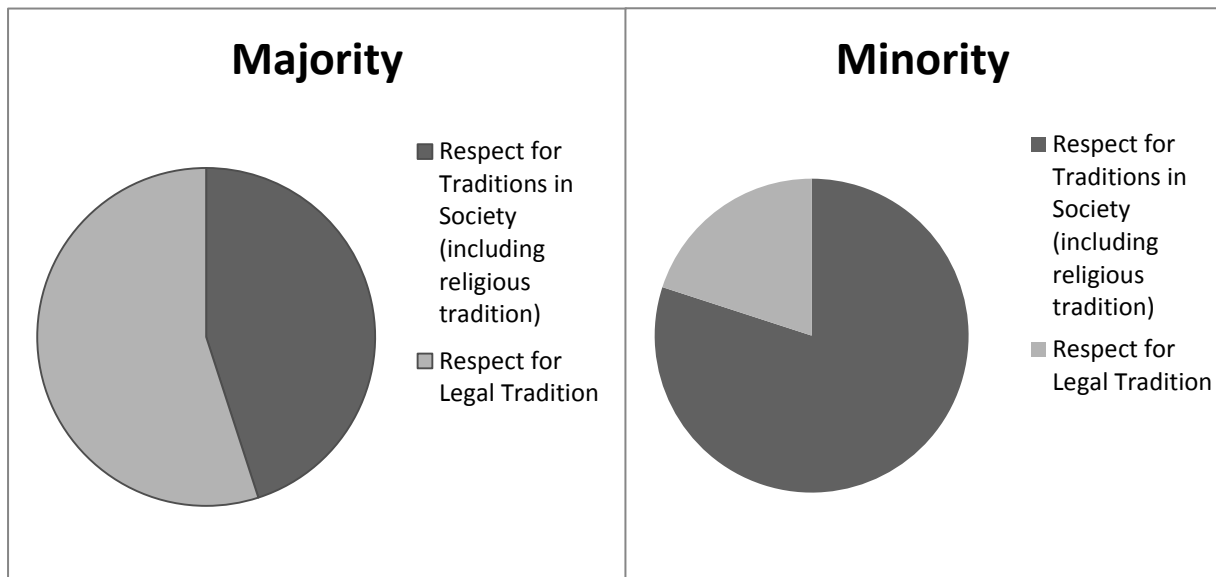


Figure 3.5-3 Sub-analysis of the values encompassed in *tradition*.

There was also a difference in the distribution of values in *self-direction* espoused by both the majority and the minority. *Self-direction* encompasses concepts such as individual freedom and independence. In the context of legal judgments, the value encompasses both the freedom of the individual but also judicial freedom to disagree or interpret the law differently. For example:

The reason I disagree with Lord Hope (or perhaps the ground on which I do so) is that his opinion depends upon the state of mind of the Chief Rabbi.³⁶³

For my part I do not accept that more recent decisions of the House of Lords call for a more nuanced approach than that stated in the *Birmingham and Eastleigh* cases.³⁶⁴

I would hold therefore that Lord Goff's rejection of a subjective approach was expressed too broadly³⁶⁵

Here the judges are identifying a choice, making it but not always justifying it. They assert the right to (self) determine what and how these arguments are relevant to their decision. These exercises of judicial freedom accounted for 86% of the coding within *self-direction* in the majority judgments. Individual freedom was also coded specifically in the judgments of Lord Mance. In contrast, individual freedom was not espoused in the minority judgments and coding within *self-direction* focused solely on judicial freedom to disagree or interpret the law differently.

In summary, quantitative analysis of the values expressed in the judgments of the minority and majority identified a differential pattern of expression associated with the decision reached. Although both the majority and minority espoused the values encompassed in *self-direction*, the majority supported values encompassed in *universalism* and the minority supported values encompassed in *tradition*. This study provides evidence of differences in

³⁶³ Lord Clarke in *R(on the application of E) v JFS Governing Body* (n 138), [147]

³⁶⁴ Lord Clarke in *R(on the application of E) v JFS Governing Body* (n 138), [137]

³⁶⁵ Lord Hope in *R(on the application of E) v JFS Governing Body* (n 138), [197]

the expression of values related to opposing decisions in indeterminate cases. The next question is whether the values expressed in the judicial judgments are reflective of the judicial personal values.

3.6 Part III: Are the values expressed in opposing decisions reflective of intrinsic personal values? The experiment

Ideally, the Supreme Court Justices who decided the case would complete a Schwartz Value Survey (SVS) to directly assess their personal values and relate these to the decision reached. However, judicial participation was declined and the letter on behalf of the Master of the Rolls, Lord Dyson, states:

[A]ny perception that judges allow matters other than the evidence and arguments presented in court influence their decision making could undermine public confidence in the judiciary.³⁶⁶

Given the perceived sensitivity of this research, an alternative approach was taken to experimentally test the value: decision paradigm.

The subjects for this study were academics in Cardiff Law School. It is acknowledged that this approach does not make a direct link between Supreme Court Justices' values and decision making. However, this study does examine whether such a link exists in sophisticated analysers of law. Indeed, this approach has been used in other psychological

³⁶⁶ The full letter is presented at the start of this thesis, page 18.

experimental examinations of judicial decision making including an experiment by English *et al* examining criminal sentencing.³⁶⁷

Ethical committee approval was received for an experimental survey. The subjects were presented with an online survey instrument which included six different vignettes based on cases which divided the Supreme Court. One of the vignettes was based on the *JFS* case. The subjects were asked to decide each vignette and rate the factors that influenced their decision. The factors were designed to reflect majority and minority positions in the case. Finally, the subjects were asked to complete a psychometric evaluation of values, the Schwartz Value Survey (SVS). The SVS was completed after deciding all six vignettes and therefore it is unlikely that any individual vignette would influence the value survey. The relationship between the decision reached in the *JFS* case vignette and personal values was assessed.

3.6.1 The experimental methodology

The vignette of the *JFS* case is presented in Appendix 1. The vignette set out the brief facts of the case and a summary of the legal principles behind the decision. The respondents were asked to decide whether the policy breached the Race Relations Act 1976 s1. Once respondents reached a decision, the respondents were asked to rate the factors that influenced the decision reached on a scale of -1 (irrelevant) to 7 (extremely important).

The factors listed included some of the factors that were coded within the judgments of the *JFS* case (such as autonomy, equality, social justice and respect for traditions) and factors

³⁶⁷ B English, T Mussweiler and F Strack, 'Playing Dice with Criminal Sentence: The Influence of Irrelevant Anchors on Experts Judicial Decision Making.' (2006) 32 *Personality and Social Psychology Bulletin* 188

which were irrelevant and acted as controls.³⁶⁸ The respondents were also asked to decide five other vignettes and rate the factors that influenced their decisions.

Once the respondents completed the legal decision making section, the respondents were asked to complete a SVS. The questionnaire listed 31 different values which were related to the ten different value motivations.³⁶⁹ The respondents were asked to rate each value based on the '*importance of the value to them*' on a scale of -1 (irrelevant) to 7 (extremely important). A standardised mean for each of the ten value motivations was calculated.³⁷⁰

Eighteen respondents completed the survey which reflected a response rate of 30%. All were full time academics within the law school engaged in undergraduate and postgraduate teaching. This survey was an experimental survey and was therefore not designed to identify the values or decisions that are representative of the academic population. The experimental design simply identified in this group of respondents whether there was a relationship between personal values and the decision reached. The limited number of respondents does mean that subtle relationships may not be identified. There may be a response bias, as those who chose to complete the survey may have different value patterns to those who chose not to complete the survey. Despite these limitations, the survey elicited significant results and revealed a relationship between personal values and decision making.

³⁶⁸ These factors were identified in judgments of other Supreme Court cases but were not coded within the *JFS* case. Examples include freedom of enterprise and security.

³⁶⁹ The SVS represented the values in proportion to the importance to legal decision making. For example, there was a minimum of four values for *tradition* and *universalism* with two values for *stimulation*.

³⁷⁰ A mean rating was calculated for each of the ten values which was then standardised around the overall mean value rating for each individual. This facilitated the comparison of an individual's values.

3.6.2 The experimental results - the value : decision paradigm confirmed.

As in the Supreme Court case, the vignette divided opinion. The majority of the respondents agreed with the Supreme Court decision that the admission criteria breached the Race Relations Act 1976 (n=11). A significant minority (n = 7) did not agree. Statistical analysis revealed that there was a significant correlation between the respondents rating of values encompassed in *universalism* (equality, wisdom, social justice, broadmindedness and protection of the environment) and the decision reached.³⁷¹ Those who rated these values highly were more likely to agree that the policy breached the Race Relations Act 1976.

In contrast, as predicted by content analysis of the Supreme Court judgments, there was a trend to a negative correlation between *tradition* and the decision reached.³⁷² This suggests that those who rate the values encompassed in *tradition* (respect for tradition, moderation and ‘acceptance of my portion in life’) highly were less likely to agree that the policy breached the Race Relations Act 1976.

This link between values and judicial decisions was extended by the experimental survey. The survey identified a clear relationship between intrinsic personal values and legal decisions. Importantly, it reflected the findings of the content analysis. Those who rated the values encompassed in *universalism* highly were more likely to decide that the policy breached equality legislation. In contrast, those who reached the opposite decision were more likely to rate *tradition* highly.

³⁷¹ The data was analysed using Spearman Rho correlation. This test assumes that both variables are not normally distributed and facilitates the identification of the magnitude and direction of an association between two variables that are on an interval scale.

³⁷² Spearman Rho $r_s = -0.275$, $p = 0.13$.

The data supports the hypothesis that intrinsic personal values can influence the legal decision in indeterminate cases. This relationship between values and legal decisions was not limited to the JFS vignette. Indeed, in each vignette analysed there was a correlation between the decision reached and personal values.³⁷³ It is evident even in a small sample that there was a relationship between values and legal decisions in this legal expert population.

3.6.3 How do these values reflect in reasoning?

Finally, the respondents were asked to rate the importance of certain factors to the decision they reached (Appendix 1). This aspect of the study was to examine whether there was an association between the reasoning and the decision reached. The analysis assessed whether the factors which were identified by the respondents as significantly influencing their decision were related to their personal values.

Respondents were asked to identify the factors that influenced their decision after deciding the case. The respondents were given a list of 15 factors and asked to rate the 'factor on its importance in your decision'. The scale used was the same as that for the SVS with -1 (irrelevant) to 7 (extremely important). Each factor was clearly defined.

The 15 factors included factors which were identified in the judicial reasoning of the case including 'equality', 'tolerance of others beliefs' which was defined as a fair, objective, permissive attitude towards those whose judgments, beliefs, practices, race or religion differ from one's own and 'respect for tradition' which was defined as feeling or showing deferential regard for the inherited, established or customary pattern of thought, action or

³⁷³ The JFS vignette was contained within an experimental survey which presented respondents with six vignettes. Four of the vignettes were based on cases which divided the Supreme Court and there was a significant correlation in these cases between the decision reached and personal values.

behaviour (religious, social or legal).³⁷⁴ Other factors were included which had no relevance to the decision taken and acted as a control such as ‘freedom of enterprise’. All factors included in this section could be related to underlying value motivations.

Respondents rated ‘tolerance of others beliefs’ as the most important factor in reaching the decision regardless of the decision made. However, analysis of the data also identified significant differences between the ratings of factors which were dependant on the decision reached. The data is set out in the Table 3 below which relates these factors to the motivational values.

Table 3: Analysis of the respondents reported influences on reasoning

| Values | Reasons | Breach of Race Relations Act (N=11) | No breach of Race Relations Act (N=7) | Kendall Tau-b³⁷⁵ | Significance (one-tailed) |
|---------------------|--|--|--|------------------------------------|----------------------------------|
| <i>Universalism</i> | Equality | 7 | 4.5 | 0.415 | 0.03 |
| | Social Justice | 6 | 2 | 0.48 | 0.01 |
| | Protection of the Vulnerable | 3 | -1 | 0.403 | 0.04 |
| | | | | | |
| <i>Tradition</i> | Respect for tradition | 1 | 5 | -0.657 | 0.002 |
| | Limits on the Obligations of the State | 1 | 4.5 | -0.403 | 0.03 |
| | Conformity to Rules | 3 | 4.5 | -0.392 | 0.04 |

The higher the median value score the more important the factor was to the decision reached for example a score of 7 represents a value that was extremely important, 3 (moderately important) and -1 (irrelevant).

³⁷⁴ Equality was defined as equal treatment and rights for all people regardless of their difference.

³⁷⁵ Kendall tau-b coefficient is a non-parametric test to assess the association between two measured quantities. This test does not rely on any assumption of the distribution of X and Y. It is commonly used in a 2x2 analysis as presented here.

Those respondents who supported the majority decision and decided that the admissions policy breached equality legislation rated both ‘equality’ and ‘social justice’ as extremely and very important to the decision reached. This was a significantly higher rating than those respondents who adopted a minority position.³⁷⁶

‘Protection of the vulnerable’ was defined as the principle that society should protect the weaker and less able members. Again, those who found that the policy breached the Race Relations Act 1976 found that ‘protection of the vulnerable’ was moderately important to the decision. In comparison those who do not agree rated this factor as irrelevant to the decision.³⁷⁷

Equality, social justice and protection of the vulnerable are all concepts which are encompassed in the value *universalism*. These data demonstrate that those who agreed that the policy breached the equality legislation and who rated the values encompassed in *universalism* highly also rated the factors, ‘equality’, ‘social justice’ and ‘protection of the vulnerable’, which are encompassed in *universalism*, as significantly more important to their decision, than those who reached the opposite decision.

In contrast, those respondents who did not agree that the admission policy breached the Race Relations Act 1976 rated ‘respect for tradition’ as very important. This was in stark contrast to those who reached the opposing view and tended to rate ‘respect for tradition’ as irrelevant.³⁷⁸ Similarly, those who did not find the policy breached the Race Relations Act

³⁷⁶ *Social justice* was defined in this context as the principle of a society which is based on equality and fairness.

³⁷⁷ Median Score; Yes = 3 (moderately important), No = -1 (irrelevant). Kendall tau-b = 0.403, p = 0.04.

³⁷⁸ *Respect for tradition*’ was defined as feeling or showing deferential regard for the inherited, established or customary pattern of thought, action or behaviour (religious, social or legal).

1976 also rated ‘the duty to conform to rules’ and ‘limitations of the obligations of the State’ as significantly more important than respondents who found that there was a breach.³⁷⁹ These concepts are included in the values of *tradition* and *conformity*, which were revealed by quantitative analysis to be espoused by the Supreme Court Justices supporting the minority opinion.

In summary, the respondents regarded factors that were consistent with their values as more persuasive. These data provide further support for the relationship between intrinsic personal values and legal decisions.

3.7 The value: decision paradigm

This study translates theories and techniques from psychological research to start to address the critical socio-legal question ‘how do judges decide cases?’ Psychologists have demonstrated a relationship between personal values and decision making and this case study of a single close call case from the Supreme Court begins the task of translating psychological theory to legal practice. The Schwartz value framework provides a new method of analysing and understanding judicial decisions and the validity of the content analysis method to identify values in legal judgments is established and affirmed by the experimental survey.

³⁷⁹ *Duty to conform to rules* in this context was defined as an obligation of the individual or group to conform to the rules/regulations/laws governing society as a whole. Those who did not agree rated the *duty to conform to rules* as significantly more important than respondents who did agree that there was a breach of the Race Relations Act. ‘*Limitations on the obligations of the State*’ recognises that although the State has a duty to individuals, the duty must have defined boundaries. The State cannot accommodate limitless obligations. Those who did not agree that there was a breach of the Race Relations Act rated the limitations on the obligations of the State as more important to the decision than those who agreed that there was a breach. This concept was included in the content analysis coding scheme as contained within *social order* and *security*. Although the concept was in keeping with the decision it was not coded in the minority opinion.

Drawing on the value content analysis, the case study employed several methods to explore the overarching hypothesis that there is an association between personal values and judicial decisions. The initial qualitative analysis of the *JFS* case revealed values within the judgments in this indeterminate ‘close call’ case. Quantitative content analysis of the value expression revealed evidence of competing values, with a different pattern of values expressed in the majority and minority judgments. The analysis suggests that in deciding a case which narrowly divided the court, the Supreme Court Justices balance these values. In reaching a decision, at least one not governed by precedent, the Supreme Court Justices support one or more values above another. Indeed, in the context of this single case, the quantitative analysis of the judgments suggests that in close call cases, uncertain decisions, where the law does not provide a clear answer, values play a role.

Personal values can be identified directly using the SVS psychometric instrument. This was incorporated into an experimental survey and the value: decision paradigm was replicated in a small sample of legal academics using this instrument. Indeed, the analysis suggests that values underpin both the decision and the selection of the factors that influence the legal decision. This data suggests that the psychological model which demonstrates the role of personal values in decision making is applicable to judicial decision making.

Current debates surrounding non-legal factors which influence judicial decision making focus on demographics, political and ideology positions. Personal values act at a more subconscious level and may provide a link between these non-legal factors. This case study suggests that judicial decision making is not binary between one position or another but a more detailed nuanced balancing of competing values which are more diverse than simply a political or ideological position. Indeed, although the law provides the basis for framing and

constraining judicial discretion, in this legally uncertain case at least, it is the personal values of an individual judge that influences how that judicial discretion is exercised and that, in turn, can influence the way in which the law develops. The following chapters start to investigate the extent and limitations of the value: decision paradigm.

Chapter 4

Does the Value: Decision Paradigm Apply to all Indeterminate Cases?

Division, dissent and judicial values

The rules are created by the judges themselves. They are created out of materials that include constitutional and statutory language and previous cases, but these conventional materials quickly run out when an interesting case arises; in those cases the conventional materials may influence, but they do not determine, the outcome. To decide these the formalist needs a metaprinciple....These principles are not found in orthodox materials (though that invariably is the pretence); they are imposed. And there is no metric for arbitrating among them, just endless contestation. That doesn't exclude the possibility that one of them is true, but there is no way to determine which one that is, the choice among them is rationally indeterminate.³⁸⁰

It could be argued that the *JFS* case is one such rationally indeterminate case. A case where there is uncertainty, where the law does not provide a clear answer. The division of the Supreme Court Justices reflects equally legally legitimate opposing positions. The analysis of the *JFS* case revealed different values expressed in judgments written in support of opposing decisions. The experimental survey supported the role of personal values in legal decision making. This chapter sets out to examine the range and limitations of the value:

³⁸⁰ RA Posner, 'The Role of the Judge in the Twenty-First Century' (2006) 86 Boston University Law Review 1049, page 1051 – 1052.

decision paradigm in cases decided by the Supreme Court which divided judicial opinion. In doing so, this chapter draws on psychological research to start to develop a theory of judicial decision making linking the value: decision paradigm, the exercise of discretion, uncertainty, and division.

4.1 Defining dissent and division

This study defines dissent as Hanretty defines it, with a dissenting judgment as one ‘which disagrees with the majority of the court over how to dispose of the case.’³⁸¹ Judicial dissent is typically conceptualised as disagreement, and it is judicial disagreement on the outcome of a case which results in division. This thesis views judicial disagreement and division on the outcome of a case, as a continuum. Cases with the highest level of judicial disagreement and division are close call cases, like the *JFS* case, cases in which the outcome turns on a single decision. These are cases that divide the judicial panel, 3:2, 3:4 or 5:4. The next stage are the ‘minority decisions’, which are not close calls, but where both outcomes are viewed as valid and more than one Supreme Court Justice supports the minority position. The next are ‘single dissents’ where one Supreme Court Justice disagrees with the majority position, and delivers a lone dissenting judgment. Cases where the Supreme Court Justices agree on the outcome but there is more than a single judgment may also be considered within the framework of disagreement, albeit of reasoning rather than outcome with total outcome consensus reflected as a single judgment.³⁸² This is represented graphically in Figure 4.1-1.

³⁸¹ C. Hanretty , 'Comparative Judicial Dissent' European Consortium of Political Research<
<http://new.ecpr.eu/Filestore/PaperProposal/eb76e6a8-2911-4d3c-8fcf-e61920b03e81.pdf>>

³⁸² It is recognised that consensus does not reflect total agreement, indeed institutional and personal factors may influence a Supreme Court Justice to achieve consensus on an outcome to which they may disagree.

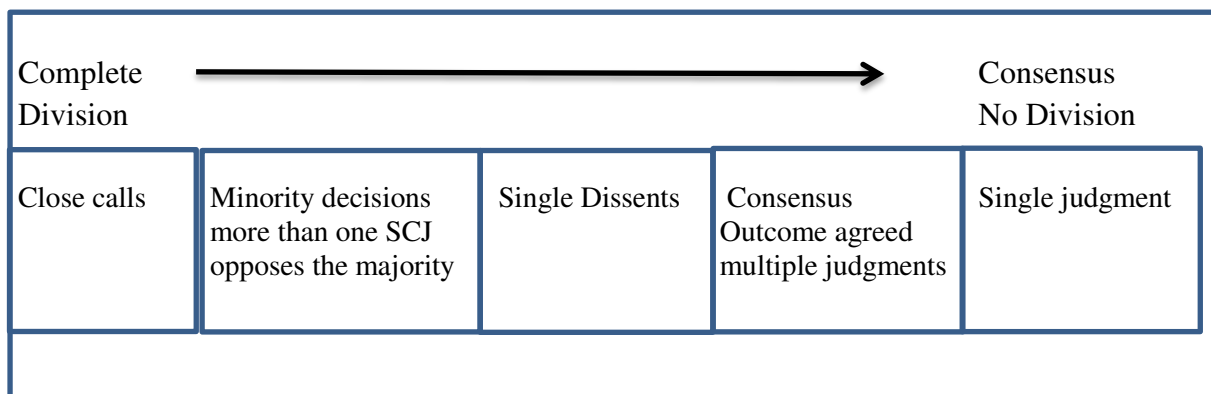


Figure 4.1-1: Graphic representation of the continuum of judicial division.

4.2 Division in the UK Supreme Court

The pattern of division in the decisions of the UK Supreme Court per calendar month is presented in Figure 4.2-2. This data set comprised of 243 decided cases. Of these cases, 57 (23%) divided judicial opinion, 27 (11%) with single dissenting judgments and 20 (8%) were close call cases in which a single vote influenced the final outcome, for example 3:2, 4:3 and 5:4 decisions. Finally there was also a set of 10 cases (4%) which divided opinion with more than one judgment supporting the minority position (for example 5:2, 6:3 and 7:2).

The data is presented per year in Table 4 (below).

Table 4: Division in the Supreme Court - First four years

| | Consensus | Close Call | Minority | Single dissent |
|--------|------------------|-------------------|-----------------|-----------------------|
| Total | 77% | 8% | 4% | 11% |
| Year 1 | 76% | 11% | 2% | 11% |
| Year 2 | 72% | 7% | 7% | 14% |
| Year 3 | 72% | 8% | 4% | 16% |
| Year 4 | 80% | 9% | 4% | 7% |

The years run from October 2009 – end of September 2010 (year 1) etc. The divided cases are categorised based on the form of division. The rate of division and consensus is expressed as a percentage of the total number of judgments delivered in that year.

The average rate of division in the Supreme Court ranges from 28% (2010 – 2011) to 20% (2012 – 2013) with some variation in the prevalence of dissenting and minority judgments. The rate of close call divided cases between 7% – 11%. There was significantly less minority cases, with a rate between 2% – 7%. Single dissenting judgments were issued in between 11% -16% of decided cases in the first three years. The highest rate of dissent occurred in the Trinity term of 2010 – 2011, with five decided cases containing single dissenting judgments, two delivered by Lord Kerr and one each by Lord Mance, Lady Hale and Lord Rodger. Although the rate of division decreased in 2012 – 2013, this decrease was reflected in individual dissenting judgments only and the proportion of minority judgments with two or more dissenting judgments has remained the same.

The high rate of individual dissent in the first three years suggests that the Supreme Court Justice's personal motivation to disagree overcame any psychological and institutional pressures towards consensus. Although the rate of division has not significantly altered under the tenure of Lord Neuberger, the rate of single dissent has changed with a notable decrease to 7% in 2012 – 2013. This suggests that institutional pressures may have changed which overcomes the internal drive to deliver a lone dissent.

The central hypothesis of this thesis is that values are more likely to play a role in decision making in these cases that divide judicial opinion, however, institutional factors and features of the cases also influence the rate of division. Indeed, there are some cases in the UK Supreme Court which are more likely to cause division than others.

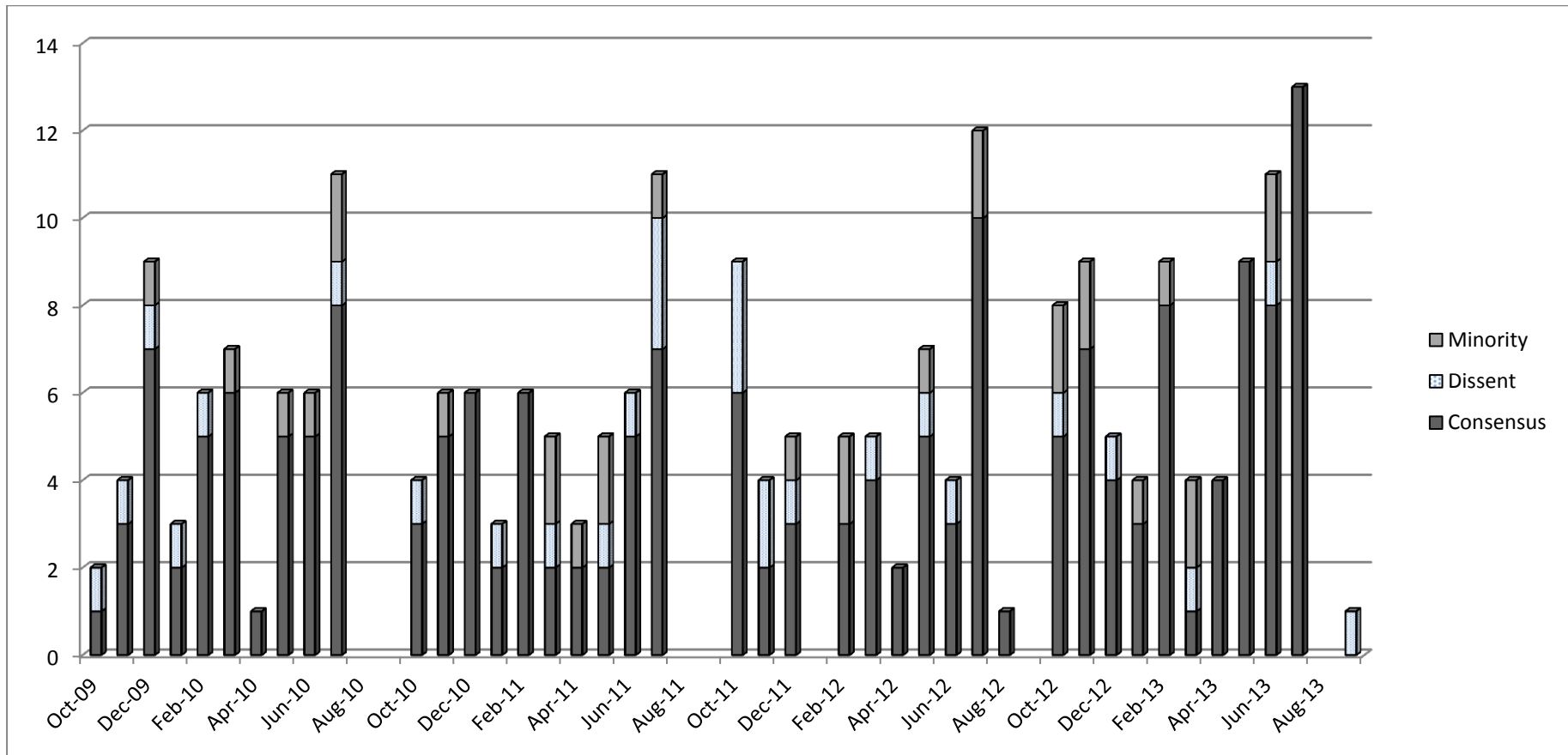


Figure 4.2-2 Distribution of judgments in cases decided in the first four years of the UK Supreme Court.

Each bar represents the number of judgments released in a single month, divided in consensus decisions, and those with a single dissenting judgment(dissent) and more than one dissenting judgment (divided cases – in the table referred to as minority).

4.2.1 Cases heard by panels of seven and nine.

The pattern of division significantly increases in cases with larger panels of seven or nine Supreme Court Justices.³⁸³ The cases heard by larger panels are those where,

[The] Court is being asked to depart from a previous decision, or there is a possibility of its doing so, or if the case raises significant constitutional issues or for other reasons is of great public importance.³⁸⁴

The majority of cases were heard by a panel of five Supreme Court Justices (79%), of which 18% divided judicial opinion, of these the majority were single dissents (62%). The panels only increased beyond five Supreme Court Justices in approximately one fifth of all cases decided in the Supreme Court. 15% of all cases heard in the first four years of the Supreme Court were heard by a panel of seven Justices, 35% of these cases divided judicial opinion, there was proportionately less individual dissenting judgments and almost 70% were cases in which two or more Supreme Court Justices opposed the decision reached by the majority. Only 6% of cases were heard by a bench of nine Supreme Court Justices. Of these cases 71% divided judicial opinion, of which 70% of cases were minority decisions. An increased rate of division is also apparent in the US Supreme Court when the case involves the overturning of precedent.³⁸⁵ The rate of division may also be influenced by the subject matter of the case.

³⁸³ Kendall tau-b = 0.286, p <0.001

³⁸⁴ Lord Hope, 'The Creation of the Supreme Court – Was it Worth it?' (Barnard's Inn Reading, London, 24 June 2010)

³⁸⁵ J Kaminski and GJ Shaffer, (2005) 'Unanimity and the Supreme Court: Anatomy of a Judicial Blowout' <<http://www.gvpt.umd.edu/apworkshop/kaminski-shaffer.pdf>> accessed 20.1.2014

4.2.2 Subject matter of the case

Corley *et al* (2010) identified that the subject matter of a case was associated with division in the U.S. Supreme Court. Cases centred on topics that are contentious within society are more likely to have a similar effect on the court and result in division.³⁸⁶ Narrow cases, which only raise a single issue of law, are more likely to achieve consensus.³⁸⁷ However, Kaminski and Schaffer identified cases which involved a ruling on civil liberties and rights issues, were more likely to end with division.³⁸⁸ This was confirmed by Corley *et al* (2010).³⁸⁹ Although, this form of analysis has not been carried out on cases heard by the UK Supreme Court Lord Kerr suggested that;

Since the coming into force of the Human Rights Act decisions that judges must make in many cases are far less likely than in times past to be determined by their view of black letter law.³⁹⁰

Indeed, Lord Kerr suggested that cases which centre on the application of the Human Rights Act 1998 are more likely to be rationally indeterminate and the outcome uncertain. It is the exercise of discretion in these cases which may lead to disagreement and result in division. This was supported by empirical evidence by Chris Hanretty who suggested that cases involving human rights issues are less likely to achieve consensus.³⁹¹ Although there are case

³⁸⁶ P Corley and others, 'Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court.' (2010) 31 Justice Systems Journal 1

³⁸⁷ DR Songer and J Siripurapu, 'The Unanimous Case of the Supreme Court of Canada as a Test of the Attitudinal Model' (2009) 42 Canadian Journal of Political Science 87

³⁸⁸ J Kaminski and GJ Shaffer, (2005) 'Unanimity and the Supreme Court: Anatomy of a Judicial Blowout' <<http://www.gvpt.umd.edu/apworkshop/kaminski-shaffer.pdf>> accessed 20.1.2014

³⁸⁹ P Corley and others, 'Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court.' (2010) 31 Justice Systems Journal 1

³⁹⁰ Lord Kerr, 'Dissenting Judgments - Self-indulgence or self-sacrifice.' (The Birkenhead Lecture, London, 8 October 2012)

³⁹¹ C Hanretty, 'Lumpers and Splitters on the United Kingdom Supreme Court' (American Political Science Association 2013 Annual Meeting, Washington, 1 September 2013)

features and institutional features that are more likely to result in division, these do not serve to explain the extent of division in the UK Supreme Court.

The minority or dissenting judgment imposes significant personal costs on the judge writing the judgment. These costs are in time and effort but also in potential loss of collegiality, which is particularly true of a strongly worded judgment. Epstein and others argued that the minority or dissenting judgment also imposes additional costs upon the other majority judges, who may have to reconsider their opinion or address the minority opinion and in doing so expend significant time and effort revising their own judgment.³⁹²

In deciding to dissent or write a minority judgment, a Supreme Court Justice must manage these conflicting pressures. The pressure of unity and collegiality must be balanced against judicial individualism and judicial independence.³⁹³ So why do judges decide to bear the costs of a minority or dissenting judgment?

4.3 What motivates dissent?

Dissenting judgments rarely effect change.³⁹⁴ Indeed, dissenting judgments are rarely cited and with the few exceptions where the dissenting view has changed the law, the dissenting opinion disappears from view.³⁹⁵ As Lord Brown suggested;

³⁹² L Epstein, WM Landes and RA Posner, 'Why (and When) Judges Dissent: A Theoretical And Empirical Analysis' (2011) 3 Journal of Legal Analysis 101. The authors argue that the dissenting opinion forces the judges to revisit their opinion and risks the reputation of the majority if it is critical of their decision.

³⁹³ A Paterson, *The Law Lords* (Macmillan Press 1982), page 103

³⁹⁴ L Epstein , WM Landes and RA Posner, 'Why (and When) Judges Dissent: A Theoretical And Empirical Analysis' (2011) 3 Journal of Legal Analysis 101

³⁹⁵ For example the dissenting opinion written by Lord Rodger in *Barker v Corus UK Ltd* [2006] UKHL 20 formed the basis of section 3 of the Compensation Act 2006.³⁹⁵ The dissent by Lord Rodger in *O'Brien v Aventis Pasteur MSD Ltd* [2008] UKHL 34 resulted in a second reference to the Court of Justice which affirmed Lord Rodgers dissenting view.

[O]ne must recognise that in the great majority of final appeals, a dissent will remain forever just that – a statement of a judge’s disagreement with the conclusion of the majority, with no sensible prospect of it ever influencing the future development of the law.³⁹⁶

With the possibility of no lasting impact from the dissenting judgment, rational choice theory would suggest that a judge would avoid writing a dissenting judgment, to minimise workload and maximise efficiency.³⁹⁷ Indeed as Justice Michael Kirby stated,

Concurring in someone else's opinion may be more congenial to colleagues. It certainly involves less work than expressing one's own contrary opinion.³⁹⁸

However, many choose to engage in writing dissenting judgments. Central to the dissenting judgment is the concept of disagreement and the unifying motivation to highlight that the majority are wrong. As articulated by Lord Brown, when he stated that ‘a judge should nevertheless, assuming always that he is clear in his own mind that the *majority’s view is wrong*, give reasoned judgment saying so.’³⁹⁹ A perspective also highlighted by Lord Kerr who stated that ‘on the whole, judges dissent for what might be regarded by some as the seemingly banal reason that they have decided that their view is right or that *the conclusions that their colleagues have reached are wrong*.’⁴⁰⁰

³⁹⁶ Lord Brown, 'Dissenting Judgments' in Andrew Burrows, David Johnston and Reinhard Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013)

³⁹⁷ E Tiller and F Cross, 'What is Legal Doctrine?' (2006) 100 *Northwestern University Law Review* 517

³⁹⁸ Lord Justice Kirby, 'Judicial Dissent' (James Cook University, Cairns, 5 February 2005), http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_feb05.html accessed 25.07.14.

³⁹⁹ Lord Brown quoted by Lord Kerr, 'Dissenting Judgments - Self-indulgence or Self-Sacrifice.' (The Birkenhead Lecture, London, 8 October 2012), emphasis added.

⁴⁰⁰ *ibid*, emphasis added.

Although the initial intention may not be to dissent, but to persuade the majority that their position is wrong, any dissent which is centred on the judicial decision that the opposing position is wrong is termed by social scientists as a ‘sincere’ dissent, one which signals a judge’s disagreement with the other judges on the panel.⁴⁰¹ The ‘sincere’ dissent is central to the attitudinal model which argues that judicial dissent is motivated by ideological preferences and suggests that in hard cases judges reach decisions which align with their political views, with relatively little constraint.⁴⁰² This model assumes that if a judge disagrees with an outcome, then the judge will willingly incur the costs (both personal and social) of writing a separate judgment.⁴⁰³

The attitudinal model has been challenged by the strategic model which focuses on the interdependent nature of judicial decision making. The model recognises that, although judges are influenced by their personal policy preferences, these preferences may be modified by strategic considerations including ‘the preferences of other actors, the choices they expect others to make and the institutional context in which they act.’⁴⁰⁴ According to the strategic model, in reaching a decision, a Supreme Court Justice may *compromise* their ideological preferences and be motivated by more strategic goals and sincere dissents may be sacrificed to further an alternative goal. This theory is criticised by Harry T Edwards who argues that decision making is a collective process and the sacrifice of ‘sincere’ ideology simply reflects a response to colleagues opposing arguments and what the law requires.⁴⁰⁵

⁴⁰¹ A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013), page 111

⁴⁰² Discussed in chapter 1

⁴⁰³ JA Segal and others, 'Ideological Values and the Votes of the U.S. Supreme Court Revisited' (1995) 57 *The Journal of Politics* 812; JA Segal and HJ Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002)

⁴⁰⁴ L Epstein and J Knight, *The Choices Justice Make* (Sage 1997), page 10

⁴⁰⁵ HT Edwards, 'The Effects of Collegiality on Judicial Decision Making.' (2003) 151 *University of Pennsylvania Law Review* 1639

Although, there is a strong theoretical underpinning for both the attitudinal and strategic model, the empirical data has been more mixed.⁴⁰⁶ There is some evidence of the operation of the strategic model in the US Courts of Appeals but Hettinger *et al* suggests that the dominant model of dissent was better accounted for (but not totally accounted for) by the attitudinal model.⁴⁰⁷ Indeed, this is the model which is more evident in the US Supreme Court, with the frequency of dissent positively related to political ideological diversity among the judges.⁴⁰⁸

JAG Griffith in his seminal book 'The Politics of the Judiciary' also suggested that judicial decision making in the UK House of Lords was underpinned by political preference.⁴⁰⁹ He argued that the House of Lords served as a political institution, not simply because the decisions reached in the final court of appeal had wide ranging impact on society and political institutions, but that the decisions had political motivations:

When people like the members of the judiciary, broadly homogeneous in character, are faced with ...political situations, they act in broadly similar ways. Behind these actions lies a unifying attitude of mind, a political

⁴⁰⁶ The empirical assessment of these models traditionally adopts economic modelling approaches. There are significant limitations to these models, not least those associated with the imprecise measurement of key concepts associated with strategic behaviour. A good review of the statistical techniques and limitations can be found in B Blackstone and PM Collins Jr., 'Strategy and the Decision to Dissent on the US Courts of Appeals.' (2014) *Justice Systems Journal* 1

⁴⁰⁷ PT Kim, 'Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects' (2009) 157 *University of Pennsylvania Law Review* 1319 provides evidence of the strategic model in the US Court of Appeals. VA Hettinger, SA Lindquist and WL Martinek, 'Comparing Attitudinal and Strategic Accounts of Dissenting Behaviour on the U.S. Court of Appeals' (2004) 48 *American Journal of Political Science* 123 suggests that the attitudinal model is more prevalent.

⁴⁰⁸ L Epstein, WM Landes and RA Posner, 'Why (and When) Judges Dissent: A Theoretical And Empirical Analysis' (2011) 3 *Journal of Legal Analysis* 101. Of note the authors also identify 'judicial dissent aversion' characterised by a decision not to dissent although the judge disagrees. The authors identified a relationship between case load and aversion.

⁴⁰⁹ JAG Griffith, *The Politics of the Judiciary* (4th edn, Fontana Books 1991)

position, which is primarily concerned to protect and conserve certain values and institutions.⁴¹⁰

Robertson used both detailed examination of judicial reasoning and jurimetrics to examine the potential political motivation behind judicial disagreement in the House of Lords. Drawing on a subset of cases, which address potentially political issues, including tax cases, public law cases and civil liberties cases, Robertson compared judicial decisions and division on several ideological dimensions including egalitarianism (concern for those in a weaker economic position) and constitutionalism (finding for the plaintiff in constitutional cases). The author suggests that;

[A] major factor in determining case outcome is the relative positions of the Law Lords on a basic dimension, for convenience labelled egalitarianism, which mirrors a traditional view of the courts doing justice by acting as a counter to social power imbalances.⁴¹¹

The analysis provides evidence of an association between ideology, decision making and dissent in the House of Lords.

A recent study by Hanretty also examined the motivation to dissent in the House of Lords, using a more political concept of ideology.⁴¹² Drawing on both the attitudinal and strategic model of judicial decision making, Hanretty empirically assessed 'political' decision making in the House of Lords using facets of political ideology to locate members of the House of

⁴¹⁰ *ibid*, page 19.

⁴¹¹ D Robertson, *Judicial Discretion in the House of Lords* (Clarendon Press 1998), page 70.

⁴¹² C Hanretty, 'The Decisions and Ideal Points of British Law Lords' (2012) 43 *British Journal of Political Science* 703

Lords in a political space. Hanretty did not find an association between political ideology and judicial dissent in the House of Lords.

The work of Robertson and Hanretty, although conflicting, does provide evidence that ideology (albeit not political) in its broadest sense served to motivate judicial dissent in the House of Lords. These models however, do not account for every dissent and are limited by their focus on political ideology and judicial attitudes which are overt and easily categorised. The focus on ideology alone serves to neglect the constraint, both internal and external on judicial decision making, the most notable of which is the law.

4.4 Constraints on division

In a recent book, Bailey and Maltzman highlighted the extent of these constraints in the US Supreme Court, revealing the clear limiting influence of legal doctrines and principles on judicial decision making.⁴¹³ The authors extended constraint beyond overt limitations and argued that judges are also ‘internally’ constrained by ‘the judge’s integrity and degree of commitment to engage in an unbiased search for the correct legal answer.’⁴¹⁴ Breyer agrees and attributes consensus to legal not political reasons.⁴¹⁵ In reaching decisions judges draw on judicial principles derived from a distinctive set of institutional norms and customs, including legal principles and theories. The internalisation of these judicial norms imposes an element of self-restraint and obligation to follow the institutional norms and customs.⁴¹⁶

⁴¹³ MA Bailey and F Maltzman, *The Constrained Court. Law, Politics and Decisions Justices Make*. (Princeton University Press, Princeton. 2011)

⁴¹⁴ B Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press 2009), page 189

⁴¹⁵ S Breyer, *Active Liberty* (Knopf 2005)

⁴¹⁶ R Kahn, 'Institutionalised Norms and Supreme Court Decision Making: The Rhenquist Court on Privacy and Religion' in Cornell W Clayton and Howard Gillman (eds), *Supreme Court Decision-Making: New Institutional Approaches* (University of Chicago Press 1999)

These internal constraints may act both consciously and subconsciously to adjust judicial decisions.

These social scientific models draw on a range of factors that may motivate or serve to limit dissent, including ideology, collegiality and judicial cultural norms.⁴¹⁷ One of the key limitations of the models as proposed is that they are discussed in isolation. In the UK context, Alan Paterson identified many of these influences at play in the Supreme Court. Drawing on the multiple dialogues that take place in the Supreme Courts, Paterson revealed the multi-faceted influences on the final outcome of the Supreme Court decision making process.⁴¹⁸ Psychologists also view decision making as a multifactorial system in which a variety of both external and internal factors can influence the outcome.

4.5 Does the psychology of decision making explain dissent?

Understanding judicial decision making as a psychological process facilitates a more nuanced understanding of judicial decision making. The factors that encourage and constrain dissent can be examined through this lens. Psychology views reasoning and decision making as the interplay between two systems or complex processes.⁴¹⁹ These systems may be influenced by both internal and external factors, which may modify the process and ultimately the outcome. Psychology views decision making, where the outcome is uncertain, as mediated through two systems, the intuitive subconscious response (system 1) and the more deliberative conscious reasoned response (system 2). It is the system 2 response, the more deliberative reasoned response that is most susceptible to conscious influences both external and internal.

⁴¹⁷ These are discussed in more detail in chapter 5.

⁴¹⁸ A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013).

⁴¹⁹ Discussed in chapter 1.

The links identified in legal research between ideology and judicial decision making may be underpinned by the psychological process of motivated reasoning. Both the attitudinal and strategic models centre on the concept that a judge's motivation influences the judicial decision, for example those who argue that judicial decision making is political, are arguing that judges are motivated by making good policy.⁴²⁰ Motivation is defined as any desire, wish or preference which influences the outcome of any cognitive task such a decision. Motivation therefore is a conscious desire which can influence a decision, for example a decision which aligns with political or other ideology may be influenced by conscious motivation. This conscious desire may be constrained by institutional factors and the law and Baum suggests that motivated reasoning can only apply to 'very hard cases' where the law does not provide a clear answer.⁴²¹

Motivated reasoning suggests a conscious process, one where, in the absence of legal constraints, a judge chooses to follow an ideology, an explicit motivation that the judge knowingly and occasionally openly embraces. However, in cases where the law is uncertain, subconscious psychological processes may also play a significant role. As discussed in the introduction, in uncertain decisions, the process of decision making may be influenced by a '*bias*' set of cognitive processes including heuristics mediated through the system 1 response.⁴²² Values therefore may serve as a subconscious motivation in this decision making process. In uncertain decisions, in the absence of external and internal conscious restraints, it may be the conflict of values that underpins division. Indeed, Kahan suggests that even in the political US Supreme Court, personal values may underpin

⁴²⁰ Indeed, JAG Griffiths would argue that this policy is not good for the general population but simply reflects the policy of an elite sub-population. JAG Griffith, *The Politics of the Judiciary* (4th edn, Fontana Books 1991)

⁴²¹ L Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2009), page 76.

⁴²² Z Kunda, 'The Case for Motivated Reasoning' (1990) 108 *Psychological Bulletin* 480. Bias in this context does not carry with it a negative connotation. It is simply a term used to indicated a predetermined direction in the decision making process.

disagreement between majority and minority decisions. Kahan argues that in cases which divide judicial opinion all justices base their decisions on their views of the law;

But what they understood the law to require was nevertheless shaped by their values – operating not as resources for theorising law, but as subconscious, extra-legal influences on their perception of legally consequential facts.⁴²³

In this way, personal values may subconsciously influence judicial reasoning, creating a hierarchy of legally consequential facts, emphasising those facts that align with values.⁴²⁴ As Segal and Spaeth suggest ‘Justices make decisions by considering the facts of the case in light of their ideological attitudes and values.’⁴²⁵ A judge may find a decision which aligns with their values to be more favourable.⁴²⁶

The psychology of decision making however suggests that values may play a more significant role in uncertain decisions, where the law and the process of system 2 deliberative reasoning do not provide a clear answer. This thesis argues therefore that values play an evident role in ‘hard cases’ where the law does not provide a clear answer, the outcome is perceived as uncertain and ‘there is a lack of consensus on the basic values and issues’.⁴²⁷ In such cases a judge, can chose to adopt a position which aligns with their values and reject conflicting values.

⁴²³ D Kahan, "Ideology In" or "Cultural Cognition of" Judging: What Difference Does it Make? Faculty Scholarship Series, Paper 4689 <http://digitalcommons.law.yale.edu/fss_papers/4689> accessed 11.08.2014, page 417.

⁴²⁴ JA Segal and HJ Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002), page 73.

⁴²⁵ *ibid*, page 110.

⁴²⁶ DM Kahan and others, 'Cultural Cognition of the Risks and Benefits of Nanotechnology.' (2009) 4 *Nature Nanotechnology* 87

⁴²⁷ P Corley and others, 'Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court.' (2010) 31 *Justice Systems Journal* 1, page 4

This thesis, is not arguing that every decision is a value based decision, indeed, psychological research suggests that highly regarded personal values can be overwhelmed by situational forces, where factors such as legal clarity, consensus and collegiality outweigh the value based decision.⁴²⁸ Indeed, Paterson highlights the many situational forces that may influence a decision in the Supreme Court.⁴²⁹ Decisions in the Supreme Court are socially constructed in a process of collective decision making, as such the decision of any individual Supreme Court Justice can be influenced by or influence another decision maker.⁴³⁰ Indeed, these factors may yield a decision that promotes alternative values.

External factors may also influence the decision to dissent regardless of the value benefit, for example the significant work associated with writing a dissenting opinion may prevent a dissenting opinion where there is a high case load.⁴³¹ The significant personal costs also ensure that a Supreme Court Justice will only write a minority or dissenting judgment on an issue the Justice regards as important. Indeed Danelski suggests that ‘a justice does not dissent by himself unless he is expressing some intensely held value.’⁴³²

4.6 Hypothesis

The underlying hypothesis in this thesis is that in ‘hard cases’, where the law is uncertain and judges exercise significant discretion, subject to legal, personality or other institutional

⁴²⁸ GR Maio and others, 'Ideologies, Values, Attitudes and Behaviour' in DeLamater J (ed), *Handbook of Social Psychology* (Plenum 2003)

⁴²⁹ A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013)

⁴³⁰ The institutional factors that may influence decision making are discussed in more detail in Chapter 5 and Chapter 6.

⁴³¹ TG Walker, L Epstein and WJ Dixon, 'On the Mysterious Demise of Consensual Norms in the United States Supreme Court' (1988) 50 *Journal of Politics* 362

⁴³² DJ Danelski, 'Values as Variables in Judicial Decision Making: Notes toward a Theory' (1965) 19 *Vanderbilt Law Review* 721, page 728

constraints, personal values play a role in judicial decision making. Division reflects judicial disagreement and this thesis argues this disagreement reflects differences in judicial values.

In hard cases a Supreme Court Justice has a choice between competing views of the law which reflect competing values and that opposing values underpin judicial division.

In choosing to write a minority or dissenting opinion, the Supreme Court Justice is choosing to reject the majority position in support of their own values. The analysis of the *JFS* case revealed the value; decision paradigm at play in a close call case, with a differential pattern of value expression in a case which divided judicial opinion. This chapter extends this work with a more detailed examination of the role of values in a variety of cases which divide judicial opinion.

4.7 Methods

To identify personal values within legal judgments, a systematic, rule-guided content analysis of the text of the judgments of a selected subset of cases which divided the Supreme Court was carried out.⁴³³ The method of coding and data analysis is described in the previous chapters.⁴³⁴ The cases were analysed within the NVivo computer programme which facilitated empirical analysis of value expression.

⁴³³ J Forman and L Damschroder, 'Qualitative Content Analysis' in Jacoby L and Siminoff LA (eds), *Empirical Methods for Bioethics: A Primer*, vol 11 (Advances in Bioethics, Elsevier 2008), page 1. The analysis will be a grounded theory analysis, in as such that the theory will be grounded in the data. S Rosenberg, P Schnurr and T Oxman, 'Content analysis: A Comparison of Manual and Computerised Systems' (1990) 54 *Journal of Personality Assessment* 298

⁴³⁴ The coding scheme is detailed in chapter 2 and applied in chapter 3.

4.7.1 Selection of cases

A SPSS database was created of every case decided between October 2009 and September 2013 which represented the first four years of the Supreme Court.⁴³⁵ The details recorded included, the case name, reference, date of the decision, area of law, the presence/absence of interveners, outcome, the Supreme Court Justices who sat on the panel, their individual position and whether they wrote a judgment. Cases for each sub-category were selected sequentially. This was homogenous purposive sampling which was limited to cases which divide judicial opinion. Although this form of sampling facilitates the understanding of the impact of values in the selected dataset, it will not facilitate any generalisation about all legal cases.⁴³⁶

4.7.2 Divided cases including close calls

The first subset of cases comprised of the first ten cases in which more than one Supreme Court Justice supported a minority position (divided cases). These cases included both close call and minority decisions. The first ten divided cases since the opening of the Supreme Court are detailed in Table 5. It is proposed that these cases, like the *JFS* case, are the ‘hard’ cases and that a pattern of differential value expression will be identified in these cases regardless of the area of law concerned. Within these cases, seven are close calls, cases where the outcome was decided by a single judicial decision.

4.7.3 Single Dissents

This thesis views single dissents as a subclass of judicial disagreement. Indeed, in a single dissent only one Supreme Court Justice is prepared to deliver a judgment which disagrees with the majority. The psychological literature suggests that the form of dissent (alone or

⁴³⁵ The judgment delivered on the 29th of October 2009 was the first judgment delivered by the Supreme Court. SPSS is a predictive analytics software created by IBM.

⁴³⁶ The case report was downloaded from the Supreme Court website<<https://www.supremecourt.uk/>>

with others) is subject to different psychological pressures. The seminal work of Solomon Asch on conformity identified that 37% of subjects facing a unanimous majority buckled under pressure and gave conforming incorrect answers. When he added a second dissenter, the rate of conformity reduced significantly to 5%, demonstrating that it is psychologically less difficult to dissent with others than alone.⁴³⁷ The psychological pressures of a single dissent are accompanied by other external pressures to conformity including institutional pressures and risks to collegiality.⁴³⁸ To limit selection bias, the cases chosen for analysis were selected based on chronological order and not the individual Supreme Court Justice. Ten cases with single dissents were selected chronologically from the opening of the Supreme Court. The cases are set out in Table 6 below; four cases in which Lady Hale delivered a dissenting judgment, two with Lord Kerr dissenting, two with Lord Walker dissenting, one with Lord Hope dissenting and one with Lord Rodger dissenting.

4.8 The value: decision paradigm in cases that divide judicial opinion.

The analysis of the *JFS* case identified a differential pattern of value expression in a single case which divided judicial opinion.⁴³⁹ The *JFS* case centred on human rights an area of law recognised by both academics and the judiciary as one which facilitate the exercise of judicial discretion. This section extends this analysis examining differential value expression in a range of cases, encompassing varied areas of law, which are unified by the divided outcome.

⁴³⁷ S Asch, 'Studies of Independence and Conformity: A Minority of One Against the Unanimous Majority' (1956) *Psychological Monographs* 1; S Asch, 'Effects of Group Pressure upon the Modification and Distortion of Judgments' in Harold Proshansky and Bernard Seidenberg (eds), *Basic Studies in Social Psychology* (Holt, Rinehart and Winston 1965)

⁴³⁸ BM Atkins and JJ Green, 'Consensus on the United States Courts of Appeals: Illusion or Reality' (1976) 20 *American Journal of Political Science* 735

⁴³⁹ Detailed in chapter 3.

The ten cases which divided judicial opinion are detailed in Table 5. These cases included both close call and minority cases. Although three cases did engage aspects of human rights law, others were centred on areas of planning law, tort law, company law and employment law.

Table 5: Divided cases selected for value analysis

| Case | | Area of Law | Majority | Minority | Form of Division |
|---|-----------------|--------------------|--|---|------------------|
| <i>R(on the application of E) v JFS Governing Body.</i> | [2009] UKSC 15. | Human Rights | Lord Phillips Lady Hale Lord Mance Lord Kerr Lord Clarke | Lord Hope Lord Rodger Lord Brown Lord Walker | Close Call |
| <i>Millar (Craig Martin) v HM Advocate (Scotland)</i> | [2010] UKSC10 | Constitutional Law | Lord Hope Lord Brown Lord Walker | Lord Kerr Lord Rodger | Close Call |
| <i>R (on the application of Sainsbury's Supermarket Ltd) v Wolverhampton City Council</i> | [2010] UKSC 20 | Planning Law | Lady Hale Lord Mance Lord Walker Lord Collins | Lord Hope Lord Brown Lord Phillips | Close Call |
| <i>R (on the application of Smith) v Secretary of State for Defence</i> | [2010] UKSC 29 | Human Rights | Lord Phillips Lord Hope Lord Brown Lord Collins Lord Rodger Lord Walker | Lady Hale Lord Kerr Lord Mance | Minority |
| <i>R(on the application of the Electoral Commission) v Westminster Magistrates Court</i> | [2010] UKSC 40 | Constitutional Law | Lord Phillips Lord Mance Lord Kerr Lord Clarke | Lord Brown Lord Walker Lord Rodger | Close Call |

| Divided case | | Area of Law | Majority | Minority | Form of Division |
|--|-----------------|--------------------|--|--|-------------------------|
| <i>Star Energy Weald Basin Limited & Anor v Bocardo SA</i> | [2010] UKSC 35 | Tort Law | Lord Brown Lord Walker Lord Collins | Lord Hope Lord Clarke | Close Call |
| <i>Revenue and Customs Commissioners v Holland</i> | [2010] UKSC 51 | Company Law | Lord Hope Lord Collins Lord Saville | Lord Walker Lord Clarke | Close Call |
| <i>Walumba Lumba (Congo) v Secretary of State for the Home Department.</i> <i>Kadian Mighty (Jamaica) v Secretary of State for the Home Department.</i> | [2011] UKSC 12. | Human Rights | Lord Hope Lady Hale Lord Collins Lord Dyson Lord Kerr Lord Walker | Lord Phillips Lord Brown Lord Rodger | Minority |
| <i>Jones v Kaney</i> | [2011] UKSC 13 | Procedural Law | Lord Phillips Lord Brown Lord Collins Lord Kerr Lord Dyson | Lord Hope Lady Hale | Minority |
| <i>Baker v Quantum Clothing Limited.</i> | [2011] UKSC 17 | Employment Law | Lord Saville Lord Mance Lord Dyson | Lord Kerr Lord Clarke | Close Call |

Table 6: Cases with a single dissenting judgment selected for value analysis

| Case | | Area of law | Majority | Dissenting judgment |
|--|----------------|---------------------|--|---------------------|
| <i>Re Sigma Finance Corp (In Administration)</i> | [2009] UKSC 2 | Banking and Finance | Lord Hope Lord Mance Lord Collins Lord Scott | Lord Walker |
| <i>R (on the application of BA (Nigeria) v Secretary of State for the Home Department)</i> | [2009] UKSC 7 | Human Rights | Lord Hope Lord Brown Lord Rodger Lord Scott | Lady Hale |
| <i>Barratt Homes Ltd v Dwr Cymru Cyfyngedig (Welsh Water)</i> | [2009] UKSC 13 | Utilities | Lord Saville Lord Phillips Lord Walker Lord Clarke | Lady Hale |
| <i>HM Treasury v Al-Ghabra</i> | [2010] UKSC 2 | Procedural Law | Lord Brown Lady Hale Lord Phillips Lord Mance Lord Rodger Lord Walker | Lord Hope |
| <i>A v Essex County Council</i> | [2010] UKSC 33 | Human Rights | Lord Phillips Lord Brown Lord Kerr Lord Clarke | Lady Hale |

| Case | | Area of law | Majority | Dissenting judgment |
|---|----------------|--------------------|---|----------------------------|
| <i>Radmacher v Granatino</i> | [2010] UKSC 42 | Family Law | Lord Phillips Lord Hope Lord Brown Lord Rodger Lord Walker Lord Kerr Lord Collins Lord Mance | Lady Hale |
| <i>R (on the application of Morge) v Hampshire County Council.</i> | [2011] UKSC 2 | Environmental Law | Lord Brown Lady Hale Lord Mance Lord Walker | Lord Kerr |
| <i>Patmalniece (FC) v Secretary of State for Work and Pensions</i> | [2011] UKSC 11 | EU Law | Lord Hope Lord Brown Lady Hale Lord Rodger | Lord Walker |
| <i>In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland)</i> | [2011] UKSC20 | Human Rights | Lord Phillips Lord Hope Lady Hale Lord Brown Lord Kerr Lord Dyson | Lord Rodger |
| <i>R (G) v Govenors of X School</i> | [2011] UKSC30 | Human Rights | Lord Hope Lord Walker Lord Brown Lord Dyson | Lord Kerr |

Those cases which centred on human rights and engaged the Human Rights Act 1998, demonstrated a differential pattern of value expression. The first case after the *JFS* case to closely divide judicial opinion was the case of *Millar (Craig Martin) v Her Majesty's Advocate (Scotland)*.⁴⁴⁰ A case which considered the validity of the power of the Scottish Government to legislate on the imposition of sentences of imprisonment under s45 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 for the offence of driving while disqualified. The new sentences were higher than those offenders would have received on summary conviction under the formerly applicable Road Traffic Offenders Act 1988. The case divided the bench three to two, with the majority (Lords Hope, Brown and Walker) finding that the change in law related to procedure and the associated increased sentences was not reserved to Westminster. Each Supreme Court Justice delivered a judgment which resulted in 180 paragraphs of text. The values espoused in the judgments were different to those espoused in the *JFS* case, indeed the values encompassed in *universalism* were not espoused by either side, however as with the *JFS* case analysis revealed a differential pattern of value expression (Figure 4.8-3). Those in the majority, who affirmed the validity of the Scottish legislation, more frequently espoused values encompassed within *self-direction* and *conformity* than those who opposed the decision. The minority (Lords Kerr and Rodger) in contrast recognised the importance of *self-direction* but more frequently espoused the values encompassed in the more conservative value *tradition*.

⁴⁴⁰ *Millar (Craig Martin) v HM Advocate (Scotland)* [2010] UKSC 10

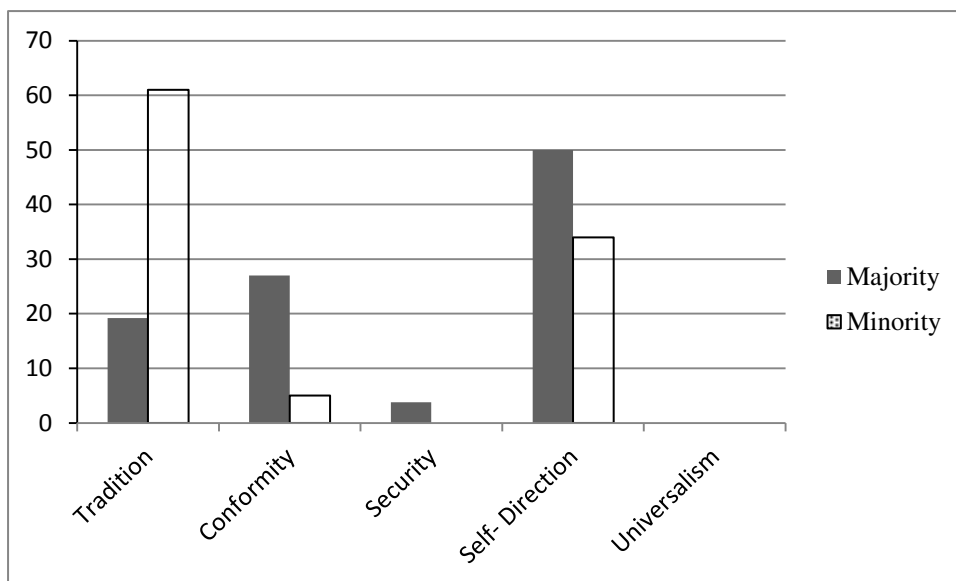


Figure 4.8-3: Value analysis of *Miller (Craig Martin) v HM Advocate*

Values expressed as a percentage of the values espoused within the judgments of those supporting the majority and minority positions.

The differential pattern of expression in the close call cases was not limited to cases which centred on Human Rights Act 1998. The next case to result in judicial division and another close call was *R (on application of Sainsbury's Supermarket Ltd) v Wolverhampton City Council*.⁴⁴¹ This was one of the many planning disputes between multinational supermarket chains. The case examined the powers of planning authorities to make compulsory purchase orders and the extent to which a planning authority can consider off-site benefits. The decision of the Supreme Court limited the powers of the planning authority and held that it was unlawful to take into account off-site benefits. The decision divided the bench four to three. The majority (Lady Hale and Lords Mance, Walker and Collins) limited the powers associated with a compulsory purchase order because of the serious invasion of property rights inherent in compulsory acquisition. In contrast, the minority (Lords Phillips, Hope and Brown) argued that the benefit of the development to the community warranted consideration.

⁴⁴¹ *R (on the application of Sainsbury's Supermarket Ltd) v Wolverhampton City Council* [2010] UKSC 20.

The judgment ran to 186 paragraphs, with each Supreme Court Justice contributing an individual judgment, albeit both the judgments of Lord Hope and Lady Hale were brief.⁴⁴² Value analysis of the judgments revealed a difference in the values expressed in the majority and minority judgments. Those in the majority who advocated the limitation of the council's power espoused values encompassed within *universalism* and *self-direction* and those who advocated extending the power of the council emphasised values encompassed within *achievement* (Figure 4.8-4). Although, engaging different values than those identified in the judgments of the *JFS* case, a similar differential pattern of expression was identified. A brief vignette of one aspect of this case was also included in the experimental survey. There was a significant correlation between the values encompassed in *achievement* and the decision reached.⁴⁴³

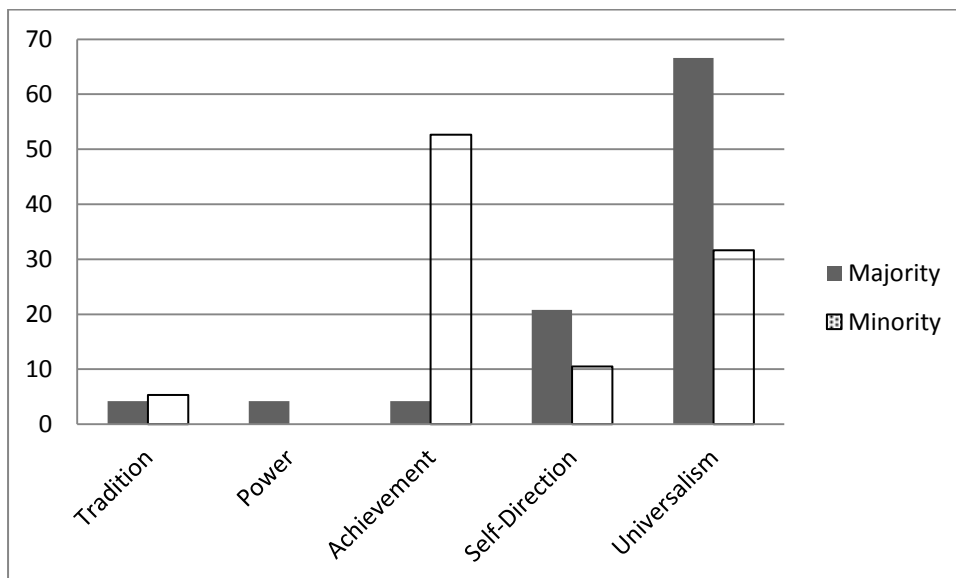


Figure 4.8-4: Value analysis of *R (Sainsbury's Supermarket Ltd) v Wolverhampton City Council*

Values expressed as a percentage of the values espoused within the judgments of those supporting the majority and minority positions.

⁴⁴² Lord Hope's judgment ran to 10 paragraphs, a brief judgment for Lord Hope. Lady Hale only wrote seven paragraphs.

⁴⁴³ $r_s = 0.538$, $P = 0.021$

Star Energy Weald Basin Limited v Bocardo centred on the recovery and quantum of damages for trespass of subsoil at 800 to 1300 feet below ground level.⁴⁴⁴ This case also closely divided the Supreme Court. The majority (Lords Brown, Walker and Collins) held that it was an actionable trespass. Even in this case there was a differential pattern of value expression with the majority emphasising values encompassed in *self-direction*, *conformity* and *tradition* (Figure 4.8-5). The minority (Lords Hope and Clarke) emphasised values encompassed in *universalism*.

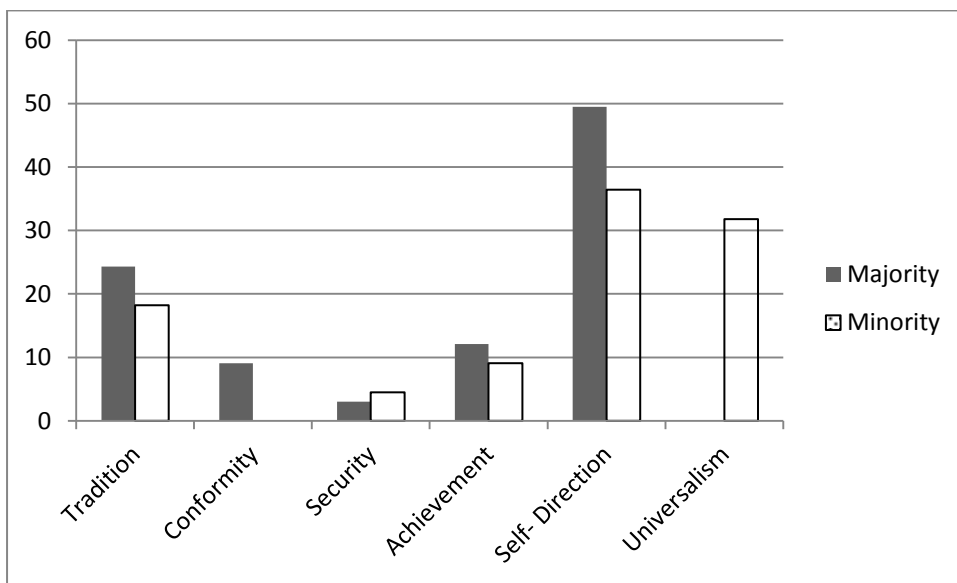


Figure 4.8-5 : Value analysis of *Star Energy Weald Basin Ltd v Bocardo SA*

Values expressed as a percentage of the values espoused within the judgments of those supporting the majority and minority positions.

Each of the close call cases analysed revealed a differential pattern of value expression, with different values priorities in the opposing judgments of the majority and minority (Table 7). In the majority of cases, where the final decision was a close call, every Supreme Court Justice, both those in the majority and minority, delivered a judgment. As highlighted by the Justices, the law surrounding these cases was uncertain and legitimate legal principles enable

⁴⁴⁴ *Star Energy Weald Basin Limited v Bocardo* [2010] UKSC 23

two opposing decisions. Indeed, in these cases there may have been a heightened awareness of the uncertainty and judicial difference with a need to strongly defend a position. The exercise of judicial discretion was central to the decision making process and it is through the exercise of discretion, in these uncertain decisions, that values may be engaged. Indeed, the judgments in these close call cases are laden with values.⁴⁴⁵ The presence of so many value statements suggests that these close call cases elicit a subconscious value centred response which is articulated in the judgments. The analysis suggests that in writing the judgment, the Supreme Court Justices reveal the values which underpin the decision reached, and the values are different in opposing judgments. What about those cases which divide judicial opinion but are not close calls?

Three minority decision cases, which resulted in more than one minority judgment but not close calls, were analysed for the expression of values. The first case analysed was *R (on the application of Smith) v Secretary of State for Defence* a case which centred on whether the Human Rights Act 1998 was applicable to those who were serving in the military in the Middle East.⁴⁴⁶ The case was heard by a panel of nine Supreme Court Justices and divided the court six to three. The majority held that the jurisdiction of the ECtHR and therefore the Human Rights Act 1998 was territorial and did not extend beyond national boundaries. As with the close call cases there was a difference in the pattern of value expression in the judgments between those who supported the majority position compared to those who opposed the decision.⁴⁴⁷ The majority emphasised the values encompassed within the conservative domain including *tradition* and *conformity*, the minority emphasised *security* and values encompassed within *self-direction* (Figure 4.8- 6).

⁴⁴⁵ The number of expressions of values ranged from 55 – 107 per case.

⁴⁴⁶ *R (on the application of Smith) v Secretary of State for Defence* [2010] UKSC 29

⁴⁴⁷ The Supreme Court Justices who adopted a majority position were Lords Phillips, Hope, Brown, Collins, Rodger and Walker. Those in the minority were Lady Hale, Lords Kerr and Mance.

Table 7: Value analysis cases that divided judicial opinion, with more than one Supreme Court Justice dissenting.

| Case | Division | Tradition | Conformity | Security | Power | Achievement | Self-Direction | Universalism |
|---|-------------------|------------------|-------------------|-----------------|--------------|--------------------|-----------------------|---------------------|
| <i>R(on the application of E) v JFS Governing Body.</i> | Majority (n=58) | 15.5% | 1.7% | 1.7% | 0 | 0 | 25.9% | 55.2% |
| | Minority (n=44) | 59.1% | 4.2% | 0 | 2.4% | 0 | 18.4% | 15.9% |
| <i>Millar (Craig Martin) v HM Advocate</i> | Majority (n = 26) | 19.2% | 27% | 3.8% | 0 | 0 | 50% | 0 |
| | Minority (n=41) | 61.1% | 4.9% | 0% | 0 | 0 | 34% | 0 |
| <i>R (on the application of Sainsbury's Supermarket Ltd) v Wolverhampton City Council</i> | Majority (n=24) | 4.2% | 0 | 0 | 4.2% | 4.2% | 20.8% | 66.6% |
| | Minority (n=19) | 5.3% | 0 | 0 | 0 | 52.6% | 10.5% | 31.6% |
| <i>R (on the application of Smith) v Secretary of State for Defence</i> | Majority (n=49) | 38.9% | 8.1% | 12.2% | 0 | 0 | 12.2% | 28.6% |
| | Minority (n=23) | 8.7% | 4.3% | 26.1% | 4.3% | 0 | 30.5% | 26.1% |
| <i>Star Energy Weald Basin Limited & Anor v Bocardo SA</i> | Majority (n=33) | 24.3% | 9.1% | 3.0% | 0 | 12.1% | 51.5% | 0 |
| | Minority (n=22) | 18.1% | 0% | 4.5% | 0 | 9.1% | 36.3% | 32% |
| <i>R(on the application of the Electoral Commission) v Westminster Magistrates Court</i> | Majority (n=41) | 19.5% | 0 | 0 | 0 | 0 | 36.6% | 43.9% |
| | Minority (n=22) | 54.6% | 13.6% | 0 | 0 | 0 | 13.6% | 18.2% |

| Case | Division | Tradition | Conformity | Security | Power | Achievement | Self-Direction | Universalism |
|--|------------------|-----------|------------|----------|-------|-------------|----------------|--------------|
| <i>Revenue and Customs Commissioners v Holland</i> | Majority (n=37) | 43.3% | 2.7% | 21.6% | 0 | 2.7% | 24.3% | 5.4% |
| | Minority (n=30) | 20% | 6.7% | 0 | 0 | 0 | 16.7% | 56.6% |
| <i>Walumba Lumba (Congo) v Secretary of State for the Home Department. Kadian Mighty (Jamaica) v Secretary of State for the Home Department.</i> | Majority (n=83) | 20.4% | 7.2% | 3.7% | 0 | 0 | 19.3% | 49.4% |
| | Minority (n=35) | 0 | 8.6% | 5.7% | 37.1% | 0 | 22.9% | 25.7% |
| <i>Jones v Kaney</i> | Majority (n= 61) | 13.1% | 19.7% | 1.6% | 0 | 0 | 21.3% | 42.6%* |
| | Minority (n=38) | 28.9% | 36.8% | 2.6% | 0 | 0 | 7.9% | 23.7% |
| <i>Baker v Quantum Clothing Limited.</i> | Majority (n=63) | 12.7% | 8.1% | 33.4% | 0 | 0 | 22.1% | 22.1%* |
| | Minority (n=44) | 2.3% | 0 | 0 | 0 | 0 | 36.3% | 61.4% |

- Benevolence featured in *Jones v Kaney* and accounted for 1.7% of the coding and in *Baker v Quantum Clothing* accounting for 1.6% of the coding

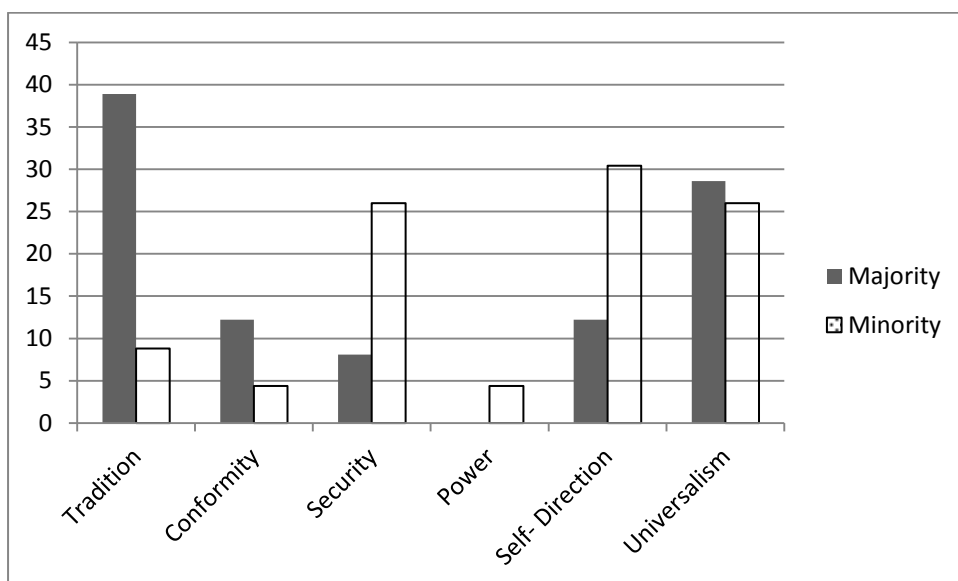


Figure 4.8-6 Value analysis of *R* (*On the application of Smith*) v *Secretary of State of Defence*

Values expressed as a percentage of the values espoused within the judgments of those supporting the majority and minority positions.

A differential pattern of value expression was also identified in the two other cases which divided judicial opinion but were not close calls, *Walumba Lumba v Secretary of State for the Home Department* and *Jones v Kaney*.⁴⁴⁸

The value analysis suggests that values are revealed in judgments in cases which divide judicial opinion with a differential pattern of value expression between Supreme Court Justices who support the majority and minority position. In cases where two or more Supreme Court Justices support the minority position, the differential expression of values is not dependant on whether the case is a close call case.

⁴⁴⁸ *Walumba Lumba (Congo) v Secretary of State for the Home Department; Kadian Mighty (Jamaica) v Secretary of State for the Home Department* [2011] UKSC12; *Jones v Kaney* [2011] UKSC 13; *Jones v Kaney* [2011] UKSC 13. The data is presented in table 7.

4.9 The value: decision paradigm in cases with a single dissenting judgment.

The pattern of judgments was very different in cases which resulted in a single dissent in comparison to both close call and minority cases. In all of the close call cases analysed with the exception of *Baker v Quantum Clothing*, in which Lord Saville heard the case but did not deliver an individual judgment, every Supreme Court Justice who heard the case contributed an individual judgment.⁴⁴⁹ The number of individual judgments reduced in cases with more than one minority judgment, but again the majority of Justices hearing the case delivered a judgment. In contrast, in cases which resulted in a single dissenting voice, there were fewer judgments. In four of the cases analysed, each Supreme Court Justice did contribute a judgment, in three cases the majority issued a single judgment and in the remaining cases one or more Justice's supporting the majority decision did not deliver an individual judgment. These data suggest that the motivation to write a judgment, which incurs costs in time, effort, and potentially collegiality, is higher in cases where judicial opinion is more closely divided. In contrast, the same motivation does not appear to be present in those Supreme Court Justices supporting the majority decision in cases where a single Supreme Court Justice stands alone in opposition to the majority.

There are also significant differences associated with the pattern of engagement of the majority with the reasoning of the opposing Supreme Court Justices in the published judgments. Engagement in this context is that defined by Paterson as critical engagement, not simply acknowledgement of the dissenting view, but discussion of the foundation of the disagreement.⁴⁵⁰ Although this form of engagement is a relatively common occurrence in the judgments of the Supreme Court, there is a relationship between the pattern of critical engagement by the majority with the reasoning of the minority and the form of division.

⁴⁴⁹ *Baker v Quantum Clothing Limited* [2011] UKSC 17

⁴⁵⁰ A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013), page 135.

In cases where more than one Justice opposed the majority position, many of the Supreme Court Justices who supported the majority position critically engaged with the reasoning of the dissenting minority.⁴⁵¹ Indeed, Paterson highlights the *JFS* case as a good example of judicial engagement, with those on both sides engaged in ‘frequent and sustained’ discussion of the opposing reasoning.⁴⁵²

In contrast, in the majority of cases with a single dissenting opinion, the judgments delivered by those supporting the majority position did not engage with the reasoning of the dissenting judgment. Indeed many did not even acknowledge the presence of an opposing judgment. Of the ten cases, with a single dissenting judgment, analysed for the presence of values, in seven of these cases, the majority did not critically engage with the reasoning of the dissenting judgment. In the three cases with engagement, the engagement was limited. For example, the judgment delivered by majority in *Radmacher v Granatino* did not critically engage with the dissenting reasoning of Lady Hale.⁴⁵³ Lord Mance, in his individual judgment supporting the majority position, did engage with the reasoning which underpinned the dissenting position, but only to a limited extent. The case *Re Brigid McCaughey for Judicial Review* centred on the ‘shoot to kill’ policy in Northern Ireland.⁴⁵⁴ The appellants sought a declaration that the scope of the inquest should comply with Article 2 of the European Convention on Human Rights (ECHR) and thereby extend to an examination of the planning and control of the operation that led to the deaths. This case was heard by a panel of seven Supreme Court Justices and each delivered a written judgment. The lone dissenting

⁴⁵¹ In many of the cases analysed the level engagement extended beyond identifying the arguments with detailed analysis and discussion of the opposing position.

⁴⁵² A Paterson, *Final Judgment. The Law Lords and the Supreme Court* (Hart Publishing 2013), page 138.

⁴⁵³ *Radmacher v Granatino* [2010] UKSC 42

⁴⁵⁴ *In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland)* [2011] UKSC 20.

opinion by Lord Rodger in this case, was recognised by those in the majority as having significant merit and strength:

Lord Rodger makes a powerful case for the proposition that the temporal application of the Convention is irrelevant for purposes of deciding the temporal application of the HRA but that, as it seems to me, does not provide an answer to the essential question.⁴⁵⁵

Yet despite the overt recognition of the strength of the argument, there was little critical engagement with the reasoning. In contrast to those cases which closely divide judicial opinion, where critical engagement is commonplace, there is limited engagement by the majority with the reasoning of the lone dissenting judgment. This lack of critical engagement may be related to the perception, by those supporting the majority position, of the certainty of their decision rather than the strength or weakness of the dissenting reasoning. Indeed, a Supreme Court Justice who perceives no uncertainty in the decision they reach, who perceives the strength of the argument supporting their position as decisive, may not consider the need to critically engage with the opposing position.⁴⁵⁶

The pattern of critical engagement in decisions with a single dissenting judgment is reflected in the values statements within the judgments with significantly less value coding in cases which result in a single dissent compared to more closely divided cases (Table 8).

⁴⁵⁵ Lord Kerr in *In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland) [2011] UKSC 20*. [109].

⁴⁵⁶ RM Dawes, D Singer and F Lemons, 'An Experimental Analysis of the Contrast Effect and its Implications for Intergroup Communication and the Indirect Assessment of Attitude' (1972) 21 *Journal of Personality and Social Psychology* 281

Table 8: Average number of value statements per judgment.

| Case division | Value statements per case | Majority (per judgment) | Minority (per judgment) | Dissent (per judgment) |
|----------------|---------------------------|-------------------------|-------------------------|------------------------|
| Close call | 65 | 13 | 12 | |
| Minority | 96 | 11 | 16 | |
| Single Dissent | 29 | 5 | | 10 |

This reduction was reflected in the judgments supporting the majority position with less than half the number of value statements in the majority judgments of cases which result in a single dissenting opinion, in comparison to cases where more than one Supreme Court Justice opposes the decision of the majority. It may be that judgments to which more than one judge contributes are developed through consensus and are more neutral in their position and this may be a facet of the reduction in values in the majority judgments of some of these cases. Indeed, the joint majority statement in the highly publicised decision in *Radmacher (formerly Granatino) v Granatino* only contained 23 value statements.⁴⁵⁷ Even in cases, where each Supreme Court Justice delivers a judgment, the expression of values within the majority judgments is substantially less than the values expressed in majority judgments of close call or minority cases. Indeed, there was sufficient value expression for analysis in all cases in which more than one Supreme Court Justice supported a minority position. In contrast, in the subset of ten cases with a single dissenting opinion, only half had sufficient value expression

⁴⁵⁷ *Radmacher v Granatino* [2010] UKSC 42

for analysis in the majority judgments. The quantity and pattern of value expression in all the cases analysed is presented in Table 9.

The first case with sufficient value expression for analysis was *A v Essex County Council*.⁴⁵⁸ The case involved a severely disabled boy who sought compensation after he was excluded from school for eighteen months whilst the council found him a suitable placement. The question was whether the delay was sufficient to comprise of a breach of his right to education under article 2 of the First Protocol to the ECHR. A majority of three Supreme Court Justices (Lords Clarke, Phillips and Brown) held that it was not arguable that A2P1 gave A an absolute right to education. Two Supreme Court Justices (Lord Kerr and Lady Hale) held that the claimant might have been able to establish a breach of the Convention in the form of a failure to provide educational facilities that were available, however a majority held that it would not be right to extend the one year time limit to enable him to bring his claim. Lady Hale alone held that the limit should be extended and the case returned to the courts. Despite the varying reasoning and different divisions in the court, there was a differential value expression between the values espoused by Lady Hale and those who reached the decision that the time limit should not be extended. The judgment delivered by Lady Hale expressed polarised values encompassed within *universalism* and *benevolence*, both values are encompassed within the *self-transcendence* dimension. In contrast, the majority espoused a wide range of values with the majority of expression in those values concerned with conservation and resistance to change (*tradition, security and conformity*) represented in Figure 4.9-7.

⁴⁵⁸ *A v Essex County Council* [2010] UKSC 3

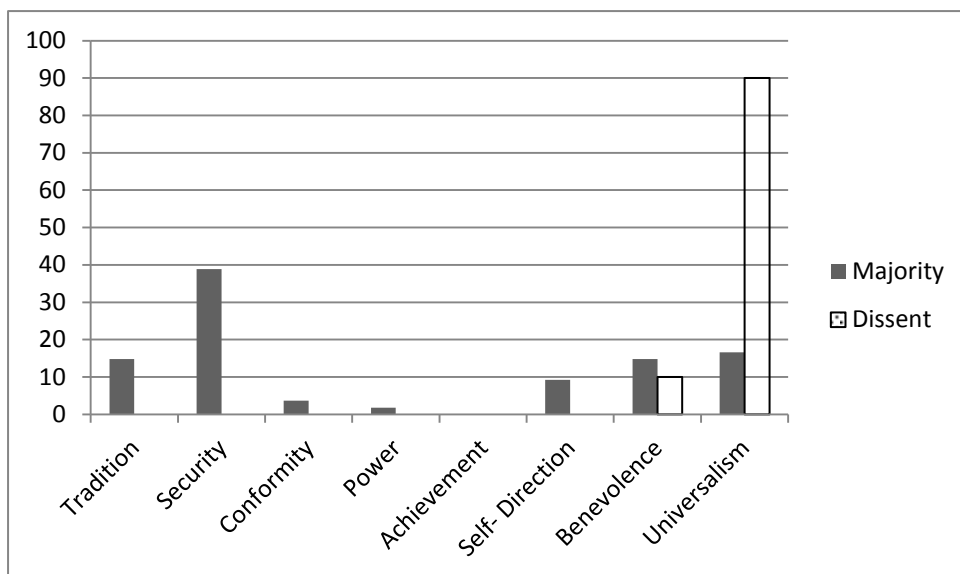


Figure 4.9-7: Value analysis of *A v Essex County Council* [2010]

Values expressed as a percentage of the total values in the majority or dissenting judgment.

A similar pattern of expression was also evident in *R (on the application of G) v The Governors of X School* another cases which centred on the application of the ECHR.⁴⁵⁹ In this case, the Justices were asked to decide whether denial of a solicitor to a school assistant in a school disciplinary hearing, the result of which may have prevented the school assistant from working in the future, was a breach of Article 6(1), the right to a fair hearing. The majority held that there was no breach. Lord Kerr delivered a dissenting judgment. The dissenting judgment expressed values limited to *self-direction* and *universalism*, in contrast the majority judgment espoused range of values encompassed within conservation including *tradition, security and conformity* (Figure 4.9–8).

⁴⁵⁹ *R (on the application of G) v The Governors of X School* [2011] UKSC 30.

Table 9: Value analysis of cases with a single dissenting judgment (major values only)

| Case | | Tradition | Conformity | Security | Power | Achievement | Self-Direction | Universalism |
|--|-----------------------------|-----------|------------|----------|-------|-------------|----------------|--------------|
| <i>Re Sigma Finance Corp (In Administration)</i> | Majority (n=11) | 0 | 0 | 0 | 0 | 0 | 72.7% | 27.3% |
| | Dissent (n=5) (Lord Walker) | 0 | 0 | 0 | 0 | 40% | 40% | 20% |
| <i>R (on the application of BA) (Nigeria) v Secretary of State for the Home Department</i> | Majority (n=11) | 63% | 0 | 0 | 0 | 0 | 10% | 27% |
| | Dissent (n=3) (Lady Hale) | 33% | | 33% | | | 0 | 34% |
| <i>Barratt Homes Ltd v Dwr Cymru Cyfyngedig (Welsh Water)</i> | Majority (n= 14) | 28.6% | 0 | 21.4% | 21.4% | | 7.1% | 14.3%* |
| | Dissent (n=6) (Lady Hale) | 50% | 0 | 0 | 16.6% | | 16.7% | 16.7% |
| <i>HM Treasury v Al-Ghabra</i> | Majority (n=4) | 25% | 0 | 0 | 0 | 0 | 25% | 50% |
| | Dissent (n=11) | 18% | 64% | 0 | 18% | 0 | 0 | 0 |
| <i>A v Essex County Council</i> | Majority (n=54) | 14.8% | 3.8% | 39% | 1.8 | | 9.2% | 16.6%* |
| | Dissent (n=10) (Lady Hale) | 0 | 0 | 0 | | | 0 | 90%* |
| <i>Radmacher v Granatino</i> | Majority (n=23) | 13% | 21.8% | 0 | 0 | 0 | 30.4% | 34.8% |
| | Dissent (n=31) (Lady Hale) | 35.5% | 9.7% | 6.5% | 0 | 0 | 12.8 % | 35.5% |

| Case | | Tradition | Conformity | Security | Power | Achievement | Self-direction | Universalism |
|---|------------------------------|-----------|------------|----------|-------|-------------|----------------|--------------|
| <i>R (on the application of Morge) v Hampshire County Council.</i> | Majority (n=18) | 5.5% | 16.8% | 22.2% | 0 | 0 | 33.3% | 22.2% |
| | Dissent (n=13) (Lord Kerr) | 0 | 0 | 0 | 7.7% | 0 | 38.5% | 53.8% |
| <i>Patmalniece (FC) v Secretary of State for Work and Pensions</i> | Majority (n=14) | 50% | 50% | 0 | 0 | 0 | 0 | 0 |
| | Dissent (n=15) (Lord Walker) | 20% | 13% | 0 | 0 | 27% | 0 | 40% |
| <i>Re Brigid McCaughey for Judicial Review (Northern Ireland)</i> | Majority (n=18) | 17% | 33% | 5% | 0 | 0 | 11% | 28%* |
| | Dissent (n=7) (Lord Rodger) | 43% | 57% | 0 | 0 | 0 | 0 | 0 |
| <i>R (on the application of G) (Respondent) v The Governors of X School (Appellant)</i> | Majority (n=15) | 13% | 20% | 7% | 0 | 0 | 20% | 40% |
| | Dissent (n=9) (Lord Kerr) | 0 | 0 | 0 | 0 | 0 | 22% | 78% |

*Benevolence featured in the case *Barratt Homes Ltd v Dwr Cymru Cyfyngedig (Welsh Water)* accounting for 7.2% of the majority coding.

Benevolence featured in the case *A v Essex County Council* and accounted for 14.8% of the majority coding and 10% of the dissent.

Benevolence featured in the case *In the matter of an application by Brigid McCaughey (Judicial Review) (Northern Ireland)* and accounted for 6% of the majority coding

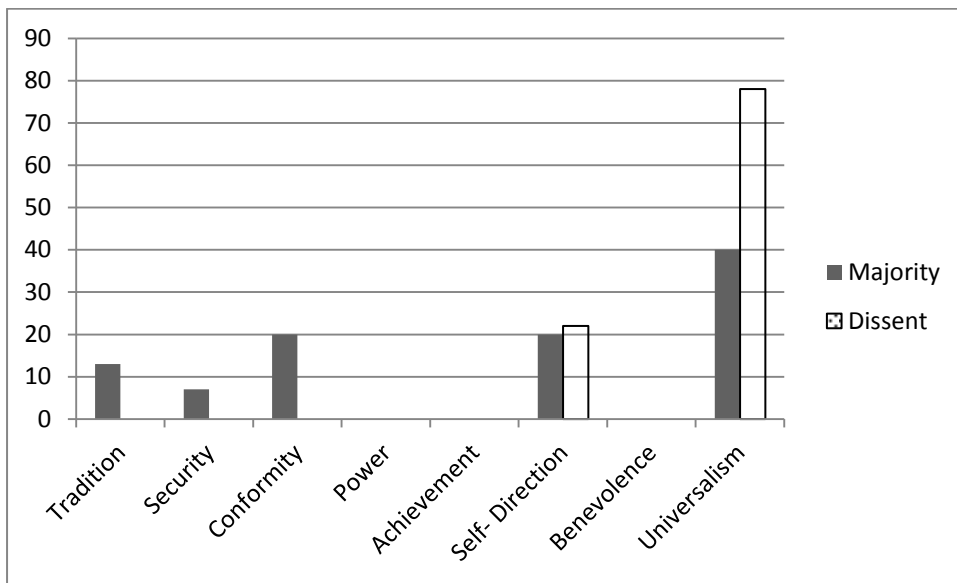


Figure 4.9-8 Value analysis of R (on the application of G) v The Governors of X School

Values expressed as a percentage of the values espoused within the majority and dissenting judgments.

Although, there is a differential value expression, similar to that of both close call and minority cases, there is a notable difference in the value expression of the dissenting opinion. In close call and minority cases, in the judgments of those supporting the minority position, there is recognition of the values expressed by the majority, however in the single dissenting judgment the values tend to be more polarised with little acknowledgement of the values espoused in the majority judgments.

This polarisation of values was also identified in the third case which centred on the application of the ECHR, *Re Brigid McCaughey for Judicial Review (Northern Ireland) [2011]* which is discussed above and centres on Article 2 (1) the right to life.⁴⁶⁰ In the case,

⁴⁶⁰ *In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland) [2011] UKSC 20.*

the lone voice of dissent was that of Lord Rodger. In his dissenting opinion, Lord Rodger affirmed the values encompassed in *tradition* and *conformity*. As with the other cases of a single dissent, the dissenting judgment reflected a similar polarisation of values, with no espousal of *self-direction* or *universalism*, values espoused by those in the majority (Figure 4.9-8).

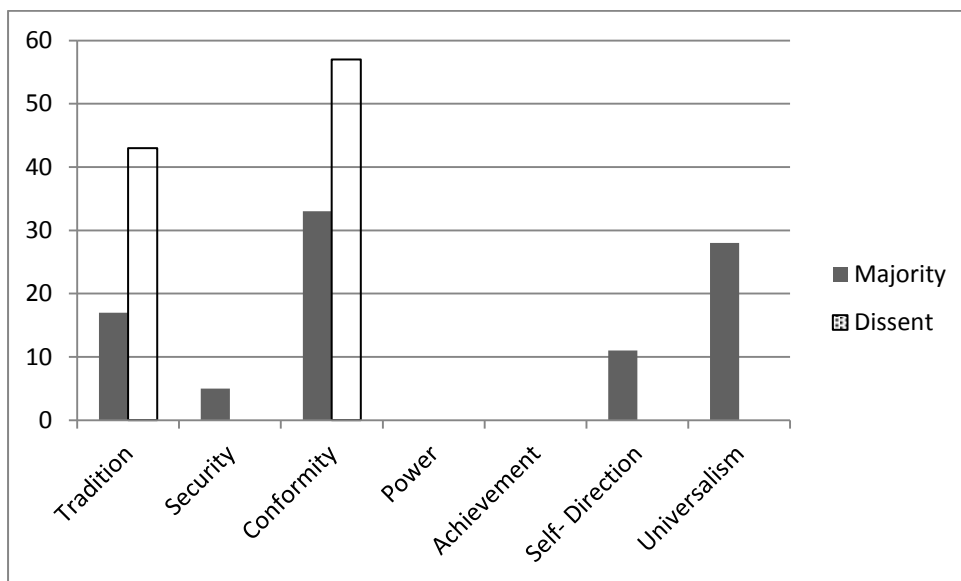


Figure 4.9-9 Value analysis of *Re Brigid McCaughey for Judicial Review (Northern Ireland)*

Values expressed as a percentage of the values espoused in the majority and dissenting judgments.

This pattern of value expression was not limited to cases which centred on the application of the principles encompassed within the ECHR (Table 9). The unusual case of *R(on the application of Morge) v Hampshire County Council* asked the Court to review a local planning authority's decision to grant permission for a rapid bus service development which would have a significant impact on the several species of protected bats which inhabited the

relevant area.⁴⁶¹ The Court held that the planning permission was valid as the specimens of specific bat species in this context were not sufficient to engage the protection of the European Habitats Directive. Lord Kerr delivered a dissenting judgment argued that the planning authority did not give due consideration to the Habitats Directive and the impact of the development on the bat species. This case also had a polarised differential expression of values, with the majority espousing values encompassed in *conformity*, *tradition* and *security* (Figure 4.9-9). These values are not reflected in the dissenting judgment of Lord Kerr.

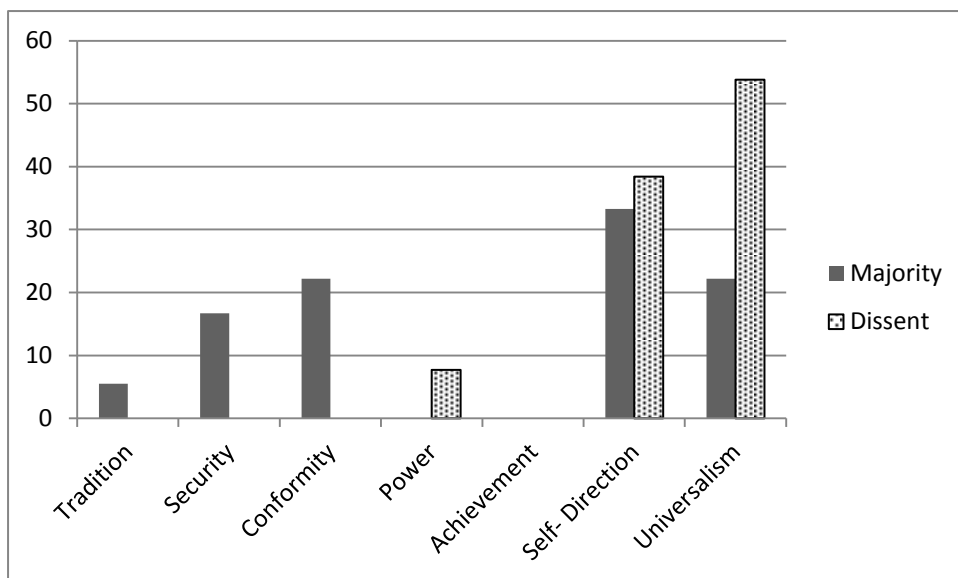


Figure 4.9-10 Value analysis of *R(on the application of Morge) v Hampshire County Council*

Values expressed as a percentage of the values espoused in the majority and dissenting judgments.

One case in this subset of cases with a single dissenting judgment is striking because of its difference. This is the highly publicised landmark ante-nuptial contract case *Radmacher (formerly Granatino) v Granatino*.⁴⁶² This case has several striking differences both in form and value expression. It was one of the cases heard by a panel of nine Supreme Court

⁴⁶¹ *R (on the application of Morge) v Hampshire County Council* [2011] UKSC 2

⁴⁶² *Radmacher v Granatino* [2010] UKSC 42

Justices. It resulted in a consensus judgment delivered by seven of the majority with only one Supreme Court Justice (Lord Mance) delivering a judgment in agreement with the majority and finally as Paterson identified, the case took 211 days for a judgment, almost twice the average length of the other cases.⁴⁶³ The single dissenting judgment was delivered by Lady Hale and included the much quoted line, ‘there is a gender dimension to the issue, which some may think ill-suited to decision by a court consisting of eight men and one woman.’⁴⁶⁴

Despite the strength of the feminist element of the dissenting judgment and the strong emphasis on the protection of the vulnerable, the value profile in this dissenting judgment reveals a tension between the opposing values encompassed in *tradition* and *universalism*. Indeed, the highly polarised value profile identified in other dissenting judgments is not evident in Lady Hale’s judgment in this case.

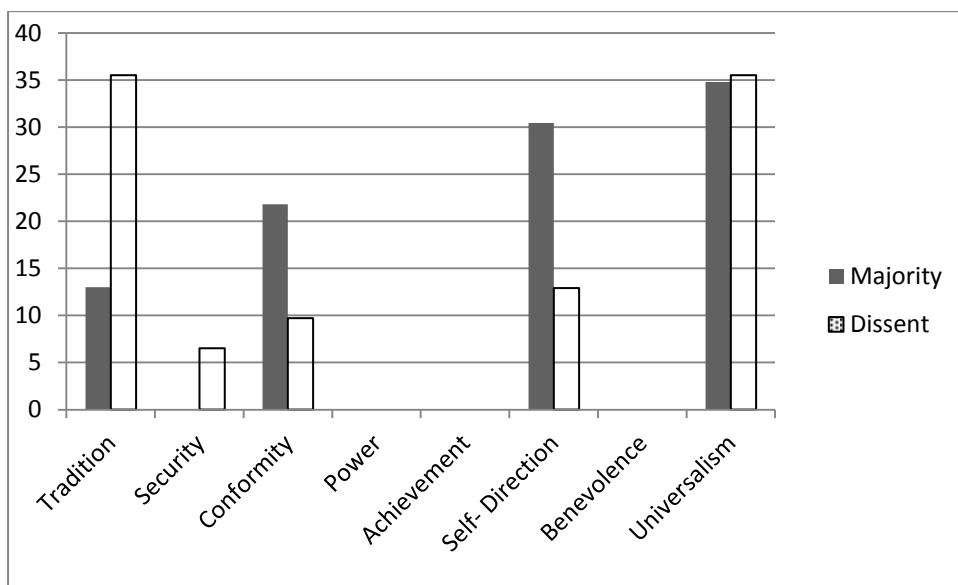


Figure 4.9-11: Values analysis of *Radmacher (formerly Granatino) v Granatino*

Values expressed as a percentage of the values espoused in the majority and dissenting judgments.

⁴⁶³Paterson A, *Final Judgment. The Law Law Lords and the Supreme Court* (Hart Publishing 2013), page 199

⁴⁶⁴*Radmacher v Granatino* [2010] UKSC 42, [137]

It is difficult to speculate why the values in the dissenting judgment of this case are different from the polarised values expressed in other cases. It may be the nature of the case, the issues involved or the way the decision was reached, but the dissenting judgment in this case does not follow the pattern of value expression of other cases with a single dissenting judgment.

In summary, the dissenting Supreme Court Justice draws on values to support their reasoning. Indeed, in many cases, the value expression is more polarised, with little recognition of the values encompassed in the majority reasoning. In contrast, the Supreme Court Justices who support the majority in a case which results in an individual dissent are less likely to write a concurring judgment, less likely to critically engage with the opposing reasoning and less likely to reveal values in their judgments than when supporting the majority position in a case which is more closely divided. To the Supreme Court Justices supporting the majority, the legal position may appear more certain and the opposing argument may appear to have less strength and less validity. Values are not drawn upon to justify the legal position and although values are espoused the pattern of expression is diffuse drawing on a wide range of values in the judgment.

4.10 Division, dissent and values

This chapter uses the values methodology to examine the presence of values in judgments of a range of cases which divided the opinion of the Supreme Court. It confirmed the expression of values in legal judgments and reveals differences in value expression associated with the form of division.

There are number of factors that are associated with an increased likelihood of division, these include institutional factors (norm of consensus, workload), personal factors (judicial attitude to division, collegiality), the details of the case and the law surrounding it. Judicial decisions are framed and constrained by the law and it is only when the law does not provide a clear answer, where the judge perceives the law as uncertain, that division occurs.

Close call ‘hard’ cases are decisions shrouded in uncertainty.⁴⁶⁵ Such cases are indeterminate where no settled rule of law ‘dictates a decision either way.’⁴⁶⁶ The decision is a choice between incomparable options where ‘one option is not better than another, one is not worse than the other but the two options are not equally good.’⁴⁶⁷ The law does not provide a clear answer and it is these cases with the highest degree of ambiguity which are most likely to result in division. The prevalence of equally plausible choices is reflected in the high level of critical engagement in the reasoning of judgments supporting opposing decisions, with Justices recognising the merits of the conflicting position.

Yet Supreme Court Justices are asked to make a choice. In doing so the Supreme Court Justice exercises discretion choosing between two equally credible legal decisions. The decisions in these cases which Tamanaha argues have the ‘least legal guidance’ have to be justified. This justification cannot be derived from the comparable options presented in the case but rely on the ‘non-comparative’ considerations which underpin the exercise of discretion.⁴⁶⁸ Indeed, in these cases where the law is uncertain, Supreme Court Justices exercise discretion and the non-comparative considerations may draw on intrinsic factors,

⁴⁶⁵R Dworkin, 'Hard Cases' (1974 - 1975) 88 Harvard Law Review 1057, page 1057.

⁴⁶⁶ *ibid*, page 1060

⁴⁶⁷ M Adler, ‘Law and Incommensurability: Introduction’ (1998) 146 University of Pennsylvania Law Review (1998) 1169, at 1170.

⁴⁶⁸ R Chang, ‘Comparison and the Justification of Choice.’ (1998) 146 University of Pennsylvania Law Review 1569

central to self, to reach their decision. It is a central hypothesis of this research that the justification in these cases is underpinned by values.

It is recognised that each case decided by the Supreme Court is unique and within each subset of cases there were cases which did not reflect the general pattern. These cases are discussed within the text of the chapter. Despite the individuality of each case, in close call cases, where the decision is most uncertain, values are most commonly identified. Values are expressed in both judgments supporting and opposing the majority position, with little difference in the quantity of value expression. There was however a significant difference in pattern of value expression. In each case, the dominant values reflected in the judgments of the majority and the minority were different. This differential pattern is not unique to close call cases and was also present in cases where more than one Supreme Court Justice supported the minority position. Indeed, this pattern of expression was evident regardless of the area of law or the size of the panel hearing the case. The analysis of values in these cases suggests that in cases which divide judicial opinion, hard cases, where the law does not provide a clear answer and requires the exercise of judicial discretion, values underpin the decision and these values are revealed in the judgments.

It was suggested by Justice Benjamin Cardozo that ‘the closeness of the division attests to the measure of doubt’ and in cases where the court is closely divided there is uncertainty. But the perception of uncertainty is not limited to a narrowly divided close call case.⁴⁶⁹ Every case which reaches the Supreme Court is a hard case, which exist, as Dworkin suggests, because of the absence of clarity:

⁴⁶⁹ *People ex rel. Hayes v. McLaughlin*, 247 N.Y. 242

Statutes and common law rules are often vague and must be interpreted before they can be applied to novel cases. Some cases, moreover, raise issues so novel that they cannot be decided by stretching or reinterpreting existing rules.⁴⁷⁰

Even with this subset of ‘hard cases’ there are some cases where ‘one outcome can be ranked more legally compelling or defensible than the others.’⁴⁷¹ Tamanaha argues that there is a more nuanced form of legal uncertainty at play in these hard cases.

Cases where there is a single dissenting opinion, the choice may no longer be perceived by all the Supreme Court Justices as a choice between incomparable options. In these cases the majority of the Supreme Court Justices identify a dominant legally plausible outcome. This is supported by evidence of critical engagement. In theory, a Supreme Court Justice who perceives no uncertainty in the decision they reach, who perceives the strength of the legal argument supporting their position as decisive may not consider a need to critically engage with opposing reasoning. In the majority of divided cases, the majority critically engaged with the minority reasoning. However, in the single dissent cases analysed, there was less critical engagement by the majority in the reasoning of the lone dissenter.

The pattern of value expression in single dissent cases was also different to cases where the decision on the outcome is more closely divided, with fewer values expressed in dissent cases. The majority of values expressed were identified in the dissenting judgment. Indeed there was little difference in the density of value expression in dissenting judgments and judgments in divided cases. The polarised pattern of values expression evident in the

⁴⁷⁰ R Dworkin, 'Hard Cases' (1974 - 1975) 88 Harvard Law Review 1057 , page 1058

⁴⁷¹ B Tamanaha, *Law as a Means to an End. Threat to the Rule of Law* (Cambridge University Press 2006), page 242.

dissenting judgments of Supreme Court Justices suggests that values may play a role in the decision. In contrast, Justices supporting the majority position, in cases with a single dissent, were less likely to reveal values in their judgments than when supporting the majority position in a case which is more closely divided. These data suggest that values may play a lesser role in the judgments of those supporting the majority position in the single dissent cases.

The differing role of values in the judicial decision making process may be related to a perception of uncertainty. System 1 reasoning and the affect response may be affirmed, rejected or amended by the more deliberative system 2 reasoning. Personal values anchor the affect response, providing a lens through which system 2 reasoning is viewed. Where system 2 reasoning does not provide a clear answer and the outcome remains uncertain, the decision continues to be anchored in the system 1 response and personal values. It may therefore be speculated, that values are revealed in decisions where deliberative reasoning does not provide a clear answer, where there is more than one 'legally plausible' solution. The findings in this chapter support this theory, with values expressed in the judgments of the most uncertain cases, cases where two or more Supreme Court Justices support a position which opposes that of the majority. In cases with a single dissent, values are expressed in the dissenting judgment, where the Supreme Court Justice views the decision of the majority as uncertain. In contrast, fewer values are expressed in the judgments of those who support the majority position, who perceive that there is a single legally plausible solution. To these Justices, the legally plausible solution may provide certainty and their values although affirmed or rejected are not revealed in their judgments.

This chapter confirms the value: decision paradigm in cases which divide judicial opinion. Psychological theory suggests that values play a role in uncertain decisions and the analysis of different forms of division demonstrates a link between judicial disagreement, uncertainty and the expression of values. The next chapter sets out to test the limits of the value: decision paradigm. If the expression of values is associated with uncertainty, then are values expressed in cases which do not divide judicial opinion, those cases that achieve outcome consensus?

Chapter 5

Outcome Consensus, Values and Uncertainty

Only by acknowledging the many influences on the justices' decisions can we gain a complete understanding of how the Court arrives at its final judgments, and begin to disentangle the puzzle of unanimity.⁴⁷²

Value analysis has demonstrated an association between values and judicial decision making in cases which divide judicial opinion, cases where the law does not provide a clear answer and judicial discretion is exercised. By definition every case which is heard in the Supreme Court is a 'hard case', a rationally indeterminate case which does not have a uniquely correct decision determined by the entire background of the body of relevant law.⁴⁷³ Despite this, the UK Supreme Court reaches a consensus decision in the majority of cases. Psychological theory suggests that it is absence of a clear outcome and continuing uncertainty after system 2 deliberation which enhances the role of personal values in the decision making process. The study of cases that divide judicial opinion suggests that values are revealed in the judgments in cases where the law is perceived as uncertain. This thesis views judicial disagreement, division and uncertainty on a continuum from those cases which divide judicial opinion to complete consensus. This chapter turns the focus away from those cases which divide judicial opinion to examine the limits of the value: decision paradigm in the decisions that achieve outcome consensus. It will be argued that although consensus does not equate with

⁴⁷² P Corley, A Steigerwalt and A Ward, *The Puzzle of Unanimity. Consensus on the United States Supreme Court*. (Stanford Law Books 2013), page 51

⁴⁷³ Dworkin R, 'Hard Cases' (1974 - 1975) 88 Harvard Law Review 1057; A Paterson, Final Judgment. *The Last Law Lords and the Supreme Court* (Hart Publishing 2013)

agreement, in the absence of a perception of uncertainty, values are not revealed in cases which achieve consensus on the outcome.

5.1 Consensus in the UK Supreme Court

In the first four years of the Supreme Court, consensus was achieved in 77% of all cases decided. This compares favourably with other jurisdictions, with rates of consensus similar to the Canadian Supreme Court (75.6%) and significantly higher than both the US Supreme Court (42.9%) and the Australian High Court (58.9%), although the rate of consensus has increased in the Australian High Court since the departure of Justice Kirby.⁴⁷⁴ All cases which reach the Supreme Court are by definition 'hard cases', cases where the final outcome is not clearly dictated by law. Yet there is a remarkably high level of consensus. Several factors have been associated with consensus in final courts of appeal, some focus on the case and case selection and others centre on the institution and the characters within it, arguing that outcome consensus is a result of social interactions.

In contrast to legal uncertainty which may result in division, it has been argued by a number of scholars that legal certainty, where the legal answer is simply more obvious and clear, explains consensus.⁴⁷⁵ Pritchett suggests that unanimous decisions occur when, 'the facts and the law are so clear that no opportunity is allowed for the autobiographies of the Justices' to

⁴⁷⁴ Chris Hanretty, Dissenting Opinions in the UKSC < <http://ukscblog.com/dissenting-opinions-in-the-uksc> > accessed 25.07.2014 reproduced in Paterson A, *Final Judgment. The Law Lords and the Supreme Court* (Hart Publishing 2013), page 113; Andrew Lynch, Changing Faces of the High Court Ease Dissent. *The Australian*. February 4th 2014. <<http://www.theaustralian.com.au/business/legal-affairs/changing-faces-of-high-court-ease-dissent/story-e6frg97x-1226826505500?nk=f1dfe5be270bdcd60a6f2f41607f48fc#mm-premium>> accessed 25.07.2014

⁴⁷⁵ CH Pritchett, 'Divisions of Opinion among Justices of the U.S. Supreme Court' (1941) 35 *American Journal of Political Science* 890; S Goldman, 'Backgrounds, Attitudes and the Voting Behaviour of Judges: A Comment on Joel Grossman's Social Backgrounds and Judicial Decisions' (1969) 31 *Journal of Politics* 214; M Klein, *Law Courts and Policy* (Prentice Hall 1984)

lead them to opposing conclusions'.⁴⁷⁶ Corley, Steigerwalt and Ward argue that it is this clarity which serves to constrain the exercise of discretion and results in consensus.⁴⁷⁷ A high level of consensus is achieved, according to Pritchett, by a high proportion of these 'easy' legally certain cases on the courts' dockets.⁴⁷⁸

There is no evidence to support this theory in the UK Supreme Court. The court only hears appeals on arguable points of law and 'concentrates on cases of the greatest public and constitutional importance.'⁴⁷⁹ Indeed, in comparison to other final courts of appeal, the Supreme Court hears very few cases and rejects over half the applications for permission to appeal, which suggests that the selection process alone should serve to reduce not increase this form of 'easy cases'. Although there is little evidence that case selection influences consensus in the UK Supreme Court, there is some evidence that institutional factors may influence the rate of consensus.

5.2 Social theories of consensus

Theories of consensus which focus on social interactions view consensus as a product of a multifactorial process and take both a broad and narrow view of the social institution. The broad view sees the Supreme Court as part of wider society and suggests consensus is a reflection of social views. The narrow view looks at social interactions within the framework of the court itself.

⁴⁷⁶ CH Pritchett, 'Divisions of Opinion among Justices of the U.S. Supreme Court' (1941) 35 *American Journal of Political Science* 890

⁴⁷⁷ P Corley, A Steigerwalt and A Ward, *The Puzzle of Unanimity. Consensus on the United States Supreme Court*. (Stanford Law Books 2013)

⁴⁷⁸ CH Pritchett, 'Divisions of Opinion among Justices of the U.S. Supreme Court' (1941) 35 *American Journal of Political Science* 890, page 890

⁴⁷⁹ Supreme Court website < <http://www.supremecourt.uk/about/role-of-the-supreme-court.html> > accessed 31.07.2014

5.2.1 Social consensus theory

Social consensus theory views judicial decision making within the broader society. It emphasises the persistence of shared values and norms as fundamental characteristics of society and suggests that a high rate of consensus in the final courts of appeal reflects a broader social consensus. The theory suggests that judicial decision making reflects society's values and norms and that consensus reflects societal agreement regarding the central issues. There is some traction in this theory and some cases which have divided judicial opinion have reflected the conflicted views of society.

This conflict of social values was evident in the judicial division in the *Nicklinson v Ministry of Justice*.⁴⁸⁰ A case which centred on assisted suicide. In his reasoning, Lord Sumption highlighted the association between social consensus and judicial decision making and revealed the difficulty in judicial decision making on issues where there is a conflict of social values:

The first is that, as I have suggested, the issue involves a choice between two fundamental but mutually inconsistent moral values, upon which there is at present no consensus in our society. Such choices are inherently legislative in nature. The decision cannot fail to be strongly influenced by the decision-makers' personal opinions about the moral case for assisted suicide. This is entirely appropriate if the decision-makers are those who represent the community at large. It is not appropriate for professional judges. The imposition of their personal

⁴⁸⁰ *R(on the application of Nicklinson and another) v Ministry of Justice ; R (on the application of AM) (AP) v The Director of Public Prosecutions*. [2014] UKSC 38

opinions on matters of this kind would lack all constitutional legitimacy.⁴⁸¹

Social consensus theory suggests that in such cases judicial decisions reflect the divisions in society. There are however several other theories on consensus, which centre on individual judges rather than society as a whole. These theories suggest that the court as a social institution has norms of behaviour that encourages consensus.

5.2.2 The court as a social institution

Epstein and others argue that the level of consensus decision making in the U.S. Supreme Court does not reflect true consensus but rather an artificially raised level of consensus because Justices who disagree with the majority 'suffer in silence'.⁴⁸² The authors suggest that in the US Supreme Court there exists an unarticulated strength associated with the norm of consensus which creates an obligation in the dissenting judge to mask their differences from public view.

5.2.2.1 *Norm of consensus*

Calderia and Zorn develop this theory suggesting that consensual norms function as social institutions which structure interactions among participants within the Supreme Court.⁴⁸³ These social institutions provide information about how people are expected to 'act in particular situations' and 'structure the strategic choices of actors in such a way as to produce

⁴⁸¹ Lord Sumption in *Nicklinson* *ibid*, [230].

⁴⁸² L Epstein, 'The Norm of Consensus on the U.S. Supreme Court.' (2001) 45 *American Journal of Political Science* 362

⁴⁸³ GA Calderia and CJ Zorn, 'Of Time and Consensual Norms in the Supreme Court' (1998) 42 *American Journal of Political Science* 874

equilibrium outcomes'.⁴⁸⁴ Within the context of the Supreme Court, the consensual norm, as a social institution, provides guidance to Justices as to when it is appropriate for them and their colleagues to go public with disagreement.⁴⁸⁵

Empirical studies, of the 'consensual norm' in the U.S. Supreme Court, examine the principle of 'vote shifts' or changes of opinion which settle on supporting the majority as evidence of effectiveness of the institutional norm. Although not in the context of the consensual norm, Paterson examined the principle of vote shifting in the UK Supreme Court when he discussed 'changes of mind' and identified decisions which were replete with changes of position, many resulting in a final decision which supported the majority position. Paterson does not suggest that the changes of mind are a facet of 'silencing' the dissention, indeed Paterson suggests that there is little evidence of a norm of consensus in the UK Supreme Court.⁴⁸⁶ Rather Paterson's work highlights the influence of the multiple facets of the Supreme Court, as a social institution, on judicial decision making. These include the influence of corridor (or coffee pot) discussions, collegiality and team working on individual decision making.⁴⁸⁷

5.2.2.2 Collegiality

The influence of collegiality within the small closed community cannot be underestimated. The influence of the process of collegiality alone may serve to modify individual decisions and encourage consensus as discussed by Harry T Edwards:⁴⁸⁸

⁴⁸⁴ J Knight, *Institutions and Social Conflict* (Cambridge University Press 1992), page 77

⁴⁸⁵ GA Calderia and CJ Zorn, 'Of Time and Consensual Norms in the Supreme Court' (1998) 42 *American Journal of Political Science* 874

⁴⁸⁶ Personal communication.

⁴⁸⁷ A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013)

⁴⁸⁸ Circuit Judge, United States Court of Appeals for the DC Circuit

Judges have a common interest, as members of the judiciary, in getting the law right and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered. Specifically,.... collegiality plays an important part in mitigating the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies communicate with, listen to and ultimately influence one another in constructive law-abiding ways.⁴⁸⁹

He argues, a collegiate environment allows judges to disagree freely and to use their disagreements to improve and refine their judgments. Although there is a little evidence of pressure to create harmonious conditions for mutual persuasion, there is evidence of friendships and team-working in the Supreme Court.

5.3 Collective decision making in the UK Supreme Court

Paterson clearly demonstrates that decision making within the Supreme Court is a social and collective process which is facilitated through formal and informal dialogue and engagement with the judgments of others. It is accepted that not every Supreme Court Justice engages in the collective process, as articulated by Lady Hale:

I think there probably is a spectrum of people who take an extremely individualistic attitude to things and people take a more consensus-seeking attitude, which is rather different from an authoritative, a directive

⁴⁸⁹ HT Edwards, 'The Effects of Collegiality on Judicial Decision Making.' (2003) 151 University of Pennsylvania Law Review 1639

thing. I don't think anybody tries to be directive and some place more weight on trying to get as many people to sign up to a particular identifiable point of view than others do.⁴⁹⁰

Although individuals may select not to participate, the systems and processes in the Supreme Court encourage a more collective decision making process. In contrast to the speeches from the House of Lords, in the Supreme Court a single Justice can deliver a judgment on behalf of the Court. This affords the Justices the opportunity to avoid writing concurring judgments where they agree with the decision and the reasoning. Indeed, in the first four years of the Supreme Court, 43% of the decisions in the Supreme Court were delivered through a single judgment. The ability to deliver a consensus judgment may also create a pressure on Supreme Court Justices to reach consensus. Lord Philips, the first President of the Supreme Court, acknowledged that the Supreme Court Justices are encouraged to reach consensus decisions and avoid minority and dissenting judgments. Consensus decisions are also encouraged by Lord Neuberger, the current President of the Supreme Court:

A presiding judge or the head of a court has no right to insist on a colleague not giving a judgment or not saying something he or she wants to say in a judgment: that is an important aspect of judicial independence. Nonetheless self-restraint is generally a judicial virtue....while I am not suggesting banning dissenting judgments, it may be that we could have fewer of them, and that they could be shorter.⁴⁹¹

The achievement of consensus is mediated through collective decision-making and team working. Indeed, Paterson highlights the significant increase in single judgments as evidence

⁴⁹⁰ A Paterson, *Final Judgment. The Law Law Lords and the Supreme Court* (Hart Publishing 2013), page 135

⁴⁹¹ Lord Neuberger, 'No Judgment - No Justice' (First BAILII Lecture, London, 20 November 2012)

of team working.⁴⁹² This team work is facilitated through a range of systems and processes within the Supreme Court including an increased number of formal meetings and pre-meetings, which encourage dialogue and collective decision making. Little is known about these meetings, but Lord Kerr provided some insight into the process and potential for developing consensus:

[T]he discipline of deliberations immediately after the hearing, where every justice is not only entitled to give his or her view but is required to provide it and to support it with reasons. This critical phase in every case gives us the opportunity to sway or be swayed by rehearsal of the arguments and even, perish the thought, a new perspective on the appeal that has somehow eluded counsel. No system is perfect but ours, with the continued value that it places on the oral tradition, is, in my entirely biased view, about as good as it can be and it is, I am sure, at least partly responsible for the small number of dissents.⁴⁹³

Although the process may reduce individual dissenting judgments, as Lady Hale suggests Supreme Court Justices are individuals who engage to varying degrees with the processes of collective decision making. Indeed, there is some evidence that the personalities of the Supreme Court may also encourage consensus and collective decision making. This is particularly true of the President of the Supreme Court.

⁴⁹² A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013), page 143.

⁴⁹³ Lord Kerr, 'Dissenting Judgments - Self-Indulgence or Self-Sacrifice.' (The Birkenhead Lecture, London, 8 October 2012)

5.3.1 The President of the Supreme Court and Consensus

Since the creation of the Supreme Court, there have been two Presidents, Lord Phillips who retired in August 2012 and subsequently Lord Neuberger. Both openly encouraged consensus, although Lord Phillips was more ‘flexible in his approach’:

I think there are horses for courses. I think if it’s an area of law that is developing.... It is much better that if people are coming at it from slightly different viewpoints they should express their view rather than trying to get some kind of compromise single judgment by laying down inflexible principles.⁴⁹⁴

The President of the Supreme Court has an opportunity to influence judicial cohesion and collective decision making and has the potential to play an important role in social leadership. The importance of social leadership was identified by Danelski in his classic work on the US Supreme Court.⁴⁹⁵ He argued that a high level of consensus in Supreme Court decision making was due in large part to effective task and social leadership and that shifts in the judicial norms of consensus seen in the US Supreme Court were due to changes in behavioural expectations and judicial cohesiveness which was precipitated by social leadership and ‘depends on esteem, ability and personality’ of the leader.⁴⁹⁶ Danelski’s paper serves as a framework for much of the subsequent American literature examining the role of leadership and consensus in the U.S. Supreme Court.⁴⁹⁷ Statistical analysis of judicial decision making in the U.S. Supreme Court from 1800 – 1991 emphasised the association between social leadership and consensus, revealing a norm of judicial consensus which

⁴⁹⁴ A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013), page 104. ‘Flexible approach’ was the term used by Paterson.

⁴⁹⁵ DJ Danelski, ‘The Influence of the Chief Justice in the Decisional Process’ in Walter F Murphy and others (eds), *Courts, Judges & Politics: An Introduction to the Judicial Process* (McGraw Hill 2006)

⁴⁹⁶ *ibid*, pages 675- 676 (stating that the office of Chief Justice does not guarantee leadership)

⁴⁹⁷ *ibid*

varied under the leadership of different Chief Justices.⁴⁹⁸ Although, not the wide variation in consensus associated with leadership in the U.S. Supreme Court, there is a difference between the decision making during the tenure of Lord Phillips and the first year of Lord Neuberger's tenure.

In October 2012, in a speech delivered just after his appointment, Lord Neuberger emphasised unanimity as a judicial norm and made a call for more comprehensive judgments with less concurring and dissenting opinions.⁴⁹⁹ In contrast to the US literature which highlights the importance of the consensual norm for political reasons, Lord Neuberger emphasised the importance for clarity and access to justice.⁵⁰⁰ The difference in motivation is reflected in the nature and form of pressure towards consensus. Although there is little evidence of a consensual norm and pressure for overall consensus, there is considerable evidence of pressure towards single majority judgments. Under Lord Bingham, the House of Lords averaged 20% single majority judgments. In contrast, in the first four years of the UK Supreme Court it has increased to 43%. Paterson suggests that this pressure stems from several members of the UK Supreme Court who served on the Court of Appeal who found working with several judgments led to uncertainty and mixed messages.⁵⁰¹ The emphasis on single majority judgments has been reflected in the decisions of the Supreme Court, with less division in the court since the appointment of Lord Neuberger.⁵⁰² A drop according to Paterson that is unparalleled in 20 years.⁵⁰³

⁴⁹⁸ SL Haynie, 'Leadership and Consensus on the U.S. Supreme Court.' (1992) 54 *Journal of Politics* 1158; L Epstein and others, *The Supreme Court Compendium: Data, Decisions, and Developments* (Congressional Quarterly Press 1994); G Calderia and C Zorn, 'Of Time and Consensual Norms in the Supreme Court' (1998) 42 *American Journal of Political Science* 874

⁴⁹⁹ Lord Neuberger, 'No Judgment - No Justice' (First BAILII Lecture, London, 20 November 2012)

⁵⁰⁰ His call stems from concerns regarding access to justice. Lord Neuberger argues that ensure effective access to justice, especially for increasing numbers of litigants in person, judges should be deliver clear reasoned judgments which are accessible.

⁵⁰¹ Personal communication,

⁵⁰² There was an average of 25% dissenting judgments during the tenure of Lord Phillip. This reduced to 21% during Lord Neuberger's first year of his Presidency of the Supreme Court. The form of these dissents also

5.3.2 Individualism

The influence of individual personalities on division and consensus is not limited to that of the President, nor is the role of social leadership. Indeed, Calderia and Zorn argue that the norm of consensus could also be influenced by changes in the population of the Supreme Court.⁵⁰⁴ They suggest that ‘the infusion of new judges, with different values might result in a decline in the willingness to suppress dissent.’⁵⁰⁵ This is true of the UK Supreme Court as any other court. Paterson agreed and highlighted distinct differences between Supreme Court Justices regarding collegiate working. He argued that there exists on the Supreme Court bench a range of personalities from the more collectively minded (group-orientated) Justices ‘whose primary aim was to engage with their colleagues’ for elucidation as to how they might together best resolve the problems posed by the appeal to those ‘who plough their own furrow’ and the ‘mid-spectrum’ judge who is somewhere in between.⁵⁰⁶ This thesis recognises the Supreme Court judiciary as individuals and therefore recognises that their attitude towards the collective decision making process may influence the rate of consensus and the decision to dissent.

The level of consensus is also influenced by what is known as the ‘freshman effect’ where some newly appointed Supreme Court Justices follow the leadership of their senior colleagues and dissent less. This pattern of behaviour was first identified in the U.S.

changed, with only 8% of decisions containing a single dissenting judgment. Although, there is no pattern in the division and dissent, there is a trend towards less division in the later months of Lord Neuberger’s tenure.

⁵⁰³ Matt Byrne ‘Individualism on the Bench.’ (2014) *The Lawyer* 21.4.2014—cited in A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013)

⁵⁰⁴ G Calderia and C Zorn, ‘Of Time and Consensual Norms in the Supreme Court’ (1998) 42 *American Journal of Political Science* 874

⁵⁰⁵ *ibid.*, page 900

⁵⁰⁶ A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013), pages 132-134

Supreme Court.⁵⁰⁷ In an empirical analysis which encompassed data from several courts of final appeal outside the US, Hanretty could not confirm the ‘freshman effect’ and did not identify an association between consensus and the length of time that the judges have been on the bench.⁵⁰⁸ Although, there is little evidence of a consistent freshman effect on the UK Supreme Court bench, there is a variation in the propensity of individuals to issue a lone dissenting opinion after joining the Supreme Court. Lord Wilson did not dissent alone in the first two years after appointment to the Supreme Court bench. He did join others in adopting a dissenting position in four cases, all of which were close call cases. Lord Reed did issue a lone dissenting judgment, 17 months after delivering his first judgment. In contrast, Lord Sumption delivered a lone dissenting judgment seven months after joining the Supreme Court bench. In the absence of comprehensive data, there is little to be said about the ‘freshman effect’ in the UK Supreme Court. These data, however, do suggest that individual Supreme Court Justices respond differently to psychological influences and pressures concomitant with joining the Supreme Court.

5.3.3 Judicial similarity

While studies of individualism recognise the difference between Supreme Court Justices, US Supreme Court Justice Stephen Breyer argues that it is judicial similarity that leads to a high rate of consensus. He suggests that the judiciary achieve consensus because they share a ‘similar view’ of the law and that judges who have a similar form of legal education and professional experience will have a similar view to the law and achieve agreement.⁵⁰⁹ This theory may have more traction in the UK Supreme Court, where the judiciary have a very

⁵⁰⁷ TM Hagel, 'Freshman Effects' for Supreme Court Justices' (1993) 4 *American Journal of Political Science* 1142; SL Wood and others, 'Acclimation Effects for Supreme Court Justices: A Cross-Validation 1888 - 1940' (1998) 42 *American Journal of Political Science* 690

⁵⁰⁸ Hanretty C, 'Comparative Judicial Dissent' European Consortium of Political Research <<http://new.ecpr.eu/Filestore/PaperProposal/eb76e6a8-2911-4d3c-8fcf-e61920b03e81.pdf>> accessed 2.8.2015

⁵⁰⁹ S Breyer, *Making Our Democracy Work. A Judge's View* (Vintage 2010)

similar legal education, with the majority educated in Oxford or Cambridge with practical experience at the Bar. Indeed, the lack of diversity on the Supreme Court bench has been discussed by many authors.⁵¹⁰ However, despite the lack of diversity in legal education and background in the Supreme Court, there is still disagreement.

5.4 Consensus and agreement

There is an underlying assumption in discussions of judicial decision making that consensus reflects judicial agreement. However, Paterson's study of judicial decision making in the House of Lords and the Supreme Court highlights the variety of decision making and levels of disagreement that may underpin a consensus on the final outcome (outcome consensus).⁵¹¹

The practice of the House of Lords was that each of the Law Lords could decide whether to write separately, with each judge having the opportunity to deliver a dissenting or concurring speech.⁵¹² There was an opportunity to deliver a single agreed text, but it was only used in 20% of cases decided in the House of Lords between 2000 and 2009.⁵¹³ The creation of the Supreme Court afforded an opportunity for change and many academics and senior judiciary supporting the single judgment highlighted the potential uncertainty created by multiple written judgments in cases where the outcome was agreed. Those who wished to maintain the multiple judgment *status quo* emphasised judicial independence and equality and highlighted that multiple judgments provided a more accurate reflection of the judicial

⁵¹⁰ This is discussed in detail in chapter 6.

⁵¹¹ A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013)

⁵¹² This is known as *seriatim* judgments, where judges on the panel give individual judgments in succession.

⁵¹³ A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013), page 102.

decision making process, revealing the variety of ways of reaching an answer and diversity in the application of the law.⁵¹⁴

Although the requirement for a single judgment was ultimately rejected, suggesting that it would create ‘spurious certainty’ where none exists, many of the Supreme Court Justices still favour the single majority judgment.⁵¹⁵ This is reflected in the data, with a doubling of single majority judgments in the first year of the Supreme Court, and a reduction in concurring judgments.⁵¹⁶

The increased prevalence of single judgments would theoretically suggest the concurring judgments may be more prevalent where a Justice disagrees with the reasoning or decides there is an issue of law which requires further elaboration or highlighting.⁵¹⁷ Concurring judgments may therefore reflect judicial disagreement, albeit disagreement about reasoning rather than outcome. Indeed, Lord Neuberger suggested that concurring judgments should be limited to these cases:

[C]oncurring judgments should only be written where they really add (or I suppose, subtract) something to (or from) the leading judgment. On the whole, there is much to be said for giving a concurring judgment only where the topic really would benefit from judicial dialogue.⁵¹⁸

⁵¹⁴ A Le Sueur, 'A Report on Six Seminars about the UK Supreme Court' Queen Mary University of London, School of Law Legal Studies Research Paper <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324749> accessed 13.08.2014

⁵¹⁵ *ibid.*, J Lee, 'A Defence of Concurring Speeches' (2009) Public Law 305

⁵¹⁶ A Paterson, Final Judgment. *The Last Law Lords and the Supreme Court* (Hart Publishing 2013), pages 105 – 108

⁵¹⁷ Lord Hope, 'Do We Really Need a Supreme Court?' (Newcastle Law School, Newcastle, 25 November 2010)

⁵¹⁸ Lord Neuberger, 'No Judgment - No Justice' (First BAILII Lecture, London, 20 November 2012)

Although based on a strong theoretical foundation, in reality, some Supreme Court Justices do not share this motivation. It is impossible to estimate accurately how many cases reflect true consensus, but it may be represented in part by those cases which result in a single majority opinion which account for 55% of all cases which achieve outcome consensus.⁵¹⁹ In the remaining 45% of cases at least one Supreme Court Justice has delivered a concurring judgment. Indeed, these cases may also represent true agreement if the concurring judgment is, as defined by Lord Neuberger, a ‘vanity judgment’ which is a judgment,

[I]ntended to agree with the lead judgment, but not to add anything other than saying ‘I have understood this case’ or ‘I think I can express it better’ or ‘I am interested in this point’ or simply ‘I am here too’. Such judgments, of which virtually every appellate judge, not least myself, has been guilty, are at best a waste of time and space, and, at worst, confusion and uncertainty – although they are popular with academics.⁵²⁰

However, the presence of concurring judgments in these cases, which achieve consensus on the final outcome, may also reflect ‘types of disagreement’.⁵²¹

5.4.1 Consensus and disagreement

The most obvious disagreement, within the context of consensus, is where a Supreme Court Justice agrees with the final outcome but disagrees or is uncertain about the reasoning of the lead judgment. In such cases, the Supreme Court Justice may write a separate judgment highlighting the areas of disagreement and uncertainty. Within these cases, a concurring

⁵¹⁹ This is a very rough estimate as a Supreme Court Justice may disagree in part with the reasoning but agree to a single majority opinion where the pressures of consensus out-weigh the pressure to deliver an independent judgment.

⁵²⁰ Lord Neuberger, ‘No Judgment - No Justice’ (First BAILII Lecture, London, 20 November 2012)

⁵²¹ P Corley, A Steigerwalt and A Ward, *The Puzzle of Unanimity. Consensus on the United States Supreme Court*. (Stanford Law Books 2013), page 4

judgment reflects a level of uncertainty and potentially disagreement, however, the disagreement does not extend to the outcome and the strength of the disagreement does not result in a dissent. Indeed, Lord Neuberger suggested that these are valuable concurring judgments which a judge may have a ‘duty’ to deliver:

However, if you do not agree with all the reasoning in a judgment, it may be your duty to write – at least on the point or points you disagree with. And in some cases, eg where one is extending the scope of tort law in an area, it is often positively helpful to have more than one judgment to take the debate forward.⁵²²

Writing any judgment imposes significant personal costs on the judge writing the judgment. Although the concurring judgment does not bring with it the costs to collegiality a dissenting opinion may risk, the costs of time and effort are significant. These constraints may serve to limit consensus judgments and despite the potential of vanity judgments, no single UK Supreme Court Justice delivers a judgment in every case they hear. On average a Supreme Court Justice will only deliver a judgment in 6% of cases which achieve outcome consensus. In comparison, every Justice delivered a judgment in 29% of close call cases and 21% of cases with a single dissenting opinion. This suggests that in cases which there is no division of judicial opinion, Supreme Court Justices are less likely to deliver a concurring judgment

5.5 The psychology of consensus.

The systems model of the psychology of decision making centres on the uncertain decision. The influence of system 1 decision making, heuristics and the affect response, are heightened where the system 2 reasoning does not provide a clear answer. Consensus in judicial decision

⁵²² Lord Neuberger, 'No Judgment - No Justice' (First BAILII Lecture, London, 20 November 2012)

making could therefore be explained by a lack of uncertainty. Indeed, consensus could be viewed as the product of system 2 reasoning where a single outcome is viewed by all as the most legally plausible. But the systems theory of psychology of decision making also recognises the internal and external influences that may moderate the final decision. Psychology recognises the decision maker as an individual and accordingly that external and internal moderators may exert a varied influence.

On average a Supreme Court Justice will deliver a consensus judgment in slightly more than a quarter of cases (27%). Lords Phillips (28%), Mance (26%) and Dyson (30%) all deliver an average number of judgments. Some Justices deliver a consensus judgment in more cases, including Lords Hope (33%), Brown (34%) and Collins (33%) with Lord Rodger the most likely to write a judgment delivering one in almost half the cases he heard (49%). In contrast, Lord Kerr was the least likely to deliver a judgment, only writing a judgment in one in ten cases (9%). Lady Hale and Lord Clarke deliver a judgment in one in five cases (20%) and Lord Walker slightly more but below average (22%).

The variation in delivering concurring judgments in cases which achieve consensus could therefore simply reflect an individual's propensity to write a judgment and heightened resistance to the potential institutional constraints that may limit judgment writing. These concurring judgments could also reflect a form of judicial disagreement and perhaps uncertainty, not on outcome but reasoning.

5.6 Hypothesis

Cases in which more than one Supreme Court Justice delivers a consensus judgment may therefore reflect the next level on the continuum of uncertainty and division from true

consensus to the close call case. Judicial decision making in the Supreme Court is influenced by many factors and is framed and constrained by the law. In cases which are uncertain, legal considerations do not provide a clear answer and personal values are revealed. However, in cases where there is consensus in the outcome, it is argued that the uncertainty is less and values are less likely to be revealed.

5.7 Selection of cases for analysis

A high number of concurring judgments in a case may reflect the complexity of the case, the importance of the issues discussed but also a level of disagreement and uncertainty. In outcome consensus cases with more than one judgment, there is range of judgment outcomes, from cases where a single Justice delivers a concurring judgment (55%) to one where every Justice delivers a judgment which represents 5% of all consensus cases. The number of judgments is not a reflection of the panel size (Table 10).

Table 10: Consensus judgments: Number of judgments per case (n (%)) in relation to panel size.

| Panel Size | Cases (n) | Single majority judgment | Two judgments | Three + Judgments | All Justices deliver a judgment |
|------------|-----------|--------------------------|---------------|-------------------|---------------------------------|
| Five | 154 | 88 (57%) | 25 (16%) | 32 (21%) | 9 (6%) |
| Seven | 25 | 10 (40%) | 3 (12%) | 11 (44%) | 1 (4%) |
| Nine | 5 | 3 (60%) | 1 (20%) | 1 (20%) | |

In an attempt to select cases which may reflect disagreement in reasoning, only cases where all the Supreme Court Justices agreed on the outcome but more than two Supreme Court Justices on the panel delivered a concurring judgment were selected for analysis. Fifteen cases with outcome consensus were analysed for the expression of personal values (Table 11). Twelve cases were heard by a panel of five Supreme Court Justices and three by a panel of seven. Each decision had a minimum of three judgments and the cases were selected in a sequential series based on the date of the judgment starting with the opening of the Supreme Court. Six of the fifteen cases analysed resulted in three judgments, the remaining had four or more and in two cases every Supreme Court Justice delivered a judgment. Although, the judgments were shorter in consensus cases than in cases where more than one Supreme Court Justice opposes the position of the majority, there was little difference between the length of these judgments and judgments in cases which result in a single dissent.⁵²³

⁵²³ Although there is a wide range in the length of judgments delivered in individual cases, the average length of the combined judgments in minority decision cases is 197 paragraphs. In contrast the average length of the combined judgments of cases which result in a single dissent is 104 paragraphs and a consensus judgment with more than three Supreme Court Justices delivering an individual judgment is 95 paragraphs.

Table 11: Outcome consensus cases selected for value analysis.

*Joint judgments. Those highlighted in bold delivered an individual judgment.

| Consensus Cases | | Area of Law | Judgments |
|---|----------------|---------------------------|---|
| <i>The Office of Fair Trading v Abbey National plc & Others</i> | [2009] UKSC 6 | Banking charges | Lord Phillips Lord Walker Lady Hale Lord Mance Lord Neuberger |
| <i>I (A Child)</i> | [2009] UKSC10 | Family law - Jurisdiction | Lord Hope Lady Hale Lord Collins Lord Kerr Lord Clarke |
| <i>Secretary of State for Environment, Food, and Rural Affairs v Meier and another</i> | [2009] UKSC 11 | Procedural land law | Lord Rodger Lord Walker Lady Hale Lord Neuberger Lord Collins |
| <i>Ahmed Mahad (Ethiopia) v Entry Clearance Officer Sahro Ali (Somalia) and Amal Wehelia (Somalia) (Appellants) v Entry Clearance Officer</i> | [2009] UKSC 16 | Immigration | Lord Hope, Lord Rodger Lord Brown Lord Collins Lord Kerr |
| <i>McInnes v Her Majesty's Advocate (Scotland)</i> | [2010] UKSC 7 | Disclosure /Evidence | Lord Hope, Lord Rodger Lord Walker Lord Brown Lord Kerr |
| <i>Tomlinson and others (FC) v Birmingham City Council</i> | [2010] UKSC 8 | Administrative Law | *Lord Hope, *Lady Hale *Lord Brown Lord Collins Lord Kerr |
| <i>Inveresk plc v Tullis Russell Papermakers Limited (Scotland)</i> | [2010] UKSC19 | Company | Lord Hope, Lord Saville Lord Rodger Lord Collins Lord Clarke |

| Case | | Area of Law | Judgments |
|--|----------------|------------------------------------|--|
| <i>HJ (Iran) Secretary of State for the Home Department</i> <i>HT (Cameroon) v Secretary of State for the Home Department</i> | [2010] UKSC 31 | Asylum | Lord Hope, Lord Rodger Lord Walker Lord Collins Sir John Dyson SCJ |
| <i>Yemshaw v London Borough of Hounslow</i> | [2011] UKSC 3 | Administrative Law (Housing) | Lord Hope, Lord Rodger Lord Walker Lady Hale Lord Brown |
| <i>ZH (Tanzania) v Secretary of State for the Home Department</i> | [2011] UKSC 4 | Rights of the Child Deportation | Lord Hope, Lady Hale Lord Brown Lord Mance Lord Kerr |
| <i>Global Process Systems Inc v Syarikat Takaful Malaysia Berhad</i> | [2011] UKSC 5 | Marine Insurance | Lord Mance Lord Collins Lord Clarke Lord Dyson Lord Saville |
| <i>Berrisford v Mexfield Housing Co-operative Limited</i> | [2011] UKSC 52 | Land Law (Leases) | Lord Hope, Lord Walker Lady Hale Lord Mance Lord Neuberger Lord Clarke Lord Dyson |
| <i>Farstad Supply A/S v Enviroco Limited</i> | [2011] UKSC 16 | Company/Marine | Lord Hope, Lord Rodger Lord Mance Lord Collins Lord Clarke |
| <i>Prest v Petrodel Resources Limited and others</i> | [2013] UKSC 34 | Family Law – Financial remedies | Lord Neuberger, Lord Walker Lady Hale Lord Mance Lord Clarke Lord Wilson Lord Sumption |
| <i>Jones v Kernott</i> | [2011] UKSC 53 | Co-ownership | *Lord Walker *Lady Hale Lord Collins Lord Kerr Lord Wilson |

*Joint judgments. Those highlighted in bold delivered an individual judgment.

5.8 Expression of values in judgments of cases where there is consensus on the outcome

Although there is little difference in the length of the judgments, there is a difference in the number of values statements in the judgments with notably less value statements in the judgments of cases where the Supreme Court Justices achieve consensus on the outcome compared to cases which divide judicial opinion (Table 12). The average number of value statements in a case which achieved outcome consensus was thirteen substantially lower than cases which divided judicial opinion or those with single dissents.

Table 12: Values expressed in judgments: Consensus and divided

| Case division | Average value statements per case | Majority (per judgment) |
|----------------|-----------------------------------|-------------------------|
| Minority | 80 | 12 |
| Single Dissent | 29 | 5 |
| Consensus | 13 | 3 |

Values presented as an average per case and per judgment.

Within the judgments of cases that achieve consensus, the majority of the value statements were in the longer lead judgments with an average of 5 value statements per judgment compared to 3 value statements per judgment for consensus judgments. In the majority (13/15) of the consensus cases the values expressed in the lead judgment are also expressed (albeit to a lesser extent) in the consensus judgments. Unlike cases which divide judicial opinion there was little difference in the pattern of value expression.

The consensus case with the most value statements per judgment was *Berrisford v Mexfield Housing Co-operative Limited* which re-examined the certainty of duration requirement in leases.⁵²⁴ The case was heard by a panel of seven Supreme Court Justices. Lord Sumption delivered the lead judgment and five Supreme Court Justices (Lords Neuberger, Walker, Mance and Clarke and Lady Hale) delivered consensus judgments. Although, the case with the most value statements, there was on average only six value statements per judgment.⁵²⁵

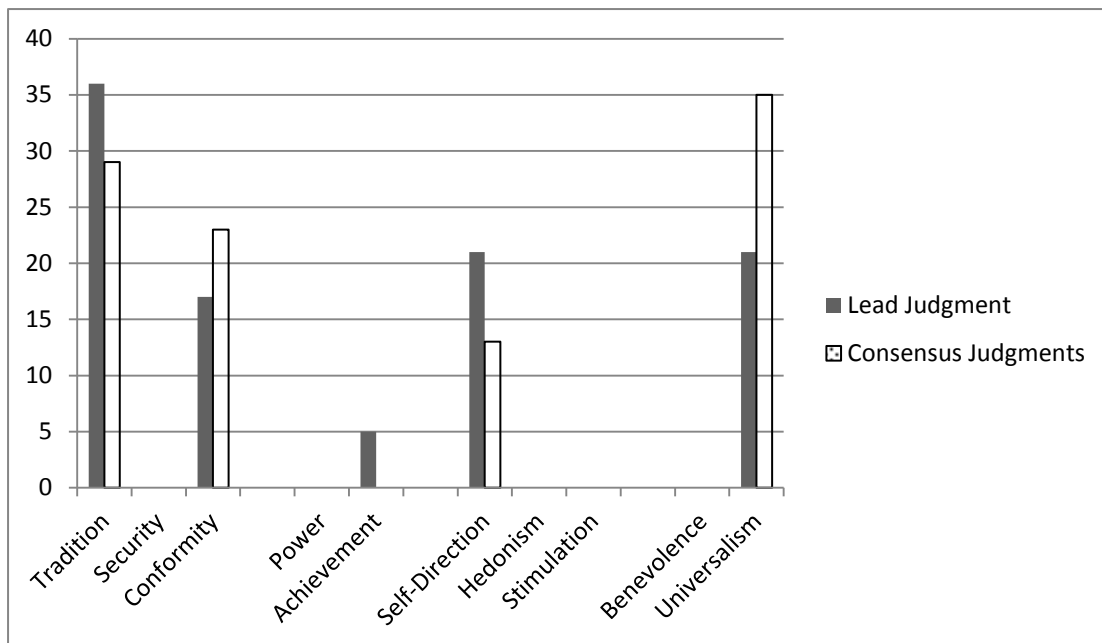


Figure 5.8-1 Values expressed in the lead judgment and consensus judgments in *Berrisford v Mexfield Housing Co-operative Limited*

The values are expressed as a percentage of the total value expressed in the judgment (lead judgment n= 19, consensus judgments n= 17).

Although there are very few value statements, the data suggests that there is very little difference in the pattern of expression of values in the judgments of cases which reach

⁵²⁴ *Berrisford v Mexfield Housing Co-operative Limited* [2011] UKSC 52

⁵²⁵ There was a very small total number of value statements and calculation of a percentage had little statistical validity. However, the data was still expressed as a percentage to facilitate comparison and to control for the number of judgments.

agreement on the outcome (Figure 5.8 – 1). This undifferentiated pattern of value expression was evident in 13 of the 15 cases analysed. One case was notable in this subset of thirteen, it was *HJ (Iran) v Secretary of State for the Home Department* which involved asylum claims made by two homosexual men.⁵²⁶ The court held that the Convention Relating to the Status of Refugees (1951) protects homosexual men, who should not have to deny their sexuality. It is the judgment of Lord Rodger in this case which is remarkable, not because of the nature of values expressed in the judgment but because of the number of value laden statements within a consensus judgment. Typically, there are few values expressed in the judgments of cases in which the panel agree on the final outcome. However, in this case, Lord Rodger delivered a longer, more value laden judgment than the lead judgment delivered by Lord Hope.⁵²⁷ This value laden judgment is unusual for a concurring judgment. Although unusual in the density of values, the values expressed were similar to those expressed by the majority and centred on *self-direction*:

Although counsel for the Secretary of State was at pains to draw this distinction between assuming that the applicant would act discreetly to avoid persecution and finding that this is what he would in fact do, the distinction is pretty unrealistic. Unless he were minded to swell the ranks of gay martyrs, when faced with a real threat of persecution, the applicant would have no real choice: he would be compelled to act discreetly.⁵²⁸

and equality:

⁵²⁶ *HJ (Iran) (FC) v Secretary of State for the Home Department* [2010] UKSC31

⁵²⁷ The judgment by Lord Hope consisted of 39 paragraphs with only three value statements. In contrast, Lord Rodger delivered a judgment of 45 paragraphs with twelve value statements. This value density is similar to a judgment in a case which divided judicial opinion.

⁵²⁸ Lord Rodger in *HJ v Secretary of State for the Home Department* (n 308), [59]

No-one would proceed on the basis that a straight man or woman could find it reasonably tolerable to conceal his or her sexual identity indefinitely to avoid suffering persecution. Nor would anyone proceed on the basis that a man or woman could find it reasonably tolerable to conceal his or her race indefinitely to avoid suffering persecution. Such an assumption about gay men and lesbian women is equally unacceptable.⁵²⁹

Within the cases which achieved consensus were three cases where individual Supreme Court Justices expressed some uncertainty regarding the final decision in their judgments. The first, *Secretary of State for Environment, Food, and Rural Affairs v Meier* was highlighted by Paterson as one with a ‘change of mind’.⁵³⁰ The case addressed whether an injunction could be issued to prevent somebody from trespassing on land which they do not currently occupy. The court decided that such an order could not be made. Lord Collins although reaching a decision in support of the majority position, highlighted his initial attraction to the alternative:

I was particularly impressed by the point that an injunction might be a remedy which was not capable of being employed effectively in cases such as this. But I am now convinced that there is no legitimate basis for making an order for possession in an action for the recovery of wholly distinct land of which the defendant is not in possession.⁵³¹

Despite the initial uncertainty, the majority of values within his judgment mirrored those expressed by the other Supreme Court Justices and lacked the polarisation of values observed in single dissenting judgments.

⁵²⁹ Lord Rodger in *HJ v Secretary of State for the Home Department* (n 308), [76].

⁵³⁰ *Secretary of State for Environment, Food, and Rural Affairs v Meier* [2009] UKSC11

⁵³¹ *Ibid*, [96], A Paterson, *Final Judgment. The Law Law Lords and the Supreme Court* (Hart Publishing 2013)

Similarly, Lord Kerr, in the case of *Tomlinson and others v Birmingham City Council* also highlighted his initial uncertainty with the final decision.⁵³² The case reviewed the application of s193 of the Housing Act 1996 and the Council's duty to provide accommodation to homeless persons. The Supreme Court examined whether the system laid down by the 1996 Act was consistent with Article 6 of the European Convention on Human Rights. The Supreme Court unanimously held that the 1996 Act did not confer upon the claimants any 'civil rights' and Article 6 was not engaged. There were three judgments in the decision, the lead judgment was written by Lord Hope with whom Lady Hale and Lord Brown agreed. Lord Collins and Lord Kerr delivered separate concurring judgments.

As with other judgments in cases which reached outcome consensus, the judgments were short with few value coded statements. Lord Hope in the lead judgment which ran to 57 paragraphs and espoused values encompassed across three main value domains *self-direction*, *universalism* and *security*, with the majority of values located within *security* and the maintenance of social order by recognising the limitation of State resources. Lord Collins agreed with the outcome but was not completely convinced by the reasoning of Lord Hope. In his short judgment, of fifteen paragraphs, he also espoused values encompassed within *security*. Lord Kerr, although again in agreement with outcome, highlighted his difficulty with the final decision:

I agree with Lord Hope and Lord Collins that this appeal should be dismissed. One can recognise, however, the initial attraction of the argument that the right involved here was a civil right within the autonomous meaning of article 6.....But I have been persuaded by the

⁵³² *Tomlinson v Birmingham City Council* [2010] , UKSC8. This case is also cited as *Ali v Birmingham City Council* [2010] UKSC8. T Cross, 'Is There a "Civil Right" under Article 6? Ten Principles for Public Lawyers' (2010) 15 *Judicial Review* 366; M Elliott, 'Statutory Duties, Administrative Discretion and "Civil Rights"' (2010) 69 *Cambridge Law Journal* 215

respondent's argument that the case-law points unmistakably in the opposite direction and I think that now is the time to recognise its effect. I have not found it easy to reach a principled basis for the distinction between social security payments and social welfare provision for both require the expenditure of public resources; both provide a valuable resource to the recipient; and both are activated by a need on the part of the beneficiary.⁵³³

The importance of precedent to his final decision was reflected in the values expressed in his judgment, with Lord Kerr espousing values encompassed within *tradition*, values which were not espoused by the other Supreme Court Justices. Although few in number, the polarisation of values observed in this consensus judgment was similar to that seen in single dissenting judgments. In the Schwartz values model, the values encompassed in *tradition* are located adjacent to those encompassed in *security* and both are located within the broader classification of *conservation*. Both values centre on self restriction, preservation of the past and resistance to change. This collocation of values within *conservation*, may have served to facilitate consensus.

Unlike, Lord Kerr who expressed initial uncertainty in the decision, Lord Brown in *Yemshaw v London Borough of Hounslow* expressed considerable uncertainty with the final decision throughout his judgment.⁵³⁴ The case which centred on the definition of domestic violence in Part VII of the Housing Act 1996, deals with housing the homeless.⁵³⁵ The Supreme Court was asked to determine if domestic violence could be extended beyond physical contact to

⁵³³ Lord Kerr *Tomlinson and others v Birmingham City Council* (n 527), [74-75]

⁵³⁴ *Yemshaw v London Borough of Hounslow* [2011] UKSC 3

⁵³⁵ Housing Act 1996, s 177(1).

incorporate other forms of violent conduct and abuse. The Supreme Court Justices held that (as per Lord Rodger):

Parliament has provided that it is not reasonable for someone to continue to occupy accommodation if it is probable that this will lead to her being subjected to violence in the form of deliberate conduct, or threats of deliberate conduct, that may cause her physical harm. So the person at risk is automatically homeless for the purposes of the 1996 Act. I can see no reason why Parliament would have intended the position to be any different where someone will be subjected to deliberate conduct, or threats of such conduct, that may cause her psychological harm. I would therefore interpret ‘violence’ as including such conduct and the subsection as applying in such cases. To conclude otherwise would be to play down the serious nature of psychological harm.⁵³⁶

This case was highlighted by Lady Hale as a case where the Supreme Court ‘moved with the times’.⁵³⁷ Lady Hale delivered the lead judgment, with which Lord Hope and Lord Walker agreed. Lord Rodger and Lord Brown delivered concurring judgments, and it was the judgment delivered by Lord Brown that was notable.

⁵³⁶ *Yemshaw v London Borough of Hounslow* [2011] UKSC 3, [46]

⁵³⁷ Lady Hale in *Yemshaw v London Borough of Hounslow* [2011] UKSC 3, [35]

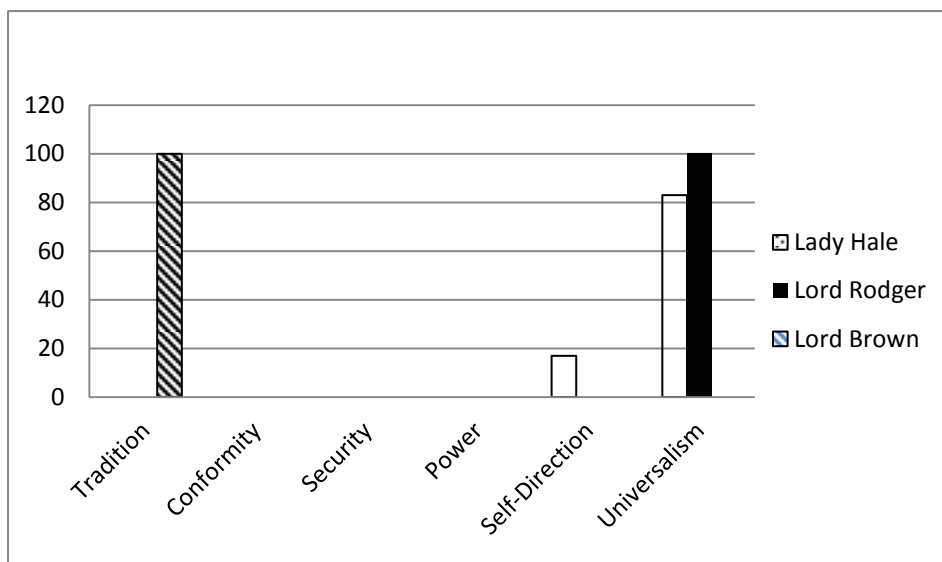


Figure 5.8-2: Value analysis of the judgments in *Yemshaw v London Borough of Hounslow*

The judgments by Lady Hale and Lord Rodger centred on the protection of the vulnerable and values encompassed in *universalism* and *self-direction* (Figure 5.8-2). In contrast, Lord Brown expressed values encompassed in *tradition* and maintaining the *status quo*, with reasoning which centred on the importance of Parliamentary intention in statutory interpretation and which adopted a narrow approach to statutory interpretation similar to the reasoning of the Court of Appeal which yielded the opposite decision. Indeed, in the opening paragraphs of his judgment Lord Brown highlighted his uncertainty with the decision:

But I have nonetheless found this a much more difficult case than other members of the Court appear to have done and I cannot hide my profound *doubt* as to whether at any stage of their legislative history the ‘domestic violence’ provisions with which we are here concerned – now enacted as

sections 177 and 198 of the 1996 Act - were intended to extend beyond the limits of physical violence.⁵³⁸

Tempting though it is to accept this argument – one does not, after all, like to appear old-fashioned – *I confess to doubts and hesitation here too*.
....With the best will in the world I find it difficult to accept that there is quite the same obvious urgency in re-housing those subject to psychological abuse, let alone that it will be possible to identify this substantially wider class of prospective victims, however precisely they may be defined, with anything like the same ease.⁵³⁹

Despite the residual uncertainty with the outcome Lord Brown openly acknowledged that he had chosen not to dissent concluding:

Rather the Court has no alternative but to decide whether it is indeed now right, pursuant to the Fitzpatrick principle, to give to the terms ‘domestic violence’ and ‘violence’ the wider meaning contended for by the appellant and both interveners. In taking this course we would, of course, be overturning two clear and unanimous decisions of the Court of Appeal: respectively of Mummery, Jacob and Neuberger LJ in *Danesh v Kensington and Chelsea Royal London Borough Council* [2007] 1 WLR 69 and of Waller, Laws and Etherton LJ in the present case. I have already *indicated my very real doubts about doing so*. At the end of the day, however, *I do not feel sufficiently strongly as to the proper outcome*

⁵³⁸ Lord Brown in *Yemshaw v London Borough of Hounslow* [2011] UKSC 3, [48], emphasis added.

⁵³⁹ *Ibid*, [57], emphasis added.

of the appeal to carry these doubts to the point of dissent. I am content that the views of the majority should prevail and that the appeal should be allowed.⁵⁴⁰

Although there was limited value expression, the doubt expressed by Lord Brown in the final outcome was reflected in the values he espoused. Indeed, the values expressed in the judgment would indicate dissent. This case presents a good example of where values are overwhelmed by situational factors. Lord Brown although uncertain about the decision, does not feel sufficiently strongly to dissent alone.

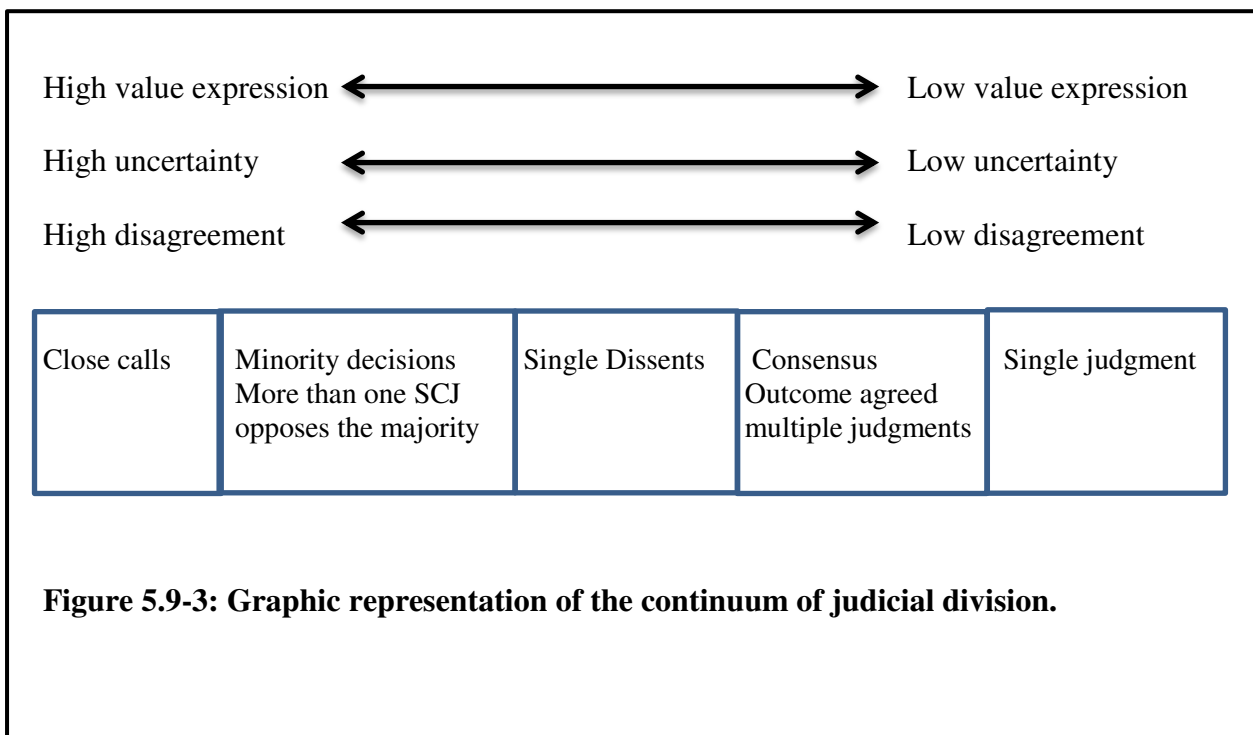
5.9 Values and consensus decisions

The analysis of values in judgments of cases which achieve outcome consensus was essential to identify the limits of the value: decision paradigm in legal judgments. Value expression was reduced in the judgments of cases which do not divide judicial opinion compared to judgments of cases which do. In 80% of the cases analysed, in which there was consensus on the outcome, the majority of values were expressed in the leading judgment. Unlike cases which divided judicial opinion, the individual judgments of consensus cases reflected the same values. In three cases, within the dataset, a Supreme Court Justice expressed some reservation about the final decision. In two, of these three cases, the values espoused by the Supreme Court Justice who expressed the reservations did not reflect those identified in the lead judgment.

In the same way that cases which divide judicial opinion can be viewed on a continuum of disagreement, cases can also be viewed as on a continuum of uncertainty. If cases which

⁵⁴⁰ *ibid* [60], emphasis added.

divide judicial opinion can be viewed as uncertain, then cases which achieve consensus could be represented on the continuum as closer to certainty. In these cases, the Supreme Court Justices perceive the law which dictates the outcome as more certain, therefore limiting discretion and the role of non-comparative considerations. As such, the Supreme Court Justices do not draw on values to support their reasoning. This is reflected in the limited value expression in the judgments which achieve outcome consensus. In the majority of cases the value expression was largely confined to the lead judgment. Indeed, with the exception of specific cases where a Supreme Court Justice identified an element of uncertainty regarding the final decision, there was very little difference in the pattern of value expression between the judgments. Differential value expression was only identified in judgments which highlighted some uncertainty. The relationship between values, uncertainty and division is graphically represented below (Figure 5.9-3).



The analysis of consensus cases has served to further qualify the role of values in legal judgments. Personal values are revealed in cases which divide judicial opinion, cases where the law is perceived as uncertain and judicial discretion plays a role. This is particularly true of cases where more than one Supreme Court Justice supports a minority position. Although there is significant value expression in lone dissenting judgments, the Supreme Court Justices supporting the majority position view the outcome as more certain and are less likely to reveal values in their judgments. Values are rarely revealed in cases which achieve consensus. The findings do not suggest that values do not play a role in consensus decisions, but suggests that the values which underpin the decisions are not revealed in the judgments where there is agreement on the outcome.

Psychological studies of decision making suggest that the influence of values is heightened in uncertain decisions, where system 2 reasoning does not provide a clear answer. The value analysis of cases supports this, with increased value expression associated with legal uncertainty and the exercise of judicial discretion. Epstein *et al* (2012) argues that the intrinsic personal influences on decision making are still present in cases which do not divide judicial opinion but suggests that if the perceived strength of the opposing argument is low then institutional and psychological factors which promote dissent aversion will prevail and produce a unanimous decision.⁵⁴¹ This thesis affirms this proposal, suggesting that the internal driver for dissent is the perception that the outcome is wrong and that this perception is mediated through uncertainty. When the perception of uncertainty is weak, then the institutional and psychological factors will encourage consensus.

⁵⁴¹ L Epstein, 'The Norm of Consensus on the U.S. Supreme Court' (2001) 45 American Journal of Political Science 362

In framing judicial decision making as a psychological process, this thesis recognises that the influences of these institutional and psychological pressures on decision making will vary between individuals. The next part of the thesis will move from the case as the unit of analysis to the individual Supreme Court Justice. In doing so, the analysis can examine the value: decision paradigm and the factors that may enable and constrain the influence of values on legal judgments at an individual level.

Chapter 6

The Value: Decision Paradigm and Individual Decision Making

[F]rom time to time one's own particular approach to concepts of justice and fairness, comes in as does one's own particular background and experiences may lead one to look at a particular factual situation in a different way.⁵⁴²

The previous chapters have centred on the cases heard in the Supreme Court revealing personal values in judgments of cases which divide judicial opinion. This chapter turns the focus from cases to individual Supreme Court Justices, to examine whether individual Supreme Court Justices consistently espouse certain values and whether these values are reflected in their judicial decisions.

Personal values are informed by life experiences and lurk beneath the surface of consciousness. They serve as a largely subconscious influence on judicial decision making. The subconscious nature of this influence suggests that values may be viewed as a form of implicit bias. Although, in law, bias has a very negative connotation, in psychology the term bias simply denotes a displacement of one's responses along a continuum of possible judgments. The term does not bear a pejorative meaning.

This chapter sets out four case studies revealing the value: decision paradigm at an individual level, the differences in individual value expression and considers the factors that may enable or limit that expression. The cases were selected using maximum variation

⁵⁴² Lady Hale 'The Highest Court in the Land: Justice Maker', (BBC4, 27 January 2011) <<http://www.bbc.co.uk/programmes/p00dhn8n>> accessed 3.08.2015

sampling, a method of purposive sampling used in small datasets. This method of purposive sampling is an extension of the statistical principle of regression towards the mean and is based on the premise that if the analysis is carried out on an extreme subpopulation then it will also reflect those within the population who are average. By including in the analysis those Supreme Court Justices who have maximum variation, the average Justice is also included. The case studies chosen are the best examples of value: decision paradigm variation and serve as the appropriate examples within the small subset of ten Supreme Court Justices assessed. The values of all the Supreme Court Justices and the influences on these values on decisions are discussed in the final chapter.

6.1 The role of the individual in judicial decisions

The UK Supreme Court Justices have increasingly accepted the influence of personal factors on judicial decisions, especially in cases which divide judicial opinion:

I am not surprised that there are differing opinions that is inevitable at this level with the nature of the cases that we hear. They are complicated, they are difficult and some of them involve questions of judgment and philosophy... I mean an approach to life. It is not at all surprising that there are different views.⁵⁴³

In discussing the subconscious influences on judicial decision making, it is important to recognise the Supreme Court Justices as individuals and that the external and internal factors that influence decision making may have a different effect on each individual. As with the variation in number of consensus judgments delivered by an individual Supreme Court

⁵⁴³ Lord Dyson on <<http://www.guardian.co.uk/law/video/2011/oct/25/supreme-court-deliver-justice-video>> accessed 2.08.2015

Justice, there is also a variation in the propensity to deliver a dissenting judgment. The decision to dissent is not without a legal context and the facts and the law surrounding the case will have a significant influence on the decision to disagree. But as highlighted in the judgment by Lord Brown, in *Yemshaw v London Borough of Hounslow*, institutional and psychological factors also play a significant role in the decision to dissent.⁵⁴⁴ Psychological factors and institutional factors including a high workload, collegiality and a norm of consensus can all serve to limit dissent.⁵⁴⁵ These external and internal influences combine to create an effect known as ‘dissent aversion’ which was described in the US Supreme Court by Epstein *et al* (2010), and defined as a situation where a Justice may not dissent even when they disagree with the majority opinion.⁵⁴⁶ It was dissent aversion which encouraged Lord Brown to join the majority in *Yemshaw*.⁵⁴⁷

Lord Brown is not alone. Supreme Court Justices are individuals and the drive to dissent will vary within an individual. Indeed, the perception of the barriers to dissent differs among Supreme Court Justices. This was highlighted by Paterson.⁵⁴⁸ Some Supreme Court Justices view the threshold for dissent as a very high threshold as Lord Wilson suggests when he stated;

⁵⁴⁴ *Yemshaw v London Borough of Hounslow* [2011] UKSC 3

⁵⁴⁵ Discussed in chapter 4. Effort aversion, a psychological factor, was described by Epstein *et al* (2010) to denote a lack of motivation to take on the additional workload associated with writing a dissenting judgment. L Epstein, WM Landes and RA Posner, 'Why (and When) Judges Dissent: A Theoretical And Empirical Analysis' (2011) 3 *Journal of Legal Analysis* 101

⁵⁴⁶ *ibid*

⁵⁴⁷ *Yemshaw v London Borough of Hounslow* [2011] UKSC 3

⁵⁴⁸ A Paterson, *Final Judgment. The Law Lords and the Supreme Court* (Hart Publishing 2013)

‘I swallow hard and accept a majority decisions unless there was a sort of propulsion... of objection. I can’t live with it, I am sorry I can’t live with it – then I think you dissent.’⁵⁴⁹

In comparison, Lord Kerr argues that the threshold is lower:

[I]f you feel that the decision is wrong or that the reasoning supporting the decision is wrong, you shouldn’t shirk away from writing a dissent.⁵⁵⁰

This variation in the threshold to dissent and perception of the pressure for consensus is reflected in the propensity to dissent alone, which varies amongst the individual Supreme Court Justices (Table 13). The majority of Supreme Court Justices have a rate of sole dissent of between one and two percent. All Supreme Court Justices face similar social and institutional pressures to conform, yet as suggested by his statement Lord Kerr is more predisposed than average to dissent alone. Lady Hale is also more likely than average to deliver a lone dissenting judgment. Lady Hale and Lord Kerr are not ‘great dissenters’, both only delivered six and eight lone dissents respectively in the first four years. The numbers are very low and therefore little can be made of the pattern of dissent, but notably neither Supreme Court Justice delivered a lone dissenting opinion in the first year of Lord Neuberger’s tenure suggesting that the increased external constraints can deter even those who are not as susceptible to the external pressures of consensus.

6.2 Judicial decision making and transparency

Kirby argues that the publication of minority or dissenting judgments serves to enhance the transparency of judicial decision making and the revealing disagreement within the judicial

⁵⁴⁹ *ibid*, page 117

⁵⁵⁰ *ibid*, page 117.

body is more transparent than the creation of artificial coherence.⁵⁵¹ This transparent disagreement according to Alder serves to draw public attention to the incommensurable ever changing values of society and keeps choices alive for the future.⁵⁵² However, the requirements of transparency extend beyond the publication of dissent. Transparency requires that a judgment reveals all the factors that influence the final decision. Although the perception of justice and what is 'right' and 'fair' is influenced by many factors both external, such as the norms of the prevailing culture, and internal, including personal experiences and values, these factors rarely appear in judgments.⁵⁵³ The influence of these factors is largely subconscious and hidden from view, even from the decision maker. It is in uncertain judgments, which have a reliance on heuristics, that subconscious influences play a role and it these decisions that social cognition psychologists suggest are susceptible to subconscious bias.

⁵⁵¹ Justice Michael Kirby, 'Judicial Dissent - Common Law and Civil Law Traditions' (2007) 123 *Law Quarterly Review* 379

⁵⁵² J Adler, 'Dissents in Courts of Last Resort: Tragic Choices.' (2000) 20 *Oxford Journal of Legal Studies* 221

⁵⁵³ K Llewellyn, 'Some Realism about Realism- Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1237; U Moore and CC Callaghan, 'Law and Learning Theory: A Study of Legal Control' (1943 - 1944) 53 *The Yale Law Journal* 1

Table 13: Distribution of decisions of each Supreme Court Justice over the first four years.

| Justice | All Cases | | | Divided Cases | | Close Call Cases | | Majority Cases | | Dissents | |
|---------------|-----------|-----------|--------------------------|----------------|----------------|------------------|----------------|----------------|----------------|----------------|---------------|
| | Total | Consensus | Rate of lone dissent (%) | Majority % (n) | Minority % (n) | Majority % (n) | Minority % (n) | Majority % (n) | Minority % (n) | Majority % (n) | Dissent % (n) |
| Lord Phillips | 76 | 68% (52) | 1.5% (1) | 76% (11) | 24% (3) | 80% (4) | 20% (1) | 78% (7) | 22% (2) | 90% (9) | 10% (1) |
| Lord Hope | 126 | 75% (94) | 0.8% (1) | 58% (10) | 42% (7) | 50% (6) | 50% (6) | 80% (4) | 20% (1) | 95% (14) | 5% (1) |
| Lord Brown | 90 | 65% (58) | 2% (2) | 53% (8) | 47% (7) | 37% (3) | 63% (5) | 71% (5) | 29% (2) | 88% (15) | 12% (2) |
| Lord Rodger | 61 | 76% (45) | 1.6% (1) | 22% (2) | 78% (7) | 0 | 100% (5) | 50% (2) | 50% (2) | 85% (6) | 15% (1) |
| Lord Walker | 104 | 72% (75) | 2% (2) | 71% (12) | 29% (5) | 58% (7) | 42% (5) | 100% (5) | 0 | 83% (10) | 17% (2) |
| Lady Hale | 119 | 74% (88) | 5% (6) | 53% (9) | 47% (8) | 62% (5) | 38% (3) | 45% (4) | 55% (5) | 57% (8) | 43% (6) |
| Lord Kerr | 101 | 69% (70) | 8% (8) | 76% (13) | 24% (4) | 62% (5) | 38% (3) | 89% (8) | 11% (1) | 43% (6) | 57% (8) |
| Lord Mance | 92 | 74% (68) | 2% (2) | 58% (7) | 42% (5) | 75% (6) | 25% (2) | 25% (1) | 75% (3) | 91% (10) | 9% (2) |
| Lord Collins | 51 | 76% (39) | 0 | 87% (7) | 13% (1) | 80% (4) | 20% (1) | 100% (4) | 0 | 100% (4) | 0 |
| Lord Clarke | 94 | 75% (71) | 1% (1) | 43% (6) | 57% (8) | 50% (5) | 50% (5) | 25% (1) | 75% (3) | 89% (8) | 1% (1) |

6.3 Judicial decisions and implicit bias

A belief is explicit if it is consciously endorsed. The study of implicit cognition suggests that actors do not always have conscious control over the processes that motivate their actions and implicit attitudes may exert a subconscious influence on the decision making process.⁵⁵⁴ Implicit attitudes are defined by Greenwald and Banaji (1995) as ‘introspectively unidentified (or inaccurately identified) traces of past experience that mediate favourable or unfavourable thought, feeling, or action toward social objects.’⁵⁵⁵ Of note these subconscious influences can be both favourable and unfavourable. However, the subconscious nature of these attitudes, can serve to create a dissonance between expressed explicit attitudes and the implicit attitudes which control social behaviour.⁵⁵⁶

The potential effect of these subconscious influences on decision making is to create an implicit bias and displace one’s responses along a continuum of possible judgments. Implicit bias therefore serves as an subconscious and uncontrollable facet of decision making. One of the remarkable features of implicit bias is that individuals may not be aware of their own bias and as suggested above, a decision maker may harbour implicit biases that are diametrically opposed to their explicitly stated and consciously avowed attitudes.⁵⁵⁷

⁵⁵⁴ AG Greenwald and L Hamilton Krieger, 'Implicit Bias: Scientific Foundations' (2006) 94 *California Law Review* 945

⁵⁵⁵ AG Greenwald and MR Banaji, 'Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes ' (1995) 102 *Psychological Review* 4

⁵⁵⁶ CN Macrae and others, 'Out of Mind but Back in Sight: Stereotypes on the Rebound' (1994) 67 *Journal of Personality and Social Psychology* 808; S Epstein and others, 'Individual Differences in Intuitive–Experiential and Analytical–Rational Thinking Styles' (1996) 71 *Journal of Personality and Social Psychology* 390; CN Macrae and GV Bodenhausen, 'Social Cognition: Thinking Categorically about Others' (2000) 51 *Annual Review of Psychology* 93; JA Bargh and others, 'The Automated Will: Nonconscious Activation and Pursuit of Behavioral Goals' (2001) 81 *J Pers Soc Psychol* 1014

⁵⁵⁷ TD Wilson, S Lindsey and TY Schooler, 'A Model of Dual Attitudes' (2000) 107 *Psychological Review* 101; D Kelly and E Roedder, 'Racial Cognition and the Ethics of Implicit Bias' (2008) 3 *Philosophy Compass* 522

Conscious bias is easily ascertained in judicial decision making, indeed it is this form of bias that is explored in confirmation hearings and underpins the studies of judicial ideology and decision making. This thesis is centred on the second form of bias, implicit bias.

Although there are a large number of studies suggesting implicit bias is pervasive in society and there is extensive literature regarding the potential impact of judicial implicit bias, based on race, gender and other legally protected characteristics, there are few empirical studies which examine the influence of implicit bias on judicial decision making.⁵⁵⁸ These studies tend to highlight negative implicit bias against members of traditionally disadvantaged groups and demonstrate that even those who embrace non-discrimination norms can treat these groups differently.⁵⁵⁹ The majority of this work is carried out on sentencing in the US courts. The authors use the differential pattern in sentencing correlated with race as evidence of implicit bias.⁵⁶⁰ Although, the equivalent studies have not been carried out in the UK, data from the UK Ministry of Justice Statistics on Race and the Criminal Justice System 2012,

⁵⁵⁸ SR Bagenstos, 'Implicit Bias, "Science," and Anti-Discrimination Law' (2007) 1 *Harvard Law and Policy Review* 477; J Kang and K Lane, 'Seeing Through Colorblindness: Implicit bias and the Law' (2010) 58 *UCLA Law Review* 465; M Shayo and A Zussman, 'Judicial Ingroup Bias in the Shadow of Terrorism' (2011) 126 *The Quarterly Journal of Economics* 1447; J Kang and others, 'Implicit Bias in the Courtroom' (2012) 55 *UCLA Law Review* 1124

⁵⁵⁹ AG Greenwald, D McGhee and JLK Schwartz, 'Measuring Individual Differences in Implicit Cognition: The Implicit Association Test.' (1998) 74 *Personality and Social Psychology* 1464; G Mitchell and PE Tetlock, 'Anti-Discrimination Law and the Perils of Misreading' (2006) 67 *Ohio State Law Journal* 1023; Greenwald AG and Hamilton Krieger L, 'Implicit Bias: Scientific Foundations.' (2006) 94 *California Law Review* 945; JJ Rachlinski and SL Johnson, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84 *Notre Dame Law Review* 1195

⁵⁶⁰ H Zeisel, 'Race Bias in the Administration of the Death Penalty: The Florida Experience' (1981) 95 *Harvard Law Review* 456; C Spohn, J Gruhl and S Welch, 'The Effect of Race on Sentencing: A Re-examination of an Unsettled Question' (1981) *Law and Society Review* 71; C Spohn, 'The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities' (1990) *Law and Society Review* 1197; A Von Hirsch and JV Roberts, 'Racial Disparity in Sentencing: Reflections on the Hood Study' (1997) 36 *The Howard Journal of Criminal Justice* 227; English B, Mussweiler T and Strack F, 'Playing Dice with Criminal Sentence: The Influence of Irrelevant Anchors on Experts Judicial Decision Making.' (2006) 32 *Personality and Social Psychology Bulletin* 188

suggests the UK judges and magistrates may also be subject to similar influences.⁵⁶¹ Indeed, the presence of negative implicit bias poses a significant challenge to judicial decision making.⁵⁶² This thesis does not address negative forms of implicit bias, in contrast, this thesis addresses bias as a predisposition along a continuum without any negative connotations.

It is possible to scrutinise and regulate explicit bias, indeed, the central focus of anti-discrimination law is the prevention of explicit bias or conscious biased decision making. In contrast, implicit bias cannot be afforded the same scrutiny or regulation. Implicit bias operates in the absence of explicit intent and operates largely subconsciously.⁵⁶³ Although it may be argued that negative biases are morally wrong, the decision maker is not morally culpable.⁵⁶⁴ As implicit biases defy intentional control, the control principle central to theories of moral responsibility attribution is violated.⁵⁶⁵ Even professional decision makers, are unable to prevent unwanted implicit biases from influencing their decision making.

Judicial decision making is the subject of many inherent psychological influences which act at a subconscious level. Personal values are one of these influences. The role of personal values is mediated through intuition, instinctive reactions which vary from individual to individual. Judicial instinct plays an important role in decision making as Richard A Posner

⁵⁶¹ Race and the Criminal Justice System published by the Ministry for Justice on the 14.10.2013 <<https://www.gov.uk/government/collections/race-and-the-criminal-justice-system>> accessed 5.6.2014. The statistics demonstrate sentencing patterns similar to those observed in the US studies, with the average prison sentence handed down to Caucasian criminals by courts in England and Wales seven months shorter than those given to Afro-Caribbean offenders.

⁵⁶² LH Krieger and ST Fiske, 'Behavioural Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment' (2006) 94 California Law Review 997

⁵⁶³ *ibid*

⁵⁶⁴ KG Shaver, *The Attribution of Blame: Causality, Responsibility, and Blameworthiness* (Springer 1985); S Wigley, 'Automaticity, Consciousness, and Moral Responsibility' (2007) 20 Philosophical Psychology 209; D Kelly and E Roedder, 'Racial Cognition and the Ethics of Implicit Bias' (2008) 3 Philosophy Compass 522

⁵⁶⁵ *ibid*

suggests judicial instinct ‘may be a more accurate and speedier alternative in particular circumstances to analytical reasoning....[however] being tacit, it is inarticulate.’⁵⁶⁶

The tacit, inarticulate nature of the influences which underpin these decisions may serve to bias a decision in favour of a specific outcome. Personal values, mediated through instinct, may therefore serve as a form of implicit bias which ‘lurks beneath the surface of consciousness.’⁵⁶⁷ It is recognised that the judiciary strive to make decisions that are ‘correct, fair, ethical, and free from the influence of biases.’⁵⁶⁸ However, personal values, mediated through system 1 heuristics, influence decision making, even within the external constraints of judicial decision making, and may potentially serve as a pervasive form of implicit bias especially in cases which divide judicial opinion.

6.4 Hypothesis

By focusing on individual Supreme Court Justices, this chapter seeks to address the role of values as an implicit form of bias in judicial decisions. In cases which divide judicial decisions, which require the exercise of judicial discretion, the absence of legal certainty facilitates decisions anchored in the initial gut reaction and personal values. If personal values function as a form of implicit bias, then there should be a consistent pattern of value expression and decision making by individual Supreme Court Justices across a range of cases.

⁵⁶⁶ RA Posner, 'The Role of the Judge in the Twenty-First Century' (2006) 86 Boston University Law Review 1049, page 1064

⁵⁶⁷ JF Irwin and DL Real, 'Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity.' (2010) 43 McGeorge Law Review 1, page 4

⁵⁶⁸ *ibid*, page 1

The hypothesis does not suggest that the expression of values is not without constraint, indeed it is accepted that there are significant legal considerations and that the decision making is modified and constrained by institutional and psychological pressures and by the judicial desire to make good law.⁵⁶⁹ The analysis of individual Supreme Court Justices' decision making reveals both the influence of personal values on legal decisions but also the influence of external constraints on decision making in uncertain cases.

6.5 Methods

The method of coding the expression of values in judgments was as previously described.⁵⁷⁰ This chapter focuses on the analysis of values not based on the case, but the individual Supreme Court Justice who delivered the judgment. The first eighteen cases which divided the Supreme Court, and included divided cases and those with a single dissenting judgment, were used in the analysis. The judgments analysed for each Supreme Court Justice represented both judgments which supported and opposed the majority positions. The analysis created a value profile which highlighted the key values expressed in the judgments of an individual Supreme Court Justice.

Values in extra-judicial writing: To further identify the values of individual Supreme Court Justices, the espousal of values within extra-judicial writing was examined. Although numerous judicial speeches were examined during this research, value content analysis was carried out on a maximum of 10 extra-judicial speeches for each Supreme Court Justice

⁵⁶⁹ H Gillman, 'What's Law Got to Do With It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making.' (2001) 26 Law and Social Inquiry 465

⁵⁷⁰ The method of analysis is described in chapter 2.

analysed.⁵⁷¹ Judicial speeches are not subject to the same limitations as judgments and the topic of the speech can be selected by the Supreme Court Justice based on their own interest as highlighted by Lord Kerr:

I apologise for that. On the basis that confession is good for the soul, I should admit that the title was chosen for the wholly unworthy reason that the Assange case was the one that came to mind as being among the most interesting coming up in our lists, at the time that I was asked to deliver this lecture.⁵⁷²

The values identified in the extra-judicial speeches were also used to generate a profile of value expression for individual Supreme Court Justices. Finally, to assess whether the decisions reached aligned with the values expressed, *outcome values* were calculated based on the decision reached in the cases analysed.

Outcome values: The case based content analysis of values in judgments revealed a different pattern of value expression between the judgments supporting and opposing the final outcome. Psychologists argue that in reaching a decision between conflicting values, the decision maker will support one value above another. Opposing judgments, in cases which divide judicial opinion, reflect this conflict between values. For example in *R v JFS*, the Justices who supported the majority opinion supported *self-direction* and *universalism* when in conflict with *tradition* and *conformity*.⁵⁷³ Those in the minority supported *tradition* and *conformity* when in conflict with *self-direction* and *universalism*. The values in conflict

⁵⁷¹ The speeches analysed were those delivered after the opening of the Supreme Court and with transcripts available on the Supreme Court website. Ten speeches were analysed if available.

⁵⁷² Lord Kerr, 'European Arrest Warrants - a European understanding of "judicial authority" as highlighted in *Assange v Swedish Prosecution Authority*' (Boydell Law Lecture, London, 19 June 2012)

⁵⁷³ *R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others* [2009] UKSC 15

therefore were *tradition* versus *self-direction*, *tradition* versus *universalism*, *conformity* versus *self-direction* and *conformity* versus *universalism*.

The outcome value analysis used the analytical approach frequently used in political analysis of judicial decisions. It is based on the assumption that in adopting a particular position whether supporting or opposing the majority, the Supreme Court Justice is affirming the values (or ideologies in political analysis) that are promoted by the decision. In calculating outcome values, an individual Supreme Court Justice supporting the majority (or minority) decision was categorised as affirming values, when in conflict with opposing values, based on the decision they reached rather than the values they espoused, even if they have not espoused any or different values in their judgment or not delivered a judgment at all. For example in the *R v JFS* case, all Justices supporting the majority position will be assigned a preference to *universalism* when it conflicts with *tradition* or *conformity*.

Table 14: Distribution of cases in the Supreme Court from October 2009 – April 2011 (Data set 1)⁵⁷⁴.

| Supreme Court Justice | Overall Cases | | | Cases with Dissenting/Minority Judgments | | | | | Coded Statements | Coding Density |
|-----------------------|-----------------------|----------------------|-------------------|--|----------------------|-------------------|---------------------|-------------------|------------------|----------------|
| | Number of cases heard | Individual judgments | Majority Decision | No of cases heard | Individual judgments | Majority Decision | Dissenting judgment | Minority judgment | | |
| Lord Phillips | 37 | 21 (57%) | 35 (95%) | 10 | 9 (90%) | 8 (80%) | 0 | 2 (20%) | 126 | 14 |
| Lord Hope | 58 | 33 (62%) | 53 (91%) | 12 | 10 (83%) | 7 (58%) | 1 (8.3%) | 4(33.3%) | 188 | 19 |
| Lord Brown | 54 | 24 (44%) | 49 (91%) | 14 | 11 (79%) | 10 (71%) | 0 | 4 (29%) | 100 | 9 |
| Lord Rodger (R.I.P) | 52 | 28 (54%) | 48 (92%) | 9 | 6 (66%) | 5 (55%) | 0 | 4 (44%) | 64 | 10 |
| Lord Walker | 52 | 17 (33%) | 47 (91%) | 14 | 9 (64%) | 9 (64%) | 2 (14%) | 3 (21%) | 59 | 7 |
| Lady Hale | 49 | 23 (47%) | 43 (88%) | 12 | 11 (79%) | 6 (50%) | 4 (33%) | 2 (17%) | 116 | 11 |
| Lord Kerr | 37 | 14 (38%) | 33 (89%) | 10 | 9 (90%) | 6 (60%) | 1 (10%) | 3 (30%) | 97 | 11 |
| Lord Mance | 37 | 16 (43%) | 36 (97%) | 8 | 7 (88%) | 7 (88%) | 0 | 1 (22%) | 102 | 15 |
| Lord Collins | 36 | 17 (47%) | 36 (100%) | 7 | 7 (100%) | 7 (100%) | 0 | 0 | 34 | 5 |
| Lord Clarke | 36 | 13 (36%) | 33 (89%) | 7 | 5 (71%) | 4 (57%) | 0 | 3 (42%) | 76 | 15 |

⁵⁷⁴ This does not include the case *R v Maxwell* [2010] as although the decision was delivered on 17th November 2010 the judgment was delivered until 11th June 2011.

6.6 Case Study 1: Lord Hope and *tradition*

Lord Hope heard the most cases (n=58) during the study period and wrote the most judgments.⁵⁷⁵ He supported the majority decision in 53 cases (91%), the minority in four cases and delivered a dissenting opinion in a single case (Table 14). Lord Hope was the most likely of all the Supreme Court Justices to deliver a judgment, writing a judgment in 62% of cases which was 20% above the average of all the Supreme Court Justices analysed. These findings align with the views expressed by Lord Hope who highlights the importance of writing individual judgments as a reflection of judicial independence, a point he made in his discussion of the decision in *Secretary of State for the Home Department v AF*,⁵⁷⁶

We have rejected suggestions that we should strive to arrive at a single judgment in all cases. We value our independence from each other, and our right to say what we believe in if we want to. There are, of course, cases where a single judgment is preferable. But if we wish to dissent or to express different reasons for arriving at an agreed conclusion then we are entitled to do this, and no one is actively discouraged from doing so. Lord Reid, who declared that it was never wise for the House to have only one speech dealing with an important question of law, would have approved.⁵⁷⁷

In the period of analysis, Lord Hope heard twelve cases which divided judicial opinion and contained either a minority (more than one Supreme Court Justice adopting a minority

⁵⁷⁵ Lord Hope of Craighead was born in Edinburgh in 1938. He was born into a family of lawyers. He was educated in a public school and attended Cambridge University and Edinburgh University. He served two years in National Service.

⁵⁷⁶ *SSHD v AF* [2009] UKHL 29

⁵⁷⁷ Lord Hope, 'The Creation of the Supreme Court – Was it Worth it?' (Barnard's Inn Reading, London, 24 June 2010)

position) or a single dissenting judgment. In these divided cases, Lord Hope supported the majority in seven cases and the minority in four and he dissented in one case. Lord Hope was more likely to support the minority in the Supreme Court than in the House of Lords, but the difference was only marginal.⁵⁷⁸

6.6.1 The expression of values in judgments

Of the 18 cases included in the analysis, Lord Hope heard twelve and delivered ten judgments. Within those judgments, Lord Hope had the highest value coding density, of all the Supreme Court Justices analysed, with an average coding density of 18 coded statements per case.⁵⁷⁹ The number of coded statements expressed as a percentage of the total number of coded statements in judgments delivered by Lord Hope is presented in Table 15 and Figure 6.6-1. The majority of coding (101 statements, 57%) was within the overarching motivation of *conservation*, which encompasses the values (*tradition, security and conformity*). These values emphasise order, self-restriction, preservation of the past, and resistance to change. Within this overarching motivation, the majority of values expressed within Lord Hope's judgments were encompassed within *tradition* (61 statements, 34%). Lord Hope did express values encompassed within the other three overarching motivations, with *self-direction* which encompasses freedom and independence representing 20.7% (36 statements) of the coding. Although Lord Hope did express values encompassed within *universalism*, these values represented only 18% (32 statements) of the coding.

⁵⁷⁸ Data was compared to that of Brice Dickson who assessed 'close calls' in the House of Lords from the period of 2001 – 2009. During that time Lord Hope sat on the bench for 25 cases which divided the court and he supported the minority in seven cases (28%) as compared to the 33% in this study. B Dickson, 'Close Calls in the House of Lords' in Lee J (ed), *From House of Lords to Supreme Court; Judges, Jurists and the Process of Judging* (Hart Publishing 2011), page 284.

⁵⁷⁹ 180 coded statements in 10 judgments

Lord Hope espoused values encompassed within *tradition* in his judgments however the high level of coding for *tradition* may be a reflection of the cases he heard during that period. Therefore, the coding for Lord Hope was compared to the average value expression of the all the judgments delivered by the Supreme Court Justices in same time period. In comparison to other Supreme Court Justices, Lord Hope was more likely than average to espouse values encompassed by *tradition* (51% higher than average) and *conformity* (increased by 82%). In contrast, Lord Hope was less likely than the average of all the Supreme Court Justices to espouse values encompassed by *universalism* (decreased by 40%) in his judgments.

In summary, analysis of the values expressed in Lord Hope's judgments suggests that Lord Hope was more likely to espouse values encompassed within *tradition* and *conformity* and less likely to espouse values encompassed in *universalism* than other Supreme Court Justices.

6.6.2 The expression of values in extra-judicial writing

The case facts and law which frame any judgment may have a significant influence on the values expressed within that judgment. Although judicial speeches are subject to the limitations and constraints imposed on those in a senior judicial position and the audience to whom the speech is delivered, judicial speeches may reveal personal values which are not constrained by the context of a legal case and may provide a more holistic view of judicial values.⁵⁸⁰ Indeed, speeches have an additional advantage, as the Supreme Court Justice, within certain limitations, was likely to select a subject matter that was of interest to them at the time.

⁵⁸⁰ It is acknowledged that judicial assistants play a role in the preparation of speeches. This role varies depending on the Supreme Court Justice and the topic of the speech.

Ten speeches by Lord Hope were analysed. The speeches were delivered on a diverse range of topics from the general role of the Supreme Court in ‘The role of the Supreme Court in protecting the rights of individuals in a jurisdiction with no written constitution,’⁵⁸¹ ‘Sovereignty in question: A view from the Bench’⁵⁸² to more specific aspects of the law in speeches such as ‘Family law in the UK’⁵⁸³ and banking law in ‘A light at the end of a tunnel – BNY in the Supreme Court’.⁵⁸⁴ There were 75 coded statements within the 10 speeches, which reflected an average coding density of 7.5 statements per speech.⁵⁸⁵ Despite the diversity of topics discussed, Lord Hope expressed similar values to those he espoused in his judgments. Indeed, the majority of value coded statements within the speeches were encompassed in the overarching motivation of *conservation*, which accounted for 61% (46 statements) of the overall coding (Table 15).

Forty two percent of the values expressed were encompassed within *conformity* or *tradition*. For example, Lord Hope frequently espoused the importance of adherence to legal traditions stating that ‘the task [of the judiciary] was to construe the agreement by reference to the statute, not the statute by reference to the agreement.’⁵⁸⁶ Indeed, he also highlighted the supremacy of the legislature:

While the judges, who are not elected, are best placed to protect the rights
of the individual, including those who are ignored or despised by the

⁵⁸¹ Lord Hope, 'The Role of the Supreme Court in Protecting the Rights of Individuals in a Jurisdiction with No Written Constitution' (Glasgow Bar Association, Glasgow, 9 December 2011).

⁵⁸² Lord Hope, 'Sovereignty in Question: A View from the Bench' (WG Hart Legal Workshop, London, 28 June 2011)

⁵⁸³ Lord Hope, 'Family Law in the UK' (Family Law Association, London, 14 November 2011)

⁵⁸⁴ Lord Hope, 'A Light at the End of a Tunnel - BNY in the Supreme Court' (Banking and Financial Services Law Association, Brisbane, 29 August 2013)

⁵⁸⁵ There were significantly less coded statements in extra-legal speeches compared to judgments. Although the reason for this difference has not been assessed, it may be that speeches are not as emotive as writing a judgment in a case which has divided judicial opinion. This would align with the notable difference in value expression in cases which did not divide judicial opinion.

⁵⁸⁶ Lord Hope, 'A Light at the End of a Tunnel - BNY in the Supreme Court' (Banking and Financial Services Law Association, Brisbane, 29 August 2013)

majority, the elected members of a legislature of this kind are best placed to judge what is in the country's best interests as a whole.⁵⁸⁷

Lord Hope lamented the loss of tradition associated with the move to the Supreme Court⁵⁸⁸ and referred to himself as 'a relic of an old system'.⁵⁸⁹

Lord Hope was less likely to espouse values encompassed within *universalism* in his speeches in comparison to his judgments. When he did espouse values encompassed within *universalism*, the statements tended to centre on flexibility of the law to adapt to changing times;

But I also believe very strongly that, if it is to be kept up to date and able to compete with the English system, our system must look outwards and not inwards as it adapts to the realities of modern life.⁵⁹⁰

I echoed those remarks when I said that one of the strengths of the common law is that it can take a fresh look at itself so that it can keep pace with changing circumstances.⁵⁹¹

Lord Hope was as likely to express *self-direction* within his speeches as in his judgments. His expressions of *self-direction* centred on judicial independence and freedom rather than individual autonomy stating that the judiciary 'value our independence from each other, and

⁵⁸⁷ Lord Hope, 'The Role of the Supreme Court in Protecting the Rights of Individuals in a Jurisdiction with No Written Constitution' (Glasgow Bar Association, Glasgow, 9 December 2011).

⁵⁸⁸ It was the central theme of his speech Lord Hope, 'The Creation of the Supreme Court – Was it Worth it?' (Barnard's Inn Reading, London, 24 June 2010)

⁵⁸⁹ Lord Hope 'The Highest Court in the Land: Justice Maker', (BBC4, 27 January 2011) <<http://www.bbc.co.uk/programmes/p00dhn8n>> accessed 3.08.2015.

⁵⁹⁰ Lord Hope, 'Scots Law Seen from South of the Border' (Scottish Young Lawyers Association, Edinburgh, 1 April 2011)

⁵⁹¹ Lord Hope, 'The Role of the Judge in Developing Contract Law' (Contract Law Conference, Saint Helier, 15 Oct 2010)

our right to say what we believe in if we want to.’⁵⁹² The value profile of Lord Hope, in graphic form, is presented in Figure 6.6-1.

6.6.2.1 Understanding the value profile graphs

This series of graphs presents the number of coded statements of each value expressed as a percentage of the total number of coded statements per individual Supreme Court Justice. The data is represented by three columns. The first is the ‘control’ column which represents the average percentage value expression for each value in the all of the judgments and represents the mean value coding for all the Justices who heard the cases. This control column therefore was the standard for value expression in the judgments. The second column represents the percentage value expression in the judgments of the individual Supreme Court Justice (light grey bars). This was higher, lower or equal to the control, which reflected that the Supreme Court Justice was less or more likely than other Supreme Court Justices to express that value in legal judgments. The final column is the value expression in the extra-legal speeches of the individual Supreme Court Justice (medium grey bars).

⁵⁹² Lord Hope, 'The Creation of the Supreme Court – Was it Worth it?' (Barnard’s Inn Reading, London, 24 June 2010)

Table 15: Values espoused by individual Supreme Court Justices in Judgments and extra-legal speeches

| | Self-enhancement | | Conservation | | | Self-Transcendence | | Openness to Change | | |
|--|------------------|--------------|----------------|--------------|----------------|--------------------|---------------|--------------------|------------------|---------------|
| | Power | Achievement | Security | Tradition | Conformity | Benevol- -ence | Universalism | Self- Direction | Stimula- tion | Hedon- ism |
| Overall Cases | 2.5% | 2.5% | 9% | 23% | 7% | 1% | 30% | 25% | 0 | 0 |
| <u>Lord Hope</u> Judgments Speeches | 1.6% 8.0% | 2.2% 5.3% | 10.1% 18.6% | 34% 21.4% | 12.8% 21.4% | 0% 0% | 18.6% 9.3% | 20.7% 16% | 0 0 | 0 0 |
| <u>Lord Kerr</u> Judgments Speeches | 2.1% 5% | 0% 1.5% | 3.1% 0% | 9.3% 7% | 2.0% 6% | 3.1% 5% | 53.6% 53% | 26.8% 20% | 0% 2% | 0% 0% |
| <u>Lord Phillips</u> Judgments Speeches | 10.3% 0% | 3.8% 0% | 13.5% 0% | 15.2% 11% | 4% 0% | 0.8% 0% | 30.1% 47% | 22.3% 42% | 0 0 | 0 0 |
| <u>Lady Hale</u> Judgments Speeches | 2.6% 0% | 0% 4% | 8.7 % 8% | 22.5% 10% | 10.3% 5% | 0.9% 0% | 38 % 45% | 17% 28% | 0% 0% | 0% 0% |

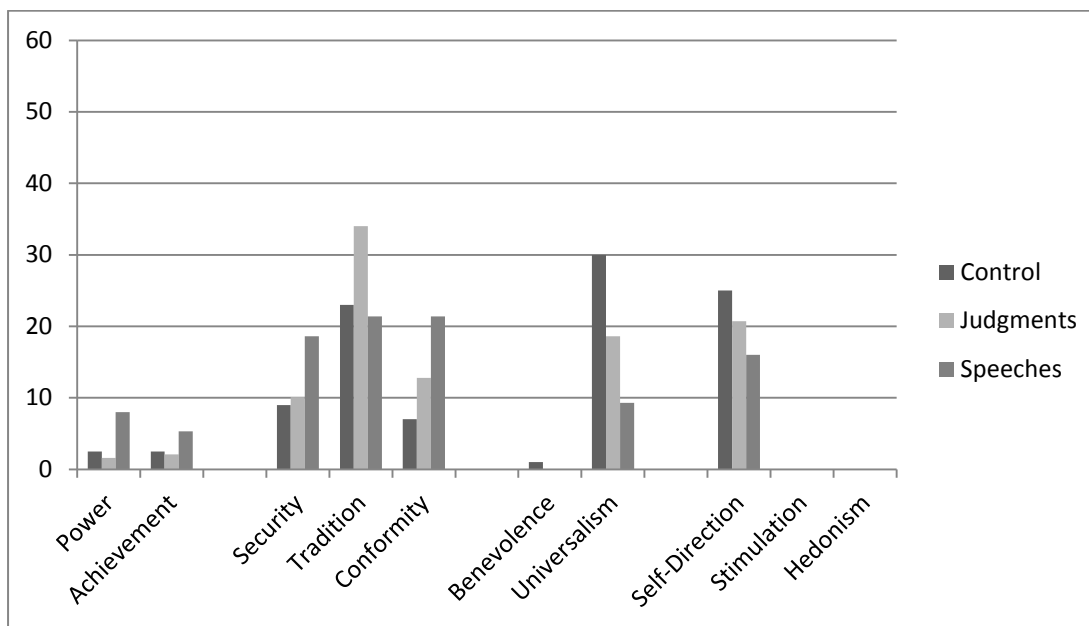


Figure 6.6-1: Value profiles of Lord Hope

In both his judgments and speeches Lord Hope espoused values encompassed within conservation including *tradition*, *conformity* and *security* and he was less likely to espouse values encompassed within *universalism*.

6.6.3 The influence of values on legal decisions

The analysis of Lord Hope's values would suggest that in reaching a decision in cases which divide judicial opinion, within legal constraints, Lord Hope would support the values encompassed in *tradition* and *conformity* when in conflict with other values. Analysis of the legal decisions of Lord Hope revealed that Lord Hope did support *tradition* when it was in opposition to any other value in 77% of all cases. Similarly, Lord Hope supported *conformity* when it was in opposition to any other value in 72% of cases. When *tradition* was opposed to *conformity* Lord Hope supported either value which suggests that Lord Hope held these

values in approximately equal regard.⁵⁹³ Indeed, with the exception of one case, where Lord Hope was in the minority, Lord Hope supported the values encompassed in *tradition* and *conformity* when these values were in conflict with any other value.⁵⁹⁴

Analysis of Lord Hope's values expressed in his judgments suggests that Lord Hope is less likely than average to promote the values encompassed in *universalism*. This was also reflected in his decisions. Lord Hope opposed the values encompassed in *universalism* when they were in conflict with any other value in three quarters (75%) of the cases he heard. When *tradition* was opposed to *universalism* Lord Hope supported *tradition* in all of the cases.⁵⁹⁵ Indeed, Lord Hope dissented in opposition to the values encompassed in *universalism* and opposed *universalism* in the 75% of cases in which he was in the minority.⁵⁹⁶

In summary, Lord Hope espoused the values encompassed within *tradition* and *conformity* in his judgments and he was less likely than average to espouse values encompassed in *universalism*. Value analysis of Lord Hope's extra-judicial writing confirmed that Lord Hope supported the values encompassed within *tradition* and *conformity*. This profile was reflected in his legal decisions. Indeed, in three quarters of the decisions analysed Lord Hope reached a decision which affirmed values encompassed within *tradition* and *conformity*. Lord Hope was less likely than average to espouse values encompassed within *universalism*. This was also reflected in his decisions, with Lord Hope less likely than average to affirm a decision which encompassed values within *universalism*, especially if *universalism* was in

⁵⁹³ In the four cases where these values were in conflict Lord Hope supported *conformity* in two cases and *tradition* in two cases, which suggested that Lord Hope held both values in equal regard.

⁵⁹⁴ Lord Hope opposed conformity in *Star Energy Weald Basin Limited v Bocardo* [2010] UKSC 23

⁵⁹⁵ *Universalism* and *tradition* conflicted in five of the cases in this analysis that were heard by Lord Hope .

⁵⁹⁶ The only case in which Lord Hope supports *universalism* in minority is *Star Energy Weald Basin Limited v Bocardo* [2010] UKSC 23

conflict with *tradition*. The analysis of the data suggests that, in cases which divide judicial opinion where the decision is uncertain, within the legal limits, personal values may influence individual judicial decisions.

6.6.4 Institutional influences on Lord Hope's decision making

Judicial decision making is not without significant constraint. Indeed, the author recognises the considerable influence of legal factors on the decisions of the Supreme Court. This study does suggest however, that within these constraints, in cases where the law does not provide a clear answer, that other factors may have a conscious or subconscious influence. Despite Lord Hope's express desire to limit his decision making to the application of the law when he stated that 'our task is to apply the law, not to decide cases according to our personal preferences', this case study suggests that personal values may serve as a subconscious influence on his decision making.⁵⁹⁷ Indeed, it could be argued that the values Lord Hope espoused were reflected in three quarters of the decisions he reached in cases which divided judicial opinion. However, psychological theory of decision making suggests that the anchoring effect of values in uncertain decisions may be modified by conscious factors. One such conscious factor is the law, and in this study, Lord Hope highlighted some other conscious influences on his decision making.

6.6.4.1 'Real expertise'

The influence of two Scottish Supreme Court Justices on the decisions of the court has been discussed by Paterson who highlights the ongoing debate among commentators surrounding

⁵⁹⁷ Lord Hope, 'Scots Law Seen from South of the Border' (Scottish Young Lawyers Association, Edinburgh, 1 April 2011)

the legitimacy of non-Scots judges deference to their Scottish counterparts.⁵⁹⁸ Although Paterson suggests that these arguments of deference are flawed, he recognises this form of deference as one element of the general deference to expertise. Lord Hope also regarded this form of deference as deference to 'real expertise'. Indeed, within his speeches, Lord Hope expressed respect for the 'real expertise' of his colleagues:

Of the five of us on the panel in *BNY*, Lord Walker was the undoubted specialist.⁵⁹⁹

We are careful, when deciding upon their composition, to ensure that the panel will comprise those Justices with real expertise in the area of law that is in issue. In family and employment law cases, for example, there is Lady Hale; in chancery law cases, Lord Walker; in commercial cases, Lord Mance and Lord Collins.⁶⁰⁰

Lord Hope suggested that conscious deference to expertise is part of the judicial culture within the Supreme Court and in deferring to the expertise of others Lord Hope has an expectation of deference to his expertise:

So, just as our practice is to respect the judgment of the English Justices who are specialists in their own field, we expect that of them when issues of Scots law are involved. And the other Justices do defer to our expertise but, of course, will reason their way to their own conclusions.....we do

⁵⁹⁸ A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013)

⁵⁹⁹ Lord Hope, 'A Light at the End of a Tunnel - *BNY* in the Supreme Court' (Banking and Financial Services Law Association, Brisbane, 29 August 2013)

⁶⁰⁰ Lord Hope, 'Scots Law Seen from South of the Border' (Scottish Young Lawyers Association, Edinburgh, 1 April 2011)

expect them to respect our judgment, and in my experience they almost always do so.⁶⁰¹

A quote from a Law Lord in Paterson's book also highlighted this element of reciprocity with regard to Scots law:

I think in Scots cases involving Scots law particularly, almost all Scottish cases will have both David Hope and Alan Rodger on them. If they agree and it's not an English law point as well, I think it would be quite difficult to disagree. [B]ut when there's a difference between them... then you can make a decision in the same way as anyone else.⁶⁰²

Indeed, Lord Hope suggested that as a consequence of this deference the Scots judges have significant influence on the Scots Law decisions:

If the fear that the Supreme Court is an anglicising court is still present, it is best answered by studying what the Court actually does and the influence on its work of the two Scots Justices.⁶⁰³

Deference to expertise may serve as a conscious institutional influence on decision making and moderate the role of values.

⁶⁰¹ *ibid*

⁶⁰² A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013), page 241.

⁶⁰³ Lord Hope, 'Scots Law Seen from South of the Border' (Scottish Young Lawyers Association, Edinburgh, 1 April 2011)

6.6.4.2 *Consensus in “Scottish” Cases*

This study highlights the external influences especially in Scot’s Law cases which may encourage a unified position from the two Scot’s Supreme Court Justices. In a discussion of decision making on Scottish cases, Lord Hope identified the importance of reaching a similar decision but recognises that disagreement can occur, which leaves decision making on ‘Scottish’ cases in the hands of the ‘other judges’. However even with the pressure of collegiality Lord Hope, as his value profile would predict, valued judicial independence:

[W]hat would have happened if Lord Rodger and I had disagreed in *Grainger* – which, as it happened, seemed both during the hearing (to the obvious alarm of Professor Reid, who was listening to the argument) and in our discussion afterwards to be very real possibility? The judgment would then have lain in the hands of the other judges. Lord Rodger and I are careful to be seen as independent of each other, to maintain our credibility with our colleagues. So the possibility of our disagreeing with each other because we see things differently is not at all remote....⁶⁰⁴

Indeed, disagreement did arise in the case of *Martin v HM Advocate*, a devolution case, which highlighted Lord Hope’s espoused values of judicial independence:

And if there is this variety of views – as existed in *Martin* – can it really be said that in choosing one over the other, judges are somehow being insensitive to the distinctive nature of Scots law? Instead, they are reasoning their way to what each believes to be the most coherent

⁶⁰⁴ Lord Hope, 'Scots Law Seen from South of the Border' (Scottish Young Lawyers Association, Edinburgh, 1 April 2011)

position, in light of the arguments presented to them and, in that case two detailed, but different, judgments of the two Scottish judges.⁶⁰⁵

Further analysis of cases which divide judicial opinion would suggest that despite the desire to avoid division between the Scottish Supreme Court Justices in cases which are centred on the law of Scotland, there is little consensus between Lord Hope and Lord Rodger in cases which divide judicial opinion suggesting that although there is a perceived pressure for consensus, it may not have a significant influence on the decisions of Lord Hope.⁶⁰⁶

Lord Hope expressed and affirmed the values encompassed within *tradition*. A recurring theme within Lord Kerr's speeches was the difference between his decisions and those of Lord Hope. Indeed, in three of the six speeches available on the Supreme Court website at the time of analysis, Lord Kerr emphasised this difference.⁶⁰⁷ The lack of agreement was reflected in the striking contrast between the values they espoused, indeed, it may be this contrast which underpins the differences in decisions reached by both Supreme Court Justices.

6.7 Case Study 2: Lord Kerr and *universalism*⁶⁰⁸

In contrast to Lord Hope, Paterson suggests that Lord Kerr favours a single majority judgment with supporting concurring judgments only where appropriate.⁶⁰⁹ This was reflected in the number of written judgments Lord Kerr delivered, writing a judgment in only

⁶⁰⁵ *ibid*

⁶⁰⁶ Discussed in chapter 6

⁶⁰⁷ Lord Kerr, 'Miscarriage of Justice - When Should an Appellate Court Quash Conviction?' (Justice Scotland International Human Rights Day Lecture, Edinburgh, 10 December 2013)

⁶⁰⁸ Lord Kerr of Tonaghmore was born in 1948. He was educated in a grammar school and Queens University Belfast.

⁶⁰⁹ A Paterson, *Final Judgment. The Law Lords and the Supreme Court* (Hart Publishing 2013), page 105.

approximately a third of the cases he decided.⁶¹⁰ This was less than the average for the Supreme Court Justices who will write judgments in almost half the cases they hear.⁶¹¹ Of all the Supreme Court Justices assessed, Lord Kerr was one of the least likely to write a concurring judgment. Despite his reluctance to deliver a concurring judgment, Lord Kerr was not reluctant to dissent. Indeed, in the first four years, Lord Kerr (with Lady Hale) was the most likely to write a dissenting judgment. Something, Lord Kerr highlighted in his extra-judicial speeches:

This lecture takes as its starting point what many might wearily describe as yet another of my dissenting judgments. Or at least it builds on a judgment of mine that, although a dissent as to outcome, at least, for once, tried to find common ground with my colleagues and to reconcile in a harmonious way various different approaches to the question of when an appellate court should quash a conviction.⁶¹²

Due to his propensity to write a dissenting judgment, Lord Kerr was as likely as any other Supreme Court Justice to deliver a written judgment in cases which divide judicial opinion.

Lord Kerr heard 37 cases in the Supreme Court during the period of analysis. He supported the majority decision in 33 (89%) cases, the minority in three and delivered a single dissenting judgment.⁶¹³

Ten of the cases heard by Lord Kerr during this time period divided judicial opinion. In these ten cases, Lord Kerr supported the majority in six, the minority in three and delivered the

⁶¹⁰ Lord Kerr delivered judgments in 34% of the cases he heard in the first four years of the Supreme Court.

⁶¹¹ The average is 48% for the ten Supreme Court Justices analysed.

⁶¹² Lord Kerr, 'Miscarriage of Justice - When Should an Appellate Court Quash Conviction?' (Justice Scotland International Human Rights Day Lecture, Edinburgh, 10 December 2013)

⁶¹³ Table 14. Of note, Lord Kerr's pattern of dissent changed after this time period which will be discussed in chapter 6.

only dissenting judgment in one case. He delivered nine judgments which contained 97 value statements and represented an average coding density of almost 11 codes per judgment. The value analysis of these judgments is represented in Table 15 and Figure 6.7-2.

6.7.1 The expression of values in the judgments of Lord Kerr.

The values expressed by Lord Kerr in his judgments are in stark contrast to those expressed by Lord Hope. Lord Kerr was less likely than average to espouse values encompassed within the overarching motivations of conservation, *security, tradition and conformity* (60%, 72%, 65% decrease respectively). Coding within this overarching category of conservation, only accounted 14% (14 statements) of the values espoused by Lord Kerr.

In contrast, the majority of coding (56%, 54 coded statements) within Lord Kerr's judgments was encompassed within the overarching motivation of self-transcendence, which affirms motives which transcend personal interests in favour of the welfare of others. This overarching motivation includes the values encompassed within *universalism* and *benevolence* with the vast majority of coded statements (53%, 52 statements) of Lord Kerr within *universalism*. Indeed, Lord Kerr was more likely than any other Justice to espouse values encompassed in *universalism*, with a coding of 77% above average. This value encompasses concepts such as equality, social justice, protection of the vulnerable which were all themes espoused in the judgments of Lord Kerr.

As with all of the Supreme Court judiciary, Lord Kerr espoused values encompassed within *self-direction*, including freedom, autonomy and independence.⁶¹⁴ Almost half of Lord

⁶¹⁴ Independence is one of the two major codes within *self-direction*. Although Lord Kerr was not more likely than average to espouse values of *self-direction*, he was 29% more likely than average to espouse values of independence.

Kerr's expressions of independence centred on judicial independence and the right to reach a different decision:

Other members of the court have expressed the view that this is what the committee would have decided. Had I felt it possible to do so, I would have been glad to be able to reach that conclusion. As it is, I simply cannot.⁶¹⁵

It was reported that Lord Kerr was more likely than most Supreme Court Justices to support the individual rather than the government, and the value profile would support this claim.⁶¹⁶

6.7.2 The expression of values in extra-judicial writing

Lord Kerr was less likely than the majority of Supreme Court Justices to deliver speeches outside of the Supreme Court. The value analysis was based on the six speeches available on the Supreme Court website on a range of topics from human rights and European arrest warrants to collaborative law.⁶¹⁷ In his speeches, Lord Kerr highlighted the competing influences on judicial decision making. For example, in his speech delivered at Queens University, Lord Kerr, highlighted the conflict between human rights and the 'war on terror' revealing the conflict between the values encompassed in *security* and *universalism*:

But that very circumstance raises a particular challenge for the administration of justice and for judges charged with defining the

⁶¹⁵ *R (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, [84]

⁶¹⁶ This reference to Lord Kerr as "liberal" was contained in James Grant 'A Law Unto Itself' *Prospect Magazine*, (London, 25 May 2011) <www.prospectmagazine.co.uk/2011/05/a-law-unto-itself-supreme-court-judges> accessed 21.07.2015

⁶¹⁷ Speeches for analysis were selected up to May 2014. Lord Kerr has subsequently delivered several speeches. A decision was taken to not code these speeches, as these would be coded with the profile in mind.

boundaries on the state's encroachment on fundamental rights in its efforts to protect national security.⁶¹⁸

In contrast to Lord Hope, in his speeches Lord Kerr emphasised values encompassed within *benevolence* and *universalism*:

That conclusion must resonate strongly with all who subscribe to the notion that we should not require those who are entitled to look to the state for the protection of their fundamental rights to accept a lesser standard of justice than we consider is the irreducible minimum of a fair trial.⁶¹⁹

Overall, the values analysis revealed a pattern of value expression in his speeches similar to those in his judgments, with the majority of values espoused by Lord Kerr encompassed within *universalism* (53%). Indeed, Lord Kerr identified the values of justice and fairness as central elements of the legal system and supported these values encompassed within *universalism* when in conflict with the opposing value of *power*:

Although the court was master of its own procedure, it could not fundamentally alter the system of trial. In particular, it could not exercise its power to regulate its own procedures in such a way as would deny parties their fundamental constitutional right to participate in the

⁶¹⁸ Lord Kerr, 'Human Rights Law and the 'War on Terror' (Lord M^cDernott Lecture Queens University, Belfast, 2 May 2013)

⁶¹⁹ Lord Kerr discussing *Omar Othman aka Abu Qatada v Secretary of State for the Home Department* [2013] EWCA Civ 277, *ibid*

proceedings in accordance with the common law principles of natural justice and open justice.⁶²⁰

Lord Kerr also highlighted the importance of transparency and flexibility in the law, encompassed within *universalism*.⁶²¹ Indeed, transparency in the law is a central theme of his speech on 'Human Rights Law and the War on Terror'.⁶²² Lord Kerr also affirmed a link between dissent and the necessity for transparency, suggesting that delivering a dissenting opinion, when it is required, renders the outcome and the decision making process more transparent:

And if exposing a minority judgment to the critical onslaught of the majority involves a degree of self-sacrifice on the part of the dissenter, that is, in my view, a small price to pay for the transparency of the debate.⁶²³

Affirmation of dissent is encompassed within *self-direction*, which affirms the values of judicial independence and freedom. In both his judgments and speeches, Lord Kerr associated judicial dissent with independence and the right to reach a different decision stating that, 'the great dissents in British legal history speak loudly of the independence of our judiciary.'⁶²⁴ Indeed, he described judicial independence as 'the most precious of freedoms'.⁶²⁵ This freedom extends beyond the right of an individual Supreme Court Justice

⁶²⁰ *ibid*

⁶²¹ The coding within transparency and flexibility of the law accounted for 58% of the value coding within *universalism* and 31% overall.

⁶²² Lord Kerr, 'Human Rights Law and the 'War on Terror' (Lord M^cDernott Lecture Queens University, Belfast, 2 May 2013)

⁶²³ Lord Kerr, 'Dissenting Judgments - Self-Indulgence or Self-Sacrifice.' (The Birkenhead Lecture, London, 8 October 2012)

⁶²⁴ *ibid*

⁶²⁵ Lord Kerr, 'The Reality of Judicial Independence: Lions under the Throne' (Franco-Irish-British Judicial Co-Operation Committee Colloque, Paris, 10 May 2007) <https://www.courdecassation.fr/IMG/File/pdf_2007/10-05-2007/10-05-2007_kerr.pdf> accessed 21.07.15.

to dissent to the Supreme Courts right to disagree with other judicial authorities including the European Court of Human Rights.⁶²⁶

His espousal of freedom and independence is not limited to judicial freedom. Lord Kerr also affirmed an individual's right to *self-direction* and autonomy, a theme which is evident in both his judgments and speeches:

I have long been convinced that the happiest clients are not necessarily those who have achieved the best possible outcomes but are those who have felt best informed of the process in which they are participants and who sense that their views have been absorbed in a way that has allowed them to influence the result.⁶²⁷

As in his judgments, the values encompassed within *self-direction* accounts for one fifth of the value coding in his speeches. Like Lord Hope, the pattern of value expression in Lord Kerr's speeches reflected the values espoused in his judgments. The value profile is presented in the graph below:

⁶²⁶Lord Kerr, 'The UK Supreme Court. The Modest Underworker of Strasbourg?' (Clifford Chance Lecture, London, 25 January 2012)

⁶²⁷ Lord Kerr, 'Collaborative Law' (London Collaborative Law Umbrella Group, London, 7 October 2009)

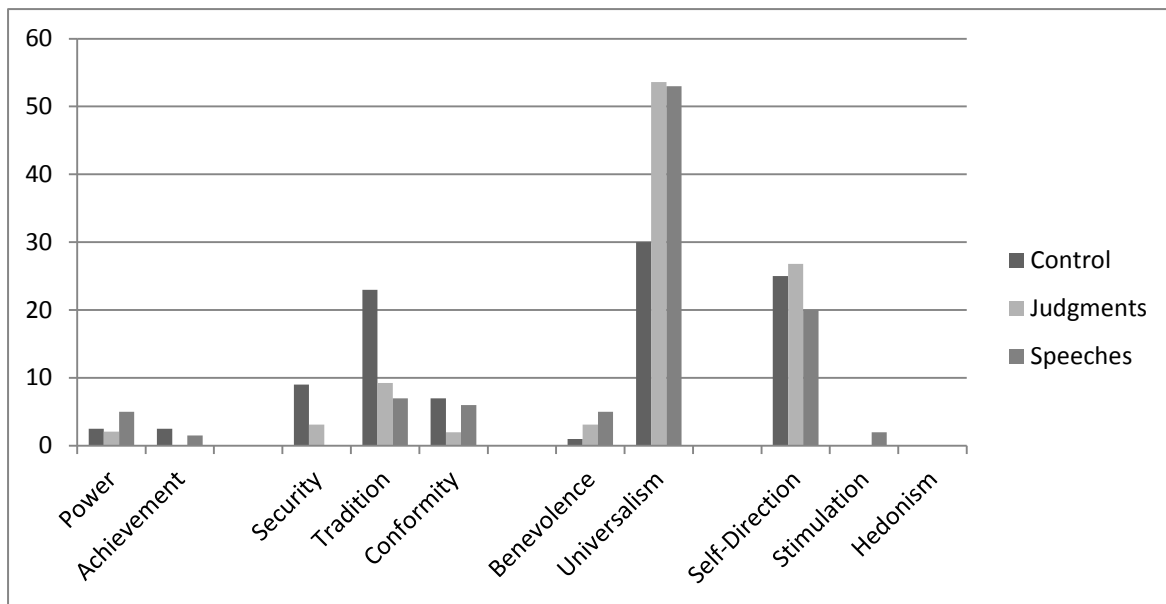


Figure 6.7-2 Value profiles of Lord Kerr

In stark contrast to Lord Hope, the values espoused by Lord Kerr centre on the values encompassed in *universalism*. Indeed, in his judgments he was more likely than any Supreme Court Justice to espouse these values. In contrast to Lord Hope, Lord Kerr was less likely to espouse the values encompassed within *tradition* and *conformity*.

6.7.3 The influence of values on legal decisions

The judicial decisions of Lord Kerr reflected his value profile. Lord Kerr supported *universalism* when it was in conflict with any other value in 81% of cases. Lord Kerr opposed the values encompassed within *tradition* in three quarters (77%) of cases when the values conflicted with any other value. Indeed, he also opposed the other values encompassed in *conservation* (*conformity* (79%) and *security* in (57%). In this dataset, Lord Kerr dissented in support of *universalism* and was in the minority in support of *universalism* or in opposition to *conformity*.

As with Lord Hope, the values expressed by Lord Kerr are reflected in over three quarters of the decisions he reached in cases which divide judicial opinion. Highlighting once again, that in cases which divide judicial opinion where the decision is uncertain, within legal limits, personal values may influence the judicial decision.

Lord Kerr recognised the influence of both conscious external factors and subconscious factors on his decision making;

The pressures, overt or subconscious, on judges making decisions about the lawfulness of measures taken by governments at times of national crisis or where a real terrorist threat to the state is evident are considerable. And, in truth, those pressures have on occasions, because of the exigencies that have been perceived to exist, proved impossible to defy.⁶²⁸

Despite the clear acknowledgement of external and internal influences, there is little evidence within Lord Kerr's speeches of the exact nature of the external influences that moderate his decision making.

6.8 The value: decision paradigm in individual legal decision making.

The value analysis of the judgments, speeches and decisions of Lord Hope and Lord Kerr revealed that although subject to legal and institutional constraints, there was a close link between the values espoused and the decisions reached by individual Supreme Court Justices, in cases which divide judicial opinion.

⁶²⁸ Lord Kerr, 'Human Rights Law and the 'War on Terror' (Lord M'Dernott Lecture Queens University, Belfast, 2 May 2013)

The value: decision model was also identified in the judgments and decisions of other Supreme Court Justices. For example, Lord Brown was one of the Supreme Court Justices who was least likely to espouse values encompassed in *universalism*, and this was reflected in his decisions with Lord Brown opposing *universalism* in 81% of cases. As with Lord Hope, Lord Rodger espoused *tradition* in his judgments which was reflected in his decisions. Lord Rodger supported *tradition* in 80% of cases where it was opposed to any other value. In contrast, Lord Clarke was less likely than average to espouse the values encompassed in *tradition* and this was reflected in his decisions in which he opposed *tradition* in 91% of decisions where this value is opposed to any other value.

The value: decision paradigm was not limited to the values encompassed within *tradition* and *universalism*. Lord Walker was less likely than other Supreme Court Justices to espouse values encompassed in *security* and this was reflected in his decisions with Lord Walker opposing *security* in 78% of his decisions related to this value. Lord Mance espoused *self-direction* in his judgments and this was reflected in his decisions. He supported *self-direction* in 74% of cases which relate to this value.

This analysis suggests that personal values play a role in the individual decision making processes of the Supreme Court judiciary. Psychological theory suggests that personal values, in legal decisions, act as a subconscious influence and although there is evidence of the values espoused within judgments and speeches, there is little evidence that the Supreme Court Justices are aware of the influence that personal values have on their legal decisions. Although, there is some recognition by the Supreme Court Justices of the role of instinct in the decision making process, there is no overt recognition of the factors that may influence

the instinctive reaction.⁶²⁹ The subconscious nature of personal values, and the concomitant lack of recognition by the judiciary of the potential role of values in judicial decision making, suggests that personal values may act as a form of implicit bias within the decision making process. Where the law does not provide a clear answer, personal values may frame the decision making process and serve to move the response along the continuum in favour of an outcome that affirms individual judicial values.

6.9 Modifying influences on the expression of values.

The influence of values however is not without limitation and the theory of systems decision making suggests that both internal and external factors can modify the influence of these subconscious processes on decision making. Indeed, Lord Hope recognised the influence of deference to expertise on his decision making. In deferring to expertise, Lord Hope may reach a decision which conflicts with his values. This study identified the potential influence of internal or external factors on the expression and perhaps the decisions of two Supreme Court Justices, Lord Phillips and Lady Hale.

6.9.1 Lord Phillips and system 2 reasoning

Expression of values within judgments may be constrained by the context of the judgment. Despite this limitation, the majority of Supreme Court Justices expressed values within their legal judgments, in cases which divide judicial opinion, which were consistent with the decisions reached.

The analysis of Lord Phillips' decisions and judgments suggested that the expression of values within judgments may be subject to other conscious or subconscious constraints. Lord

⁶²⁹ Discussed in chapter 1, pages 51 – 54

Phillips was the President of the Supreme Court during the period of analysis. Paterson suggests that the values of those in leadership positions play a disproportionate part in the outcome of the hard cases which come before them.⁶³⁰ This occurs when those in leadership roles express an early preference for a position and there is a norm of consensus. However, this may not be true for Lord Phillips. Indeed, in his latest book Paterson, in reference to the leadership of Lord Phillips, suggests that the 'position is not clear cut'.⁶³¹

During the period of analysis, Lord Phillips heard 37 cases in the Supreme Court. He supported the majority decision in 35 (95%) of cases and the minority in two cases. Although, Lord Phillips heard less cases than the deputy President Lord Hope, he delivered the leading judgment in the majority of cases he heard. Ten cases resulted in minority or single dissenting judgments. Lord Phillips supported the majority in eight of these divided cases. During this time, Lord Phillips was as likely as any other Supreme Court Justice to support the minority position. The values expressed by Lord Phillips in his judgments and extra-legal speeches are represented in Table 15 and Figure 6.9- 3.

Lord Phillips was less likely than average to espouse values encompassed within *tradition* in his judgments. This lack of affirmation of tradition was evident in his judicial speeches, in which Lord Phillips highlighted his support for change and the creation of a Supreme Court in contrast to the more traditional Lord Hope.⁶³² Indeed, he decided to break with tradition as Lord Chief Justice and hear cases in both the Civil and Criminal Divisions of the Court of

⁶³⁰ A Paterson, *The Law Lords* (Macmillan Press 1982), page 123

⁶³¹ A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013), page 160.

⁶³² Lord Phillips has delivered several speeches in support of the constitutional changes that resulted in the Supreme Court. For example in Lord Phillips, 'The Supreme Court and other Constitutional Changes in the UK' (Address to the Members of the Royal Court, the Jersey Law Society and Members of the States of Jersey, St Helier, 2 May 2008); In Lord Phillips, 'The Challenges of the New Supreme Court' (Gresham Special Lecture, London, 8 June 2010), he stated 'I was one of those in favour of a Supreme Court.' Lord Phillips espoused the importance in safe-guarding judicial independence in a speech entitled Lord Phillips, 'Constitutional Reform: One Year On ' (Judicial Studies Board Annual Lecture, London, 27 March 2007).

Appeal.⁶³³ Other aspects of Lord Phillips' value profile were unusual. Although the values most frequently espoused in his speeches were encompassed within *self-direction* and *universalism*, he was not more likely than average to espouse these values in his judgments. He was, however, more likely than average to espouse values encompassed in the opposing values of *power* and *achievement*.

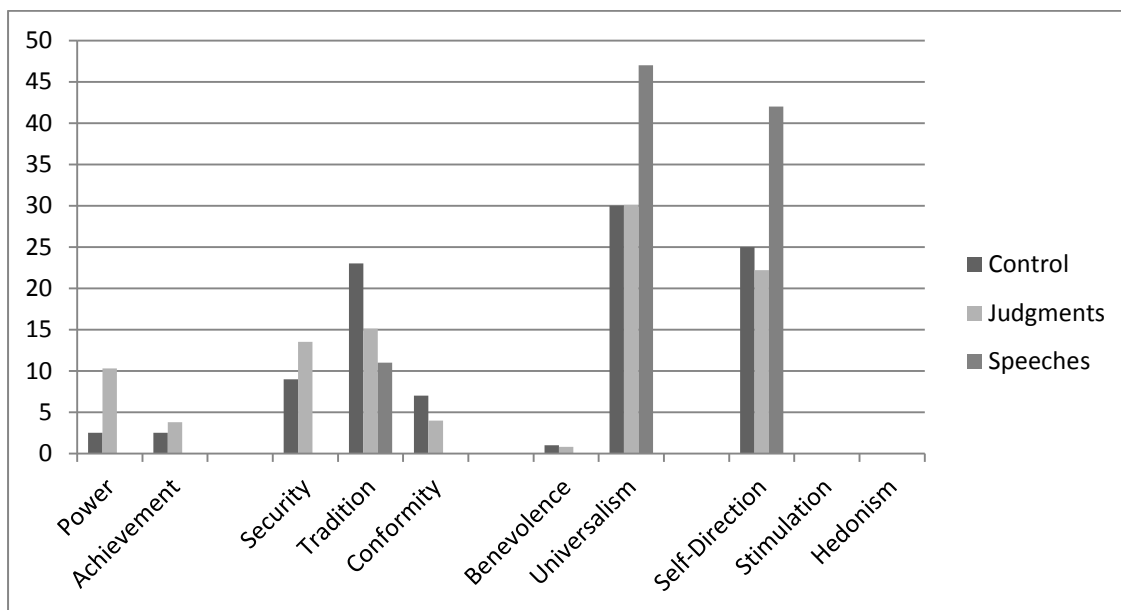


Figure 6.9-3: Value profiles of Lord Phillips

As with other Supreme Court Justices, there was some alignment between the decisions of Lord Phillips and the values he espouses, or does not espouse. Analysis of the decisions, in cases which divided judicial opinion, revealed that Lord Phillips did oppose *tradition* (67%) and *conformity* (57%) when these values were in conflict with any other value.⁶³⁴ However, there was no consistent alignment between the other values that Lord Phillips espoused in his judgments and the decisions he reached. In contrast, to the expectations based on the analysis of the values espoused in his judgments, Lord Phillips was more likely to reach a decision

⁶³³ Lord Chief Justice traditionally sat principally in the Criminal Division of the Court of Appeal.

⁶³⁴ *Tradition* and *conformity* were opposed to other values in nine and seven cases respectively.

that affirmed *universalism* and *self-direction* when these values were in conflict with any other value.⁶³⁵

Although, Lord Phillips did not highlight these values in his judgments, he did positively affirm these values in his extra-judicial writing, particularly prior to becoming the President of the Supreme Court. There were only three speeches available on the Supreme Court website at the time of analysis, but Lord Phillips had delivered numerous speeches, during his time as Lord Chief Justice of England and Wales.⁶³⁶ In these speeches, Lord Phillips affirmed values encompassed by *universalism*.⁶³⁷ Indeed, in contrast to the expectations based on the values espoused in his judgments where Lord Phillips espoused values encompassed within *security*, when discussing his decisions in cases where national security and human rights conflict, including the control order cases, Lord Phillips identified that he opposed *security* in favour of *universalism* and the protection of human rights.⁶³⁸ Lord Phillips also emphasised the importance of judicial independence and personal liberty in his speeches, both values are encompassed within *self-direction*.⁶³⁹ Indeed he has stated that ‘a judge should value independence above gold, not for his or her benefit but because it is the essence of the rule of law.’⁶⁴⁰ The affirmation of *self-direction* and *universalism* was reflected in the decisions of Lord Phillips and his extra-judicial speeches but not in his written judgments.

⁶³⁵ *Universalism* and *self-direction* were affirmed in 58% and 70% of cases respectively. These values were opposed to other values in seven and eight cases decided by Lord Phillips.

⁶³⁶ Lord Phillips, 'Crime and Punishment' (The High Sheriffs Law Lecture, Oxford, 11 October 2006); Lord Phillips, 'Equality Before the Law' (East London Muslim Centre, London, 3 July 2008)

⁶³⁷ Lord Phillips, 'Youth Justice' (Royal Society of Edinburgh's Alternatives to Prison Conference, Edinburgh, 9 December 2006). The theme of this speech was the promotion of alternatives to custodial sentences for less serious offences.

⁶³⁸ Lord Phillips, 'Terrorism and Human Rights', (University of Hertfordshire Law Lecture, Hatfield, 19 October 2006); *Secretary of State for the Home Department v AF* [2009] UKHL 28; Lord Phillips, 'European Human Rights - A Force for Good or a Threat to Democracy' (Centre of European Law Lecture, London, 17 June 2014)

⁶³⁹ Lord Phillips, 'Equality Before the Law' (East London Muslim Centre, London, 3 July 2008)

⁶⁴⁰ Lord Phillips, 'Judicial Independence' (Commonwealth Law Conference, Nairobi, 12 September 2007)

Indeed, there is difference between the values espoused by Lord Phillips in his Supreme Court judgments and both the values he espoused in his extra judicial writing and the values he affirmed in his decisions. Two factors may influence the values expressed in the judgments of Lord Phillips. The majority of judgments delivered by Lord Phillips were lead judgments. It was noted by Schubert that;

The extent to which a judicial opinion represents the personal views and language of the author varies inversely with the size of the group which accepts the opinion; and so institutional opinions should tend to be more depersonalised than concurring or dissenting opinions.⁶⁴¹

Indeed, this external pressure, as the President of an institution delivering a lead judgment, may serve as a conscious influence on the written judgments of Lord Phillips.

However, an insight from Paterson's book suggests that the inconsistency between the values affirmed in the decisions reached by Lord Phillips and values evident in his judgments may reflect his decision making process. Paterson suggests that Lord Philips 'tended to keep an open mind in difficult cases far later than most of his colleagues.'⁶⁴² Indeed he highlighted that Lord Phillips was likely to change his position relatively late in proceedings. This may suggest Lord Philips' reasoning is less anchored in system 1 thinking and personal values. In a recent documentary about the Supreme Court, Lord Phillips recognised the tension between the decision he would like to reach and the one the law tells him he should reach. In reference to his decision making he stated that 'what you feel... is not necessarily

⁶⁴¹ GA Schubert, *The Judicial Mind: Attitudes and Ideologies of Supreme Court Justices, 1946 - 1963* (Northwestern University Press 1965), page 946.

⁶⁴² A Paterson, *Final Judgment. The Law Lords and the Supreme Court* (Hart Publishing 2013), page 162.

relevant'.⁶⁴³ Although the decisions Lord Phillips reached were more consistently in favour of *universalism* and opposed to *tradition*, this was not as consistent as other Supreme Court Justices. The less consistent value: decision paradigm in his judgments may simply reflect his ability to consciously moderate the influence of the affect response and personal values on his decisions.

Psychological theory of decision making suggests that system 1 reasoning and the affect response can be overridden by deliberative system 2 reasoning. The analysis of the decisions of Lord Phillips suggests that some elite decision makers are less anchored in the instinctive system 1 response than others. Indeed, Guthrie *et al* demonstrated a range of system 1 heuristic responses in their judicial population.⁶⁴⁴ Although both systems are evident in the judicial decision making, judges are located on different parts of the scale from intuitive to deliberative and the data would suggest that Lord Phillips is located at the more deliberative range of the scale.

6.9.2 Lady Hale and judicial culture

Lady Hale also has an unusual value decision profile, with a lack of consistency between the values espoused in judgments and the decisions reached. Lady Hale heard 49 cases in the Supreme Court, during the period of analysis, including twelve cases which resulted in a minority or dissenting judgments. She delivered eleven individual judgments in these cases, six in support of the majority, two in support of the minority and four single dissenting judgments. Indeed, Lady Hale delivered a dissenting judgment in 8% of cases she heard

⁶⁴³ Lord Phillips 'The Highest Court in the Land: Justice Maker', (BBC4, 27 January 2011) <<http://www.bbc.co.uk/programmes/p00dhn8n>> accessed 3.08.2015.

⁶⁴⁴ C Guthrie, JJ Rachlinski and AJ Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93 Cornell Law Review 101

during this time and she was the least likely to support the majority. Lady Hale's unusually "high" rate of dissent was also noted by Brice Dickson who identified that in the period from her joining the House of Lords in 2004 to October 2009, Lady Hale had joined the dissent in nine cases, significantly more than the majority of other judges.⁶⁴⁵

Lady Hale is less likely than average to espouse values encompassed in *self-direction* in her judgments. These values include autonomy and independence but also freedom of a Justice to reach a different decision, a freedom that Lady Hale affirmed by delivering dissenting judgments, both alone and joining the minority position. This is not the only unusual aspect of the values expressed in the judgments delivered by Lady Hale. Although Lady Hale is more likely than average to espouse values encompassed within *universalism*, she is also more likely than average to espouse the opposing values encompassed both within *power* and *conformity*. The value profile for Lady Hale is presented below.

⁶⁴⁵ Data taken from the analysis published by Brice Dickson in *Judicial Activism in Common Law Supreme Courts* (Oxford University Press 2007)

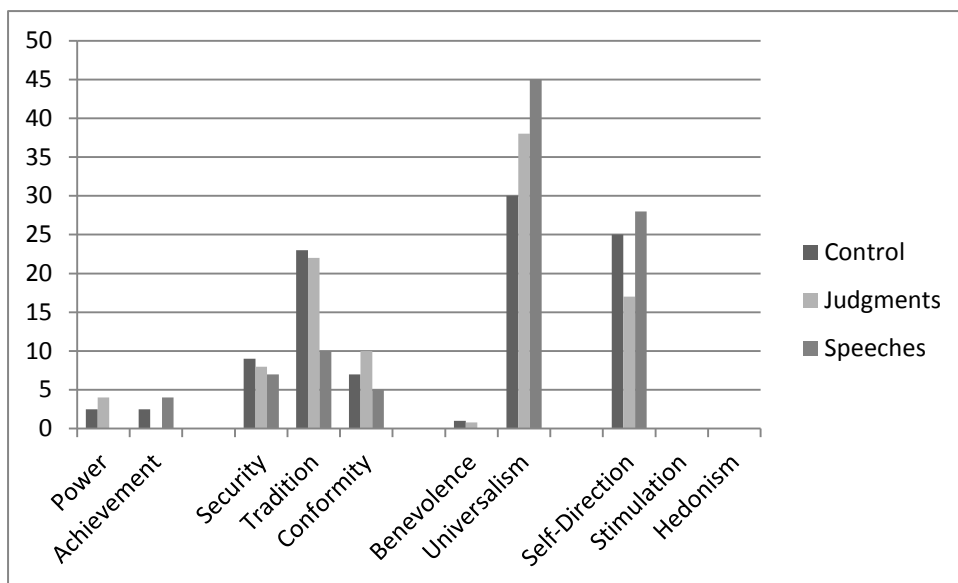


Figure 6.9-4: Value profiles for Lady Hale

Lady Hale has had a career in academia which has resulted in extensive extra-judicial writing.⁶⁴⁶ Indeed, this has continued and Lady Hale has the most speeches available for analysis on the Supreme Court website.⁶⁴⁷ Analysis of ten of her speeches revealed a value profile, which centres on *self-direction* and *universalism*. The majority of her speeches have been in the area of human rights and equality, in which she espoused values which are encompassed in *universalism*, a value reflected in her judgments.⁶⁴⁸ Lady Hale also espoused values encompassed within *self-direction*.⁶⁴⁹ She has described herself as having a reform agenda and recognised that she is happy to support a minority position with a distinctly

⁶⁴⁶ Lady Hale has the most speeches on the Supreme Court speeches website <http://www.supremecourt.gov.uk/news/speeches-archive.html>.

⁶⁴⁷ Lady Hale had 22 speeches on the Supreme Court website available for analysis delivered between 2009 – 2013. In comparison Lord Hope had 12 speeches available on the website at the time.

⁶⁴⁸ Lady Hale, 'The Quest for Equal Treatment' (2005) Public Law 57; Lady Hale, 'Equal Access to Justice in the Big Society' (Sir Henry Hodge Memorial Lecture, London, 27 Jun 2011); Lady Hale, 'The Conflict of Equalities' (Alison Weatherfield Memorial Lecture at the Employment Lawyers Association, London, 10 July 2013); Lady Hale, 'What's the Point of Human Rights?' (Warwick Law Lecture, Warwick, 28 November 2013); Lady Hale, 'Who's afraid of Human Rights?' (Welsh Observatory on the Human Rights of Children and Young People, Swansea, 14 June 2013); Lady Hale, 'Equality in the Judiciary' (Knutton Menon Memorial Lecture, London, 21 February 2013)

⁶⁴⁹ Lady Hale, 'Terrorism and Global Security: Threats to the independence of the judiciary in a changing world' (10th Biennial International Conference of International Association of Women Judges, Seoul, 12 May 2013); Lady Hale, 'Social Mobility' (Young Legal Aid Lawyers Society, London, 30 October 2013); Lady Hale, 'A Minority Opinion?' (2008) 154 Proceedings of the British Academy 319

different view point.⁶⁵⁰ This was evidenced by her propensity to dissent both in the House of Lords and in the Supreme Court yet is not reflected in her judgments.

It was the values espoused in Lady Hale's extra-judicial speeches which were reflected in her decisions. Analysis of Lady Hale's decisions revealed that Lady Hale supports *self-direction* in 56% of cases and *universalism* in 63% of cases in which they were opposed to other values. Indeed, Lady Hale has delivered single dissenting judgments which affirmed the values encompassed within *universalism*. This finding is in accordance with Dickson's work which suggests that Lady Hale will staunchly uphold human rights.⁶⁵¹ This is also evident in her earlier decisions in the House of Lords.⁶⁵²

But it is the opposition of power that Lady Hale was the most consistent. In contrast to the positive affirmation of power in her judgments, Lady Hale opposed *power* in 84% of cases in which *power* is in conflict with any other value. When *universalism* was opposed to *power*, Lady Hale supported *universalism* in all cases. Power has a motivational objective of the attainment of social status and prestige and control or dominance over people and resources. The values contained within this motivational goal include social power, wealth, authority, public image and social recognition.

⁶⁵⁰ Lady Hale, 'A Minority Opinion?' (2008) 154 Proceedings of the British Academy 319, page 322. Lady Hale, 'Welcome to the UK Supreme Court' (Denning Lecture, London, 28 November 2008)

⁶⁵¹ Dickson B, 'Close Calls in the House of Lords' in Lee J (ed), *From House of Lords to Supreme Court; Judges, Jurists and the Process of Judging* (Hart Publishing 2011), page 295

⁶⁵² *ibid* ; *R v J* [2005] 1 AC 562; *R (Kehoe) v Secretary of State for Work and Pensions* [2006] 1 AC 42; *M v Secretary of State for Work and Pensions* [2006] 2 AC 91; *Down Lisburn Health and Social Service Trust v H* [2006] 36 UKHL; *Re G (Children) (Residence: Same-sex Partner)* [2006] 1 WLR 2305.

As with Lords Hope and Kerr, Lady Hale reached decisions which align with certain values, however as with Lord Phillips there is an inconsistency between the values expressed within the context of the judgments and the values affirmed by the decision reached.

Lady Hale acknowledged that a judicial decision in a hard case;

....often involves a choice between different conclusions, any of which it may be possible to reach by respectable legal reasoning. The choice made is likely to be motivated at a far deeper level by the judges own approach to the law, to the problem under discussion and to the ideas of what makes a just result.⁶⁵³

In the same speech, Lady Hale suggested that judicial choice is guided, not only by the judge's own views of what is right and just, but also by his or her personal philosophy of judging but that 'most judges in this country never have occasion to own up to a personal philosophy, whether of life or judging'.⁶⁵⁴

Although she dismissed the 'unique voice' theory, she did highlight her different perspective associated with gender:

This is not to say that Lady Justice Arden and I speak 'in a different voice,' for we use the same kinds of reasoning and sources as do the men. Rather it is that our experience of leading women's lives allows us to see things that the men cannot always see, including the institutionalised

⁶⁵³ Lady Hale, 'A Minority Opinion' (2008) 154 Proceedings of the British Academy 319

⁶⁵⁴ *ibid*, pages 319 – 336.

inferiority involved in many socially accepted practices, as much in our own countries as elsewhere.⁶⁵⁵

Lady Hale identifies her philosophy as a feminist position with which she aligns with a ‘concern to see the world through other eyes than those of the traditionally empowered.’⁶⁵⁶ This view aligns with the decisions reached by Lady Hale, which affirm *universalism* and *self-direction* but values which do not consistently prevail in her written judgments. This is unusual and may be related to several factors both conscious and subconscious. As with Lord Phillips, Lady Hale suggests that she attempts to regulate the control of system 1 reasoning and gut reaction on the decisions she reaches:

If one’s being serious about being a judge, you have to be really quite careful to separate out your personal feelings about what the result ought to be from your rational and considered view as a judge as to what the result is.⁶⁵⁷

Indeed, this focus on system 2 reasoning may serve to modify the values expressed in the judgments. However, the inconsistency with values espoused in legal judgments and the decisions reached may also be due to the judicial culture. Her position as a single female Justice from an academic background may have an influence on the values that Lady Hale expresses in her judgments, not based on gender, but on the uniqueness of her position and the potential for social isolation. Most people are a combination of a ‘pragmatic intuitive politician’ who seeks approval and personal affirmation and the competing motivation of asserting ones autonomy (*self-direction*) and personal identity by remaining true to ones

⁶⁵⁵ Lady Hale ‘It’s a Man’s World: Redressing the Balance’ (Norfolk Law Lecture, Norwich, 16 February 2012)

⁶⁵⁶ Lady Hale, ‘A Minority Opinion’ (2008) 154 *Proceedings of the British Academy* 319, page 326.

⁶⁵⁷ In an interview with Louisa Peacock ‘Facing your Fears’ <<https://soundcloud.com/telewonderwomen/lady-hale-face-your-fears-with>> accessed 02.08.2015

innermost convictions.⁶⁵⁸ Although Lady Hale can assert her autonomy, and does so in the decisions she reaches, the potential for social isolation may allow the pragmatic politician to prevail in some of her written judgments.

Lady Hale is a highly respected member of the Supreme Court bench, indeed she was appointed to the deputy President position when Lord Hope retired. Her decisions have had a significant impact on the decisions of other Supreme Court Justices, certainly Lord Hope recognises her as an expert to whom he would defer. In *Stack v Dowden*(2007), Lord Walker openly acknowledges her draft opinion as having an influence on his decision.⁶⁵⁹ However the decision in *Radmacher v Granatino* [2010], Lady Hale wrote

In short, there is a gender dimension to the issue which some may think ill-suited to a decision by a court consisting of eight men and one woman.

It is for that reason I have chosen to write a separate judgment....’⁶⁶⁰

The statement highlighted the potential that gender has to isolate. Schultz and Shaw characterises the judicial culture, not limited to the UK, as one which can serve to isolate based on gender.⁶⁶¹ Indeed, in discussion about her role as a Supreme Court Justice, Lady Hale identified the potential for isolation within the judicial community:

⁶⁵⁸ PE Tetlock, 'Intuitive Politicians, Theologians, and Prosecutors: Exploring the Empirical Implications of Deviant Functionalist Metaphors' in Thomas Gilovich, Dale W Griffin and Daniel Kahneman (eds), *Heuristics and Biases* (8th edn, Cambridge University Press 2009) , page 584

⁶⁵⁹ *Stack v Dowden* [2007] UKHL 17, [14]

⁶⁶⁰ *Radmacher v Granatino* [2010] UKSC 42, [138]

⁶⁶¹ H Sommerlad, 'Let History Judge? Gender, Race, Class and Performative Identity: A Study of Women Judges in England and Wales' in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Onati International Series in Law and Society. 2013)

I have spent quite a lot of my life in a minority situation. Sometimes it can be a bit lonely. Sometimes you think oh wouldn't it be good to have another woman to natter with.⁶⁶²

It is accepted that many factors may modify the expression of values in written judgments, the judicial culture is just one which may underpin the difference between the values espoused in the judgments of Lady Hale and the values affirmed in the decisions she reaches. Although the external pressures influence the expression of values in written judgments, these pressures do not appear to modify the impact of values on the majority of the decisions reached by Lady Hale.

6.10 Psychology of judicial decision making: Values, legal judgments, decisions and bias.

It has long been argued by legal and jurisprudential theorists that subconscious internal factors may influence expert judicial decisions in 'hard cases'. Indeed, there is increasing recognition by the judiciary that extra-legal factors may influence decisions in cases where legitimate legal reasons do not provide a clear answer. This series of case studies suggests that personal values represent one element of the subconscious factors that influence decision making and this study provides further evidence to suggest that even with the constraints of the judicial oath, in decisions that divide the opinion of the Supreme Court, personal values play a role.

The literature on the psychology of decision making by individuals suggests that all experts are susceptible to system1 instinctive influences and these instinctive responses may serve to bias the decision making process. These influences are not always perceived as negative,

⁶⁶² In an interview with Louisa Peacock 'Facing your Fears' < <https://soundcloud.com/telewonderwomen/lady-hale-face-your-fears-with> > accessed 02.08.2015

indeed, Daniel Kahneman argues that experts are experts precisely because their experience leads them to instinctively sort out complex patterns of data and come to the right conclusion.⁶⁶³ However, the association between these subconscious influences and decisions brings into sharp focus discussions of judicial implicit bias. Again, it is important to note, that bias in this context is not a pejorative term. Indeed, in judicial decisions implicit bias may serve as a ‘meaningful manifestation of social and cultural norms.’⁶⁶⁴

However, the presence of implicit bias creates a tension with the expectations of transparency and accountability associated with judicial decisions. Accountability is in social psychology the link between individual decision makers on the one hand and social systems on the other. Accountability, like decision making, is a system which merges several variables including the belief that the decision makers’ individual inputs can be identified and the reasons for an individual’s view will be scrutinised.⁶⁶⁵ Judicial decisions must therefore be able to withstand the scrutiny necessary to render them accountable. This is particularly true for decisions of the Supreme Court where the decision has such far reaching consequences. However, decisions of the Supreme Court are not subject to appeal and as Lord Phillips suggests the accountability of these decisions relies on the individuals and the systems and processes of the court itself:

So far as our judicial decisions are concerned, the appellate system provides accountability. Decisions of the Supreme Court are not subject to appeal. The buck stops with us....⁶⁶⁶

⁶⁶³ D Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011)

⁶⁶⁴ JD Levinson, 'Forgotten Racial Equality: Implicit Bias, Decision Making and Misremembering' (2007) 57 *Duke Law Journal* 345

⁶⁶⁵ PE Tetlock and others, 'People as Intuitive Prosecutors: The Impact of Social-Control Goals on Attributions of Responsibility' (2006) 43 *Journal of Experimental Social Psychology* 195

⁶⁶⁶ Lord Phillips, 'Judicial Independence & Accountability: A View from the Supreme Court' (Launch of The

In the absence of appeal, it is argued that to render a decision of the Supreme Court accountable, it is essential that the factors that influence the final decision are transparent. Many Supreme Court Justices have discussed the essential need for transparency and Lord Kerr highlighted the specific importance of transparency of reasoning;

And if exposing a minority judgment to the critical onslaught of the majority involves a degree of self-sacrifice on the part of the dissenter, that is, in my view, a small price to pay for the transparency of the debate.⁶⁶⁷

However in cases which divide judicial opinion, this chapter demonstrates that there is an association between the values espoused by the individual Supreme Court Justices and their judicial decisions. Personal values serve as largely subconscious influences on decision making and it is the subconscious nature of these influences which creates the tension with the narrow definition of transparency and accountability. However, these subconscious influences are not without constraint. Indeed this research suggests that personal values function within the framework of judicial discretion which is as Dworkin suggests 'like the hole in a doughnut, it does not exist except as an area left open by a surrounding belt of restriction.'⁶⁶⁸

6.10.1 Constraints on the influence of values: Internal and external

It is accepted that system 2 reasoning provides an internal constraint on the system 1 influences including values and the influence of values will only take effect if affirmed by

Politics of Judicial Independence UCL Constitution Unit, London, 8 February 2011)

⁶⁶⁷ Lord Kerr, 'Dissenting Judgments - Self-Indulgence or Self-Sacrifice.' (The Birkenhead Lecture, London, 8 October 2012)

⁶⁶⁸ Dworkin R, *Taking Rights Seriously*, vol 136 (Harvard University Press 1978), page 31

system 2 reasoning. Indeed, any judicial decision is constrained by the “evidence and arguments” and the legal considerations surrounding the decision.⁶⁶⁹ However, other factors also serve to constrain judicial decision making, as recognised in the letter on behalf of Lord Dyson which opened this thesis, the judicial culture also serves to constrain the exercise of discretion and the influence of personal values.⁶⁷⁰

The judicial culture encompasses not only the constraints of the judicial oath but also a ‘distinctive set of norms and customs, including legal principles and theories.’⁶⁷¹ Any culture provides a shared meaning system that determines socialisation process and encompasses communication of ideas, values and behavioural expectations.⁶⁷² Roccas and Sagiv argue that culture can moderate the relationship between values and behaviour ‘by determining the repertoire of normative behaviours.’⁶⁷³ This study suggests that aspects of the judicial culture in the Supreme Court, including collegiality and respect for expertise, may modify the influence of values on decisions reached.

This thesis is not taking a normative position on the rightness or wrongness of values in judicial decision making or whether the presence of values undermines the accountability of Supreme Court decisions. However in cases which divide judicial opinions, where the evidence, arguments and law surrounding the decision do not provide a clear answer and there is legal uncertainty, the decision requires the exercise of discretion which is influenced

⁶⁶⁹ Taken from the letter by Simon Carr on behalf of Lord Dyson, Master of the Rolls, page 18.

⁶⁷⁰ *ibid*

⁶⁷¹ R Kahn , 'Institutionalised Norms and Supreme Court Decision Making: The Rehnquist Court on Privacy and Religion' in Cornell CW and Gillman H (eds), *Supreme Court Decision-Making: New Institutional Approaches* (University of Chicago Press 1999), page 175

⁶⁷² G Hofstede, *Culture's Consequences: Comparing Values, Behaviours, Institutions and Organisations Across Nations* (Sage 2001); R Fisher, 'Where is Culture in Cross Cultural Research? An Outline of a Multilevel Research Process for Measuring Culture as a Shared Meaning System,' (2009) 9 *International Journal of Cross Cultural Management* 25; S Roccas and L Sagiv, 'Personal Values and Behavior: Taking the Cultural Context into Account' (2010) 4 *Social and Personality Psychology Compass* 30

⁶⁷³ *ibid* Roccas and Sagiv (2010), page 30

by personal values. The role of values is largely subconscious, and although some of the judiciary do identify this role in the decision making or that of “instinct”, it is largely unarticulated in written judgments. In these limited cases, personal values serve to create bias and within the confines of the judicial process, personal values may consistently move a decision along the continuum in favour of a specific outcome.

There is, of course, a potential for bias to be negative, where it serves to discriminate, indeed unfettered discretion would serve to do just that, but values are not unfettered, they influence decisions within a narrow framework and although a single Supreme Court Justice may reach a decision in divided cases which consistently aligns with their values, the outcome of cases in the Supreme Court is not decided by a single Justice. In the Supreme Court, decisions are made by a panel of Justices. The case studies revealed a stark difference in value profiles of Lord Hope and Lord Kerr and demonstrated an association between these differences in values and differences in decisions. The following chapter looks at the court as a whole and draws on debates surrounding judicial diversity to address whether the study of values can contribute to these debates.

Chapter 7

What does the Value: Decision Paradigm Contribute to the Diversity Debate?

[I]n disputed points you need a variety of perspectives and life experiences to get the best possible results. You will not get the best possible results if everybody comes at the same problem from exactly the same point of view. You need a variety of dimensions of diversity, I am talking not only about gender and ethnicity but about professional background, areas of expertise and every dimension that adds to the richer collective mix and makes it easier to have genuine debates.⁶⁷⁴

This thesis has demonstrated that personal values play a role in the exercise of judicial discretion and judicial decision making in cases which divide the Supreme Court. Indeed, there is a consistent pattern between the values espoused in judgments and the values affirmed by the decisions of the majority of individual Supreme Court Justices. The case studies suggest that there is a differential pattern of value affirmation by individual Supreme Court Justices. It is this differential pattern of value expression that is explored in this chapter. Decisions, in the Supreme Court, are made by panels and this chapter centres on the Supreme Court Justices as individuals within a community of collective decision makers. In doing so, this chapter will discuss the impact of judicial values and the value decision paradigm on the wider debates surrounding the importance of judicial diversity.

⁶⁷⁴ Lady Hale, 'Judicial Appointments ' (Written Evidence to the House of Lords Select Committee on the Constitution, HL Paper 272, 28 March 2012)), [90]

It has long been argued that the Judicial Committee of the House of Lords, now the UK Supreme Court, is characterised by justices who are white, male, with a public school, and Oxbridge education. Indeed, since opening in 2008, eight Supreme Court Justices have been appointed to the bench, all male, all privately educated and seven from Oxbridge. It is clear that despite continuous debate and reflection on the lack of diversity by academics, government and the popular press, little has changed. These debates tend to centre on overt diversity, overt characteristics that are easily codified and reflect how the judiciary are seen. The study of personal values reveals that judicial decisions are the subject of tacit influences. Personal values are formed by life experiences and are influenced by gender, ethnicity and professional backgrounds and reflect many of the traits identified within the overt diversity debates. However, personal values are influenced by more than simple demographic variables. This chapter draws on the study of personal values and judicial decision making to highlight the tacit diversity of the Supreme Court judiciary and address debates surrounding judicial diversity, judicial appointments and panel selection.

7.1 Judicial diversity: The statistics

Debates surrounding the importance of diversity on the bench have fuelled the reform of the judicial appointments process and served to encourage a wider range of applicants.⁶⁷⁵ Despite this the Supreme Court bench remains predominantly, the domain of public school educated, white males who have graduated from Oxbridge. Since the Supreme Court was formed in October 2009, 20 Supreme Court Justices have sat on the bench full-time.⁶⁷⁶ All

⁶⁷⁵ Debates surrounding the diversity of the bench of the final court of appeal are not limited to the UK. HT Edwards, 'Race and the Judiciary.' (2002) 20 *Yale Law and Policy Review* 325; Malleson K, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 *Journal of Law and Society* 126; Malleson K, 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36 *Journal of Law and Society* 376. Judicial appointments are governed by Part 4 of the Constitutional Reform Act 2005 and Schedule 13 of the Crime and Courts Act 2013.

⁶⁷⁶ The data included Lord Hodge who joined the Supreme Court bench in September 2013.

but Lord Kerr and Lady Hale went to an independent school.⁶⁷⁷ All but two Supreme Court Justices attended Oxford or Cambridge.⁶⁷⁸ Occasionally, judges are invited to sit on the Supreme Court bench, six invited judges heard cases in the Supreme Court during the period of analysis.⁶⁷⁹ All of these judges were male, but they did have a more diverse education, with four of the six attending independent schools and only three attending Oxbridge. Although the social background of the judges is not recorded by the Judicial Appointments Commission (JAC), studies in the UK demonstrate a close association between educational background and social class, with those attending independent schools typically from higher social classes.⁶⁸⁰ To date only one female has sat on the Supreme Court bench, Lady Hale.⁶⁸¹ No Black Minority Ethnic (BME) judge has sat on the UK Supreme Court bench. As Lady Hale stated 'in the Supreme Court there is still only me and the only ethnic minorities we have are the Scots and the Irish'.⁶⁸²

This lack of diversity is not new nor is it limited to the UK. However, the UK has the lowest proportion of women sitting on the bench in the highest court when compared to other common law countries.⁶⁸³ Despite two decades of attention and growing support, the rate of

⁶⁷⁷ Lady Hale went to Richmond High School for Girls, which subsequently became a grammar school. Lord Kerr attended a Roman Catholic grammar school in Northern Ireland.

⁶⁷⁸ At the time of writing 9 SCJ's attended Oxford and 9 SCJ's attended Cambridge. Lord Kerr attended Queens University Belfast and Lord Hughes who joined the bench in April 2013 attended Durham University.

⁶⁷⁹ Lord Judge and Lord Scott heard four cases on the Supreme Court bench. Lord Matthew Clarke and Lord Hamilton heard two and Sir Anthony Hughes and Lord Carloway both heard one case. Of these, Lord Matthew Clarke and Lord Hamilton both went to non-fee paying schools. Lord Hamilton and Lord Carloway attended the University of Glasgow, Sir Anthony Hughes attended Durham University.

⁶⁸⁰ SJ Ball, R Bowe and S Gewirtz, 'School Choice, Social Class and Distinction: the Realization of Social Advantage in Education' (1996) 11 *Journal of Educational Policy* 89; D Reay, 'The Zombie Stalking English Schools: Social Class and Educational Inequality' (2006) 3 *British Journal of Educational Studies* 288. In the absence of specific data on social class, this chapter used education as both an independent factor and an indicator of class.

⁶⁸¹ There was also only one female Justice on the High Court of Australia in 2003, however since then more female judicial appointments have been made and in 2013, three of the seven justices were female. R Davis and G Williams, 'A Century of Appointments, but Only One Woman: Gender and the Bench of the High Court of Australia' (2003) 28 *Alternative Law Journal* 54.

⁶⁸² L Hale, 'Equality in the Judiciary.' (Kuttan Menon Memorial Lecture, London, 21 February 2013)

⁶⁸³ K Malleson and PH Russell, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto 2006). In 2013, the Supreme Court of the United States had three female Justices on a bench of nine and the Supreme Court of New Zealand had two female Justices on a bench

change has been remarkably slow. Indeed Kate Maleson goes further and argues that rather than making steady progress the UK judicial bench is becoming less diverse.⁶⁸⁴ In the setting of increasing media concern regarding the power of the Supreme Court, the public discussion of the lack of overt diversity has once again increased in prevalence.⁶⁸⁵ These debates centre on overt diversity, that which can be seen. This chapter will examine a second form of diversity, tacit diversity, which encompasses those influences on decision making that are not overt. Although there has been recognition that these influences exist, the influences have been difficult to ascertain and have not been reflected in the diversity debate. The central argument in this thesis is that personal values are one of these tacit influences. The study of personal values transcends many of the limitations of the current studies of tacit influences on judicial decision making and provides a tool to examine tacit influences that extend beyond demographic characteristics.

of five. In 2000, the High Court of Australia used to have a single female appointment but by 2013 the High Court of Australia had three females on a bench of seven. R Davis and G Williams, 'A Century of Appointments, but Only One Woman: Gender and the Bench of the High Court of Australia' (2003) 28 *Alternative Law Journal* 54

⁶⁸⁴ K Maleson, 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36 *Journal of Law and Society* 376; K Maleson, *Women, Judging and the Judiciary* (Routledge 2013). Indeed, Kate Maleson's argument is supported by the statistics in cited in Appendix 2 in the 'Improving Judicial Diversity' (Judicial Diversity Task Force, London, 13 September 2012), pages 53 – 56 <<https://www.gov.uk/government/publications/improving-judicial-diversity-judicial-diversity-taskforce-annual-report>> accessed 03.08.2015

⁶⁸⁵ Adam Wagner, 'Analysis: Supreme Court Asserts its Constitutional Power in Expenses Scandal Appeal' (UK Human Rights Blog, 2 December 2010) <<http://ukhumanrightsblog.com/2010/12/02/analysis-supreme-court-asserts-its-constitutional-power-in-expenses-scandal-appeal>> accessed 20 July 2014; ; Erika Rackley, 'We Need a More Diverse Supreme Court' *The Guardian* (London, 29 March 2011) <<http://www.guardian.co.uk/law/2011/mar/29/more-diverse-supreme-court-bench>> accessed 20 July 2014; Owen Bowcott, 'UK Supreme Court's only Female Judge Calls for more Diversity in Appointments' *The Guardian* (London, 25 October 2011) <<http://www.guardian.co.uk/law/2011/oct/25/uk-supreme-court-diversity>> accessed 20 July 2014; Owen Bowcott, 'Supreme Court becomes a Constitutional Animal' *The Guardian* (London, 28 November 2012) <<http://www.guardian.co.uk/law/guardian-law-blog/2012/nov/28/supreme-court-constitutional-welsh-byelaws>> accessed 20 July 2014; Terri Judge, 'Supreme Court sits in Secret for First Time in History' *The Independent* (London, 21 March 2013) <<http://www.independent.co.uk/news/uk/crime/supreme-court-sits-in-secret-for-first-time-in-history-8544535.html>> accessed 20 July 2014

7.1.1 Why do we want judicial diversity?

There are several strands to the arguments in support of a more diverse judiciary which are eloquently discussed by Erika Rackley in her book *Women, Judging and the Judiciary: From Difference to Diversity* and by Baroness Neuberger in her 2010 report from the Advisory Panel on Judicial Diversity.⁶⁸⁶ The same arguments have been raised by American legal academic and Court of Appeals judge Harry Edwards in relation to black judges in the U.S.A.⁶⁸⁷

Two of these arguments relate to democratic legitimacy and are centred on the perception of the judiciary as the ‘other’ by the general population. The first argument is that the overt lack of diversity may cause those appearing before the courts to believe that they are being judged by a society to which they do not belong. The second argument concerns the wider population and suggests that the lack of diversity may serve to undermine public confidence in the decisions reached. It is argued that the limited demographic diversity of the bench serves to create the perception that being a judge is the preserve of a very limited elite subclass in society. It is this perception which serves to undermine public confidence in the judiciary.⁶⁸⁸ Erika Rackley highlights the need for a ‘reflective’ judiciary arguing that although legitimacy can be derived from legal experience, this is no longer sufficient and the judiciary increasingly must ‘reflect’ the community it serves.⁶⁸⁹ Indeed, this is the argument supported by the House of Lords Constitution Committee:

⁶⁸⁶ Baroness Neuberger, 'The Report of the Advisory Panel on Judicial Diversity' (Report for the Ministry of Justice, London, 2010) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf>> accessed 12.03.2013; E Rackley E, *Women, Judging and the Judiciary. From Difference to Diversity* (GlassHouse, Routledge 2013)

⁶⁸⁷ HT Edwards, 'Race and the Judiciary.' (2002) 20 Yale Law and Policy Review 325

⁶⁸⁸ R Moorhead, M Sefton and L Scanlan, *Just Satisfaction? What Drives Public Participation and Satisfaction with Courts and Tribunals* (Report for the Ministry for Justice, London, 2008)

⁶⁸⁹ E Rackley E, *Women, Judging and the Judiciary. From Difference to Diversity* (GlassHouse, Routledge 2013)

It is vital that the public have confidence in our judiciary. One aspect of ensuring that confidence is a more diverse judiciary that more fully reflects the wider population.⁶⁹⁰

The diversity arguments extend beyond democratic legitimacy. The lack of overt diversity risks the loss of potential judicial talent due to the absence of lawyers from non-traditional backgrounds.⁶⁹¹ Furthermore, given that legal talent is not gender specific and is not associated with class or race, then the lack of diversity suggests inequality in career progression or judicial appointments.⁶⁹² Indeed the advocates of diversity argue that the lack of apparent diversity on the judicial bench creates a situation which deters potential candidates who do not belong to the perceived stereotype.⁶⁹³ Therefore it is argued that a more diverse bench would serve to enhance equality of opportunity both for women and those in minority sections of society.⁶⁹⁴

There is agreement amongst academics, politicians and the judiciary that more women and minority candidates should be appointed to the judicial bench and it is clear how this would play a role addressing the issue of public confidence. These arguments relate to overt diversity, how the judicial bench is seen by the general public or those aspiring to the

⁶⁹⁰ Baroness Jay Chairman of the House of Lords Constitution Committee commenting on the Judicial Appointments Report (2012) < <http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/news/jap-report-publication>> accessed 1st July 2013.

⁶⁹¹ K Malleon, 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36 *Journal of Law and Society* 376

⁶⁹² Only 32% of the Bar and 10% of QCs are female, traditionally the source of the judiciary. Rackley identified that this was due to a low application rate. E Rackley, *Women, Judging and the Judiciary. From Difference to Diversity* (GlassHouse, Routledge 2013), pages 38-39. Only 9.7% of the Bar are BME.

⁶⁹³ LJ Moran and DK Wintfeldt (2011), 'Barriers to Application for Judicial Appointment Research: Lesbian, Gay, Bisexual and Transgender Experiences' Project Report Interlaw Diversity Forum for LGBT Networks <<http://eprints.bbk.ac.uk/4396/>> accessed 28.07.2015

⁶⁹⁴ K Malleon, 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36 *Journal of Law and Society* 376

judiciary.⁶⁹⁵ However, there is another strand to the diversity debate and this centres on whether altering the demographic profile of the judicial bench will alter judicial decisions. This line of argument suggests that judicial decision making is subject to tacit influences that are associated with overt demographic differences.

7.2 Tacit diversity

Michael Polanyi described tacit knowledge as ‘things that we know but cannot tell’.⁶⁹⁶ The knowledge that influences decisions but is not articulated and includes personal ideals and influences which are acquired and transmitted through social networks and experience, yet not set out explicitly. The debates surrounding judicial diversity which highlight the importance of tacit knowledge, centres on the individual and their unique knowledge:

[T]he greater the diversity of participation by [judges] of different backgrounds and experiences, the greater the range of *ideas* and information contributed to the institutional process.⁶⁹⁷

These *ideas*, according to Mr. Justice Cameron, are the ‘inarticulate premises in the process of judging’;

Judges do not enter public office as ideological virgins. They ascend the Bench with built-in and often strongly held sets of values, preconceptions, opinions and prejudices. They are invariably expressed in the decisions

⁶⁹⁵ *ibid*

⁶⁹⁶ M Polanyi, 'Tacit Knowing. Its' Bearing on Some Problems of Philosophy' (1962) 34 *Reviews of Modern Physics* 601, page 601.

⁶⁹⁷ L Epstein, J Knight and AD Martin, 'The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the US Supreme Court' (2003) 91 *California Law Review* 903, page 944, italics added.

they give, constituting inarticulate premises in the process of judicial reasoning.⁶⁹⁸

Indeed, Robert Stevens suggests that it is these ‘inarticulate premises’ that serve as the main reason why England and Wales require a more diverse judiciary.⁶⁹⁹

The majority of work examining judicial tacit (inarticulate) premises has focused on the female judge. It has been argued that increasing judicial diversity would lead to better decision making because women and minorities bring something different to the decision making process.⁷⁰⁰ This gendered difference has been characterised by Carol Gilligan who contends that the unique female voice is a result of both biological and social differences which facilitates greater insight into feminist issues.⁷⁰¹ This was translated to judicial decision making in the US, in 1977, by Herbert Kritzer and Thomas Uhlman who argued that ‘common sense as well as sociological theory suggests that the socialisation experiences of men and women are significantly different’ and these differences, in combination with cultural norms, should lead to differences in judicial behaviour.⁷⁰²

The concept of the different voice has been approved by feminist legal theorists who argue that as a consequence of the different life experiences women judge differently to men and

⁶⁹⁸ Quote cited in R Stevens, 'Reform in Haste and Repent at Leisure: Iolanthe, the Lord High Executioner and Brave New World' (2004) 24 *Legal Studies* 33, page 78.

⁶⁹⁹ *ibid.*

⁷⁰⁰ S Goldman, 'Should There be Affirmative Action for the Judiciary' (1979) 62 *Judicature* 488; An excellent review of this work can be found in K Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11 *Feminist Legal Studies*, 1

⁷⁰¹ C Gilligan, 'In a Different Voice: Womens Conceptions of Self and of Morality' (1977) 47 *Harvard Educational Review* 481; C Gilligan, *In a Different Voice: Psychological Theory and Womens Development* (Harvard University Press 1982)

⁷⁰² HM Kritzer and TM Uhlman, 'Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition' (1977) 14 *Social Science Quarterly* 77, page 86

bring a different perspective to the judicial decision making process.⁷⁰³ This view is shared by many women judges in the US and New Zealand.⁷⁰⁴ One study in New Zealand found that 70% of women judges and 39% of male judges agreed with the statement that

‘Judges judge by what they think is right and proper and that necessarily involves a particular set of values and standards which are influenced by gender.’⁷⁰⁵

A survey of judges in America, in 1993, highlighted that male and female judges reported different life experiences in which women appeared to experience more gender inequality and discrimination than men.⁷⁰⁶ In these surveys, the majority of female judges and a large proportion of male judges consider that gender influences not only values but judicial decision making.

Lady Hale has acknowledged that she is a ‘feminist judge’ and suggested that her gender did play a role in the decision that she reached.⁷⁰⁷

⁷⁰³ TG Walker and DJ Barrow, 'The Diversification of the Federal Bench: Policy and Process Ramifications' (1985) 47 *Journal of Politics* 596; E Martin, 'The Representative Role of Women Judges' (1993) 77 *Judicature* 126 ; J Resnik, 'Asking about Gender in Courts' (1996) 21 *Signs* 952; H Barwick, J Burns and A Gray, *Gender Equality in the New Zealand Judicial System: Judges' Perceptions of Gender Issues* (Joint Working Group on Gender Equity, 1996). There are many feminist theorists who are uncomfortable with this thesis and accuse Gilligan of ‘essentialising’ women. M Crawford, 'Agreeing to Differ: Feminist Epistemologies and Women's Ways of Knowing' in M Crawford and M Gentry (eds), *Gender and Thought: Psychological Perspectives* (Springer, New York 1989), pages 128 – 145; L Code, *What can she know? Feminist theory and the constitution of knowledge*. (Cornell University Press 1991); J Parpart, 'Who is the "Other"? A Postmodern Feminist Critique of Women and Development Theory and Practice' (1993) 24 *Development and Change* 439

⁷⁰⁴ C Hunter, J Nixon and S Blandy, 'Researching the Judiciary: Exploring the Invisible in Judicial Making.' (2008) 35 *Journal of Law and Society* 76

⁷⁰⁵ H Barwick, J Burns and A Gray, *Gender Equality in the New Zealand Judicial System: Judges' Perceptions of Gender Issues* (Joint Working Group on Gender Equity, 1996)

⁷⁰⁶ E Martin, 'Men and Women on the Bench: Vive la Difference?' (1989 - 1990) 73 *Judicature* 204 ; PY Martin, JR Reynolds and S Keith, 'Gender Bias and Feminist Consciousness among Judges and Attorneys: A Standpoint Theory Analysis' (2002) 27 *Signs* 665

⁷⁰⁷ B. Hale, 'Equality and the Judiciary: Why Should We Want More Women Judges?' (2001) *Public Law* 489; Lady Hale, 'A Minority Opinion?' (Maccabean Lecture in Jurisprudence, London, 13 November 2007)

In short, there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman.⁷⁰⁸

Indeed in a BBC documentary Lady Hale suggested that if the bench had not been ‘all men’ then a ‘different decision’ would have been reached.⁷⁰⁹ However, Lady Hale has denied the ‘different voice’ principle.⁷¹⁰ In contrast, to this narrow approach to the role of gender in judicial decision making, Lady Hale suggests a more nuanced approach to “difference” which highlights gender as one element of the many facets of the different life experiences that a female judge brings to the decision which will enhance the judicial decision making process and make the system of justice “richer”.⁷¹¹ Indeed, in a speech in 2013, Lady Hale stated

I too used to be sceptical about the argument that women judges were bound to make a difference, but I have come to agree with those great women judges who think that sometimes, on occasions, we may do so.⁷¹² These arguments of difference are founded on a more subtle theoretical approach to the influence of gender on decision making, which suggests that the multiple facets of a gendered life experience add different perspectives which ‘enrich judicial decision making’.⁷¹³ This more nuanced approach to difference has a strong theoretical foundation and suggests that women bring a different perspective to the process

⁷⁰⁸ Lady Hale was the sole voice of dissent in *Radmacher v Granatino* [2010] UKSC 42, [137]. In this case, Lady Hale dissented against the decision to formalise the importance of a pre-nuptial agreements in divorce proceedings.

⁷⁰⁹ Lady Hale ‘The Highest Court in the Land: Justice Maker’, (BBC4, 27 January 2011) <<http://www.bbc.co.uk/programmes/p00dhn8n>> accessed 3.08.2015.

⁷¹⁰ B. Hale, ‘Equality and the Judiciary: Why Should We Want More Women Judges?’ (2001) Public Law 489; Lady Hale, ‘A Minority Opinion?’ (Maccabean Lecture in Jurisprudence, London, 13 November 2007)

⁷¹¹ B. Hale, ‘Equality and the Judiciary: Why Should We Want More Women Judges?’ (2001) Public Law 489

⁷¹² Lady Hale, ‘Equality in the Judiciary’ (Knutton Menon Memorial Lecture, London, 21 February 2013)

⁷¹³ Lady Justice Arden ‘Address to the Association of Women Barristers Annual General Meeting’ (London, 3 June 2008); M. Arden ‘Common Law and Modern Society: Keeping Pace with Change (Shaping Tomorrow’s Law)’ (2015, Oxford university Press).

of decision making.⁷¹⁴ This ‘gendered sensibility’ reflects that ‘women view the world and what goes on in it from a different perspective than men.’⁷¹⁵ It encompasses the many life experiences which are experienced differently by women including but not limited to the experiences surrounding childcare and childbirth.⁷¹⁶ Central to the more nuanced approach to difference is the recognition that the alternative views that enrich the decision making process may or may not be reflected in the final outcome. Indeed, as Rackley suggests

difference lies in the fact that she hears a different story (rather than simply the fact that it has a different ending) and more specifically, in the potential of her counter-narrative to open up new avenues for exploration and alternative understandings of the judge and judging.⁷¹⁷

Indeed, Lady Hale suggests the difference may not be reflected in the final outcome in the context of a panel decision;

⁷¹⁴ B. Hale, ‘Equality and the Judiciary: Why Should We Want More Women Judges?’ (2001) Public Law 489; B. Hale ‘Making a Difference? Why We Need a More Diverse Judiciary.’ (2005) 56 Northern Ireland Legal Quarterly, 281; E. Rackley ‘Difference in the House of Lords’ (2006) 15 Social & Legal Studies 163; Lady Hale, ‘A Minority Opinion?’ (Maccabean Lecture in Jurisprudence, London, 13 November 2007); R. Hunter, ‘Can Feminist Judges Make a Difference?’ (2008) 15 International Journal of the Legal Profession 7; E. Rackley, “What a Difference Difference Makes: Gendered Harms and Judicial Diversity.” (2008) 15 International Journal of the Legal Profession, 37; D. Feenan, ‘Women Judges: Gendering Judging, Justifying Diversity’ (2008) 35 Journal of Law and Society, 490; E. Rackley, ‘Detailing Judicial Difference.’ (2009) 17 Feminist Legal Studies; 11; K. Malleson ‘Diversity in the judiciary: The case for positive action’ (2009) 36 Journal of Law and Society 376. E. Rackley, ‘Women, Judging and the Judiciary: From difference to Diversity’ (Routledge, 2013); R. Hunter ‘More than Just a Different Face? Judicial Diversity and Decision Making. (2015) 68 Current Legal Problems 119.

⁷¹⁵ B. Wilson ‘Will Women Judges Really Make a Difference?’ (1990) 28 Osgoode Hall Law Journal 507

⁷¹⁶ B. Hale, ‘Equality and the Judiciary: Why Should We Want More Women Judges?’ (2001) Public Law 489; 501.

⁷¹⁷ E. Rackley, “What a Difference Difference Makes: Gendered Harms and Judicial Diversity.” (2008) 15 International Journal of the Legal Profession 37, 47.

If you are a group who are trying to reach a common answer, different people will put in different things to that debate and, hopefully, produce a common answer.⁷¹⁸

Difference in this context is reflected in the enriched decision making process and the factors that influence the final decision, but may only “on occasion” be reflected in the final outcome.⁷¹⁹ To date, empirical studies have not been carried out to test this complex multivariate theory. Indeed, to date the empirical research has centred on the ‘different voice’ theory examining outcomes for difference associated with gender. The majority of studies have been centred on the US judiciary where there are sufficient female judges for analysis and although gender appears to influence the political ideology of US Supreme Court Justices, the influence of gender on decision making is much more varied.⁷²⁰ These empirical studies examine two forms of influence: individual and panel effects.

7.2.1 Direct effect of gender on decision making – ‘Individual effects’

Studies which consider ‘individual effects’ on decision making focus on the judge as a unitary subject and argue that individual male and female judges will reach different decisions. To date the vast majority of these studies have examined the United States Supreme Court and have not identified a significant difference between the decisions reached

⁷¹⁸ Lady Hale, Oral Evidence to the Select Committee on the Constitution Judicial Appointments Process (2012) <<http://www.parliament.uk/documents/lords-committees/constitution/JAP/JAPCompilevidence28032012.pdf>>, 275

⁷¹⁹ E. Rackley, ‘Women, Judging and the Judiciary: From difference to Diversity’ (Routledge, 2013), page 201.

⁷²⁰ S Davis, S Hair and D Songer, ‘Voting Behaviour and Gender on the US Courts of Appeals’ (1993) 77 *Judicature* 129

by male and female justices.⁷²¹ This was not limited to the United States. There was no significant overall difference between male and female judicial decisions in criminal appeals in the Alberta Court of Appeal.⁷²² Although, there was no general difference when the decisions in all cases were assessed, there was a difference in a subset of cases that involved gendered issues including sex and employment discrimination cases.

Two studies of the United States State Supreme Courts demonstrated that female judges were more likely than male judges to support plaintiffs in sex discrimination cases.⁷²³ Similarly an analysis of the United States Court of Appeals, by Songer *et al*, did not identify a difference in decision making between male and female judges in obscenity or criminal search and seizure cases but the authors did find a difference in decision making in employment discrimination cases.⁷²⁴

Although in the majority of cases, there is no difference in decision making associated with gender, in a small subset of cases which have a gendered element, female judges may decide differently and if cases are decided by a female judge alone, the gender of that judge may influence the final decision. Unlike in the lower courts, cases in the superior courts tend to be heard by a panel of judges. In such cases, does the gender of the judges influence the decision? Can a single female voice be heard?

⁷²¹ D Allen, 'Voting Blocs and the Freshman Justice on the State Supreme Court.' (1991) 44 *Western Politics Quarterly* 727, S Davis, S Hair and D Songer, 'Voting Behaviour and Gender on the US Courts of Appeals' (1993) 77 *Judicature* 129

⁷²² P McCormick and J Twyla, 'Do Women Judges Make a Difference? An Analysis of Appeal Court Data' (1993) 8 *Canadian Journal of Law and Society* 135

⁷²³ D Allen and D Wall, 'The Behaviour of Women State Supreme Court Justices: Are they Tokens or Outsiders?' (1987) 12 *Justice Systems Journal* 727. In this study, the authors investigated eighteen areas of law in 21 State Supreme Courts over a 13 year period. The authors did not state the number of cases in the subsets analysed, but identified gender differences in decisions reached in sex discrimination cases. G Gryski, E Main and W Dixon, 'Models of State High Court Decision Making in Sex Discrimination Cases.' (1986) 48 *Journal of Politics* 143. Gryski *et al* identified a differential pattern of decision making between male and female judges in 126 sexual discrimination cases decided over a 10 year period.

⁷²⁴ DR Songer, S Davis and S Haire, 'A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals' (1994) 56 *The Journal of Politics* 425

7.2.2 Indirect effects of gender on decision making – ‘Panel effects’.

The study of decision making by panels of judges moves away from the decisions of an individual judge to the influence of an individual judge on the decision of the panel as a whole, or ‘panel effects’. Again, as with the study of direct gender effects, in the vast majority of cases the presence of a female judge on the panel does not make an appreciable difference on the decision reached, however as Boyd *et al* suggest:

The results of this exercise are now reasonably clear: the presence of women in the federal appellate judiciary rarely has an appreciable empirical effect on judicial outcomes. *Rarely, though, is not never.*⁷²⁵

A large scale study by Peresie *et al* examined the influence of the presence of a female judge on a three judge panel in a subset of cases which have a gender element (sexual harassment and sex discrimination cases) in the Federal Appeal Courts over a three year period (1999 – 2001).⁷²⁶ The authors identified that the plaintiffs lost in the vast majority of cases, but that they were twice as likely to prevail when a female judge was on the bench. Indeed, the authors demonstrated that the presence of a female judge significantly increased the probability that a male judge would support the plaintiff in the cases analysed.⁷²⁷ Similarly, Moloney Smith identified that the presence of women on the bench has resulted in more verdicts for female plaintiffs in sex discrimination cases.⁷²⁸

⁷²⁵ CL Boyd, L Epstein and AD Martin, ‘Untangling the Causal Effects of Sex on Judging’ (2010) 54 American Journal of Political Science 389, page 406

⁷²⁶ JL Peresie, ‘Female Judges Matter: Gender and Collegial Decision Making in the Federal Appellate Courts’ (2005) 114 Yale Law Journal 1759

⁷²⁷ *ibid.*

⁷²⁸ S Moloney Smith, ‘Diversifying the Judiciary: The Influence of Gender and Race on Judging’ (1994) 28 University of Richmond Law Review 179, page 185 citing T Lester, ‘The Reasonable Woman Test in Sexual Harassment Laws - Will It Really Make a Difference?’ (1993) 26 Indiana Law Review 227

This was confirmed by Boyd *et al* in an analysis of approximately 8,000 cases heard in the United States Court of Appeals for the Federal Circuit.⁷²⁹ The authors also demonstrated that the presence of a female judge on a panel would lead to significantly more rulings in favour of the party alleging discrimination in cases of sexual discrimination. Indeed, Boyd *et al* stated:

[W]e observe consistent and statistically significant individual and panel effects in sex discrimination disputes: not only do males and females bring distinct approaches to these cases, but the presence of a female on a panel actually *causes* male judges to vote in a way they otherwise would not—in favour of plaintiffs.⁷³⁰

Why does the presence of a single female judge on a panel influence the panel's decision in a limited set of cases? The authors contended that this was also related to informational effects. It was argued that male judges recognised that female judges possessed information that male judges perceived as more credible and persuasive than their own knowledge on these gendered issues. In doing so, female judges either directly or indirectly influenced the choices of their male colleagues.⁷³¹ Indeed, this theory was supported by Farhang and Wawro who analysed evidence from sexual harassment cases in the U.S. Court of Appeals.⁷³² The authors demonstrated that female judges influence the panel through the exchange of ideas and information rather than male counterparts making concessions to women to achieve

⁷²⁹ CL Boyd, L Epstein and AD Martin, 'Untangling the Causal Effects of Sex on Judging' (2010) 54 *American Journal of Political Science* 389 . Of note the authors used a matching system to standardise the comparison between gender. The authors defined a female panel as one which had a female judge, there was insufficient data to examine the presence of two or more female judges independently.

⁷³⁰ *ibid*, page 406. Italics added by authors.

⁷³¹ L Baldez, L Epstein and AD Martin, 'Does the US Constitution Need an Equal Rights Amendment?' (2006) 35 *Journal of Legal Studies* 243; CL Ostberg and ME Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Cambridge University Press 2007); *ibid*

⁷³² S Farhang and G Wawro (2010) 'Deliberation versus Bargaining on the US Court of Appeals.' *Law and Economics Workshop, Berkeley Program in Law and Economics, UC Berkeley* <<http://www.escholarship.org/uc/item/1wm7t0hv>> accessed 26.07.2013 2010.

unanimity.⁷³³ Although not the influence of a female judge, a very small study by Glynn and Sen suggested that in gendered issues, male judges who have daughters may adopt a more feminine position.⁷³⁴

There is very little empirical work examining the influence of the gender of judges on judicial decisions in the UK. Indeed, the paucity of research may be due to the small number of female judges in the UK.⁷³⁵ However, a survey of a small subset of female judges in the UK revealed that almost 38% of judges thought that female judges had a different approach to judging.⁷³⁶ The study did not investigate whether this difference influenced the judgments reached. The Feminist Judgments Project provides theoretical evidence to support the alternative difference theory in the UK by revealing the underlying gendered influences in judgments.⁷³⁷ The relevance of the project was highlighted by Lady Hale in evidence to the Select Committee on the Constitution in 2012,

You may be aware that there was a very interesting project recently, the Feminist Judgments Project, where some academic, feminist lawyers decided that they would rewrite from a feminist perspective the judgments in a range of mostly famous cases from areas all around the law. Sometimes they reached exactly the same conclusion but with a different reasoning and sometimes they reached a different conclusion, demonstrating with varying degrees of success that where you start from can have an effect on where you end up.⁷³⁸

⁷³³ *ibid*

⁷³⁴ A Glynn and M Sen, 'Like Daughter, like Judge: How Having Daughters Affect Judges Voting on Womens Issues.' (MPSA Annual National Conference, Chicago, 2011)

⁷³⁵ The statistics released on the 11th July 2013, revealed that 24.3% of judges in the UK were female, of which only 5 sit in the higher courts where cases are heard by a panel.

⁷³⁶ This was a very small subset of the female judiciary. 18 interviewees were included in the analysis.

⁷³⁸ Lady Hale, Oral Evidence to the Select Committee on the Constitution Judicial Appointments Process (2012) <<http://www.parliament.uk/documents/lords-committees/constitution/JAP/JAPCompiledevidence28032012.pdf>>, 275

7.2.2.1 *The limitations of empirical analysis of the role of gender on judicial decision making—critical mass theory.*

One of the key limitations to the analysis of the role of gender in judicial decision making is the principle of ‘critical mass.’ This principle as applied to gender and judicial decision making suggests that until women, working in a predominantly male environment, increase in number beyond ‘token status’ they will largely conform to the characteristics of the dominant male group.⁷³⁹ A study by Collins *et al*, applied critical mass theory to the role of gender in legal decision making in the United States Federal District Courts.⁷⁴⁰ The authors identified the presence of more than one female Justice did influence decision making. This was limited to specific areas of law, with female judges adopting a more liberal position in criminal justice cases and cases concerning civil liberties and rights. However there was no detectable variation in cases which concerned labour and economic regulation. The authors proposed that critical mass theory may explain many of the inconsistencies in previous studies and suggested that the influence of gender may indeed be more profound if the number of female judges increased to a critical mass.

7.3 The influence of other demographic variables on judicial decision making.

The tacit influence of other demographic variables on judicial decision making has also been assessed, but to a much lesser degree. A study by Massie *et al* found that race had no effect on judicial decision making in the United States Court of Appeals when all cases were analysed.⁷⁴¹ However, as with gender effects, race associated differences could be detected

⁷³⁹ RM Kanter, 'Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women' (1977) 82 *American Journal of Sociology* 965 .

⁷⁴⁰ PM Collins, KL Manning and RA Carp, 'Gender, Critical Mass and Judicial Decision Making.' (2010) 32 *Law and Policy* 260

⁷⁴¹ T Massie, SW Johnson and SM Gubala, 'The Impact of Gender and Race in the Decisions of Judges on the United States Courts of Appeals' (Midwest Political Science Association Annual Meeting, Chicago, 25 April 2002)

if the data was limited to specific types of cases which had a racial element.⁷⁴² Similar findings were identified by Cameron and Cummings, who demonstrated that increased racial diversity on the panels of the United States Court of Appeals substantially changed the voting behaviour of the judges on the panels in affirmative action cases, mimicking the panel effect of female judges.⁷⁴³ Indeed, Kasteslec has demonstrated that a black judge was more likely to than a non-black judge to support affirmative action and the presence of a single black judge on a panel of three would significantly increase the likelihood that the panel would vote in favour of affirmative action.⁷⁴⁴ Chew and Kelley also suggested that African American judges reach different decisions to white judges, but the difference was limited to a very specific set of cases that concerned racial harassment.⁷⁴⁵

The study of criminal cases and sentencing suggests that the influence of race may extend beyond a distinct subset of race-related cases, but the differences are minimal and inconsistent. Welch *et al* suggested that ethnicity influences judicial decision making with the black judge more 'even-handed' with white and black defendants than the white judge who tended to treat the white defendant more leniently.⁷⁴⁶ Steffensmeier and Britt examined the influence of race on sentencing in Pennsylvania between 1992 -1996.⁷⁴⁷ The authors identified a very small race-judge effect, with black judges more likely to sentence both black and white offenders to prison. However, black and white judges largely weighted case and

⁷⁴² *ibid*

⁷⁴³ CM Cameron and CP Cummings, 'Diversity and Judicial Decision Making: Evidence from Affirmative Action Cases in the Federal Courts of Appeals, 1971 - 1999.' (Princeton University Working Paper, 30 March 2003)

⁷⁴⁴ JP Kasteslec, 'Racial Diversity and Judicial Influence on Appellate Courts.' (2013) 57 *American Journal of Political Science* 167

⁷⁴⁵ PK Chew and RE Kelley, 'Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases' (2009) 86 *Washington University Law Review* 1117

⁷⁴⁶ S Welch, M Combs and J Gruhl, 'Do Black Judges Make a Difference?' (1988) 32 *American Journal of Political Science* 126

⁷⁴⁷ D Steffensmeier and CL Britt, 'Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?' (2001) 82 *Social Science Quarterly* 749; D Steffensmeier and S Demuth, 'Ethnicity and Judges Sentencing Decisions. Hispanic-Black-White Comparisons' (2001) 39 *Criminology* 145

offender information in similar ways when making punishment decisions and there also was similarity in sentencing practices. Despite the limited data, ethnicity appears to exert a tacit influence on judicial decision making.

There is also very limited data available on the influence of sexual orientation of judicial decision making. Leslie Moran undertook a series of interviews with lesbian and gay members of the judiciary and legal professionals in Australia, England, Wales and South Africa. The interviews revealed that judges do not feel that their sexuality has any impact on judicial decisions.⁷⁴⁸ Similarly there is very little evidence on the role of religion on judicial decision making, however one small study, carried out in the USA, did identify that religion played a role in judicial perception of role orientation. In a very small survey of 22 judges, Wold identified that Protestant judges tended to adopt a more restraintist position, strictly adhering to precedent, than Catholic or Jewish judges.⁷⁴⁹ In contrast, a study by Ashenfelter *et al*, did not identify any association between the religion of a judge and decision reached in civil rights cases in three federal districts.⁷⁵⁰

7.4 Personal values and the diversity debate

In summary, there is some empirical evidence that specific overt characteristics such as gender and race may be associated with tacit influences on judicial decision making, in a limited subset of cases. Whether this is related to unique information or experiences, tacit knowledge appears to play a role in decision making. One of the key limitations to the

⁷⁴⁸ LJ Moran, 'Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings' (2006) 28 Sydney Law Review 565

⁷⁴⁹ JT Wold, 'Political Orientation, Social Backgrounds, and the Role Perceptions of State Supreme Court' (1974) 27 The Western Political Quarterly 239

⁷⁵⁰ O Ashenfelter, T Eisenberg and SJ Schwab, 'Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes.' (1995) 24 Journal of Legal Studies 257

assessment of the influence of tacit knowledge is the need to relate tacit influence to overt easily characterised demographic variables.

The study of personal values transcends many of the limitations of the current studies and may provide a tool to examine tacit influences that extend beyond overt demographic characteristics. Personal values are both informed and formed by life experiences. They reflect demographic characteristics but are not limited to overt demographics. Personal values therefore provide an insight into the individual which goes beyond overt demographics and as such may provide a tool to start to explore the multifaceted influences on judicial decision making highlighted by “difference” theory. The examination of judicial values may serve to provide deeper insight into the tacit knowledge that influences judicial decisions and add another deeper layer to the diversity debate.

7.4.1 Personal values, demographics and genetic inheritance

The relationship between overt characteristics and decision making may be related to personal values. For example Gilligan argued that women define themselves through connection with others and emphasise care and the preservation of relationships when solving disputes.⁷⁵¹ Indeed, Beutel and Marini demonstrated that females are more likely to express concern and responsibility for the well-being of others and less likely to espouse materialism and competition.⁷⁵² This association with values has led authors such as Davis *et al* to propose that the ‘different voice’ of the female judge was a reflection of these values and

⁷⁵¹ C Gilligan, *In a Different Voice: Psychological Theory and Womens Development* (Harvard University Press 1982)

⁷⁵² AM Buetel and MM Marini, 'Gender and Values' (1995) 60 *American Sociological Review* 436

should lead a female judge to support community values over individual rights when they come into conflict with each other.⁷⁵³

There is an association between personal values and demographic characteristics at a population level. Empirical population studies, using the Schwartz psychometric test, identified that women attribute more importance to *universalism*, *conformity* and *security* values. In contrast, men tend to attribute more importance to *power* values and those encompassed within *achievement*, *hedonism*, *stimulation* and *self-direction*.⁷⁵⁴ The value difference associated with gender is nuanced and subject to social moderators.⁷⁵⁵ Indeed, the gender difference may also be associated with culture and nationality, with more apparent value differences associated with gender in Israel, South Africa and Italy as compared to Canada.⁷⁵⁶

The data regarding the influence of race on personal values is mixed. A small study of managers in 1977 did not identify any variation in values associated with race.⁷⁵⁷ However a small study in Israel demonstrated that ethnicity had a significant impact on the rating of values encompassed within *tradition*, *conformity*, *self-direction* and *achievement*, with a positive correlation between the more traditional ethnic groups and the values encompassed in *tradition* and *conformity*.⁷⁵⁸

⁷⁵³ S Davis, S Hair and D Songer, 'Voting Behaviour and Gender on the US Courts of Appeals' (1993) 77 *Judicature* 129

⁷⁵⁴ SH Schwartz and T Rubel, 'Sex Differences in Value Priorities: Cross-Cultural and Multimethod Studies' (2005) 89 *Journal of Personality and Social Psychology* 1010

⁷⁵⁵ E Prince-Gibson and SH Schwartz, 'Value Priorities and Gender' (1998) 61 *Social Psychology Quarterly* 49. The difference was only identified at a population level.

⁷⁵⁶ SH Schwartz and others, 'Extending the Cross-Cultural Validity of the Theory of Basic Human Values with a Different Method of Measurement' (2001) 5 *Journal of Cross-Cultural Psychology* 519

⁷⁵⁷ J Watson and J Williams, 'Relationship Between Managerial Values and Managerial Success of Black and White Managers' (1977) 62 *Journal of Applied Psychology* 203

⁷⁵⁸ E Prince-Gibson and SH Schwartz, 'Value Priorities and Gender' (1998) 61 *Social Psychology Quarterly* 49. The ethnicity classification used was based on birth country and father's ethnicity dividing the subjects into five groups, Israeli born/ Israeli father, Israeli born/ European or American father, European or American

7.4.2 Personal values beyond demographics

Population studies reveal an association between some demographic variables and personal values. However these studies also reveal that personal values are more nuanced and encompass more than simple demographic difference. Although at a population level females tend to support values that are encompassed within *universalism*, *conformity* and *security*, this is moderated by nationality.⁷⁵⁹ Moreover, a study of directors of publically-traded corporations in Sweden suggested that female directors tend to care less about *conformity* and *security* and more about *stimulation* and *self-direction* than the general female population.⁷⁶⁰

Variation of personal values was also demonstrated to be influenced by education, with less educated respondents attributing more importance to *security*, *tradition* and *conformity* values than more formally educated respondents, regardless of gender.⁷⁶¹ Indeed, education was associated with increased *self-direction* and *stimulation* and reduced *tradition* and *conformity*.⁷⁶² There is also some evidence that value priorities differ amongst university students in relation to their area of study. Students who were engaged in the study of economics accorded higher priority to *power* and *achievement*, values associated with autocratic behaviour. In contrast, those who were studying the humanities were more likely to rate *universalism* highly.⁷⁶³

born/European or American father, Israeli born/ Asian/African father and Asian or African born /Asian or African father.

⁷⁵⁹ SH Schwartz and others, 'Extending the Cross-Cultural Validity of the Theory of Basic Human Values with a Different Method of Measurement' (2001) 5 Journal of Cross-Cultural Psychology 519

⁷⁶⁰ RB Adams and P Funk, 'Beyond the Glass Ceiling: Does Gender Matter?' (2012) 58 Management Science 219

⁷⁶¹ GV Caprara and others, 'Personality and Politics: Values, Traits and Political Choice.' (2006) 27 Political Psychology 1; H Steinmetz and others, 'Testing Measurement Invariance Using Multigroup CFA: Differences between Educational Groups in Human Values Measurement' (2009) 43 Quantity & Quality 599

⁷⁶² E Prince-Gibson and SH Schwartz, 'Value Priorities and Gender' (1998) 61 Social Psychology Quarterly 49

⁷⁶³ DL McCabe, JM Dukerich and JE Dutton, 'Context, Values and Moral Dilemmas: Comparing the Choices of Business and Law School Students' (1991) 10 Journal of Business Ethics 951

A relationship has also been identified between political choice and personal values, centre-left voters rated *universalism*, *benevolence* and *self-direction* higher than centre-right voters. Centre-right voters were more inclined to rate *security*, *power*, *achievement* and *tradition* higher than their centre-left counterparts.⁷⁶⁴

It has been argued that when people attain stable positions in the occupational world and engage with family life, they tend to become less preoccupied with their own success and more concerned with the welfare of others.⁷⁶⁵ This change in motivation is reflected in personal values, with an association identified between increasing age and an increased priority of *benevolence* and *universalism* and a negative correlation with *power* and *achievement*.⁷⁶⁶ *Self-direction* and *stimulation* were also negatively correlated with age, with an associated increase in *tradition*, *conformity* and *security*.⁷⁶⁷

Subjective religiosity or 'the personal perception of how religious one is' has also been related to personal values. Indeed, those who perceived themselves as very religious were more likely to rate *tradition* and *conformity* highly, values associated with self-restraint. In contrast there is a negative correlation between religiosity and *hedonism*, *self-direction*, *achievement* and *power* values. These values are associated with change-seeking attributes.⁷⁶⁸

⁷⁶⁴ GV Caprara and others, 'Personality and Politics: Values, Traits, and Political Choice' (2006) 27 *Political Psychology* 1

⁷⁶⁵ J Veroff, D Reuman and S Field, 'Motives in American Men and Women Across the Adult Life Span' (1984) 20 *Developmental Psychology* 1142

⁷⁶⁶ SH Schwartz and others, 'Extending the Cross-Cultural Validity of the Theory of Basic Human Values with a Different Method of Measurement' (2001) 5 *Journal of Cross-Cultural Psychology* 519

⁷⁶⁷ M Rokeach, *The Nature of Human Values* (Free Press 1973); NT Feather, *Values in Education and Society*. (Free-Press 1975)

⁷⁶⁸ SH Schwartz and others, 'Extending the Cross-Cultural Validity of the Theory of Basic Human Values with a Different Method of Measurement' (2001) 5 *Journal of Cross-Cultural Psychology* 519

7.5 Hypothesis – There is diversity of values on the Supreme Court bench

The findings of this thesis suggest that personal values are more nuanced than demographics and reflect a wider variety of life experiences and influences. The central hypothesis of this chapter is that the study of values will provide a more discriminating view of judicial diversity. With the exception of Lady Hale, the overt demographic characteristics of the Justices on the UK Supreme Court bench are the same. All male, all white and all of a certain age. Personal values however reflect more than overt demographic characteristics and the case study analysis suggested that individual Supreme Court Justices, despite the demographic uniformity of the Supreme Court bench, have a variety of personal values which are reflected in their decisions. This chapter will build on this finding and examine personal values and decision making in the context of the judicial diversity debate.

The key questions addressed in this chapter are as follows:

- Do Supreme Court Justices emphasise different values? Is there tacit diversity?
- If Supreme Court Justices emphasise different values, is the difference in values reflected in decision making?
- What does this mean for judicial diversity?

7.6 Judicial values

The values expressed by individual Supreme Court Justices were identified using cases from data set 1 decided between October 2009 and April 2011.⁷⁶⁹ Of these cases, the Supreme Court Justices heard an average of 45 cases of which 22% divided judicial opinion which represented an average of 10 cases which divided opinion with a range of 7 – 14 cases. In

⁷⁶⁹ The data including the number of cases heard and judgments delivered by individual Supreme Court Justices is presented in Table 14, page 235.

these cases, each Supreme Court Justice delivered between 5 – 11 judgments which were analysed for value statements and the average coding density per judgment was 11 coded units. Two Supreme Court Justices, Lords Walker and Collins were less likely to express values within their judgments.

The Supreme Court Justices supported the majority position in an average of 68% of cases with Lords Phillips and Mance more likely to support the majority position. Lord Collins supported the majority position in all of the seven cases he delivered a judgment on in this time period.⁷⁷⁰ In this data set, Lady Hale was most likely to issue a dissenting judgment, delivering a single dissenting judgment in one third of cases she heard during this time period. Single dissenting judgments were also delivered by Lord Hope, Lord Walker and Lord Kerr. The combined values of all the Supreme Court Justices, expressed as a percentage of the total coded statements in the eighteen cases analysed, are presented below (Table 16).

⁷⁷⁰ Lord Collins did dissent in one case *R v Maxwell* [2010] UKSC48, although a decision was delivered on the 17 November 2010, the judgment was not released until 20 July 2011 after the period of content value analysis.

Table 16: Values identified through content analysis of judgments in divided cases.

| Value | Total Coding (N = 1086) | Total number of cases (N= 18) |
|----------------|------------------------------------|--|
| Universalism | 315 (30%) | 18 |
| Self-direction | 269 (25%) | 18 |
| Tradition | 244 (23%) | 17 |
| Security | 100 (9%) | 16 |
| Conformity | 72 (7%) | 12 |
| Power | 27 (2.7%) | 9 |
| Achievement | 23 (2.3%) | 4 |
| Benevolence | 15 (1%) | 3 |
| Stimulation | 0 | 0 |
| Hedonism | 0 | 0 |

The values are expressed as n (% of total value expression).

Eight of the ten values were identified in the judgments. Over three quarters of the coding was within three key value motivations *tradition*, *self-direction* and *universalism*, these values were expressed in all of the cases analysed. This result is unsurprising given the nature of the values encompassed within these groups. Although not as frequently espoused, *security*, *conformity* and *power* featured in half or more of the judgments analysed.

Stimulation and *hedonism* were not coded in any of the judgments. This is also unsurprising given the nature of these values. The defining goal of *stimulation* is excitement, novelty and challenge in life. *Hedonism* is defined as the pleasure or sensuous gratification for oneself.

By the nature of these values, it is unlikely that either will be espoused, denied or affirmed in a legal case. Indeed, in a legal context it is difficult to envisage a case which would allow the Supreme Court Justices to reveal such values.

7.7 Is there diversity of expression of values by the Supreme Court Justices?

The values expressed by the Supreme Court Justices in the 18 cases analysed in data set one are presented in Table 17. The average expression of all the Supreme Court Justices is presented at the top. It is notable that the pattern of value expression varied between individuals Supreme Court Justices.

The most commonly espoused value was *universalism*, which accounted for 30% of the overall coding within all judgments. Five Supreme Court Justices espoused this value more often than average, with Lord Kerr most likely to espouse *universalism* which accounts for 53.6% of his total coding.⁷⁷¹ Although many of the Supreme Court Justices expressed *universalism* more often than average, others were less likely to espouse these values. Lord Rodger was the least likely to espouse the values encompassed within *universalism*, accounting for 12.5% of coding, with Lords Brown and Hope also less likely than average to espouse these values.

In contrast, these Supreme Court Justices were more likely than average to espouse values encompassed within *tradition* and *conformity*. Lord Rodger had the highest percentage coding for *tradition*, which accounted for over half (58%) of his value statements. The majority of the coding reflected adherence to statutory purpose and affirmation of Parliamentary sovereignty.

⁷⁷¹ This was discussed in detail in chapter 6.

Other values that were frequently expressed included *self-direction*, *security*, *achievement* and *power*. Lord Mance is the most likely to espouse *self-direction* which encompasses autonomy, freedom and independence and accounts for 36% of the value statements of Lord Mance compared to an average of 25%. Lord Mance also had the highest percentage coding for *security*, which accounted for a fifth of his value expression. *Security* was expressed in 16 of the cases analysed and encompasses family and national security but also preventing uncertainty in the law.

The analysis of the expression of values in judgments suggested that despite the lack of overt diversity, there was a wide variation in the rate and pattern of value expression by individual Supreme Court Justices. Indeed, the distribution of value expression suggested that there was evidence of tacit diversity in the Supreme Court. As discussed in the earlier chapters, there is an association between value expression and decisions in cases which divide judicial opinion. The next question is whether the diversity of values expressed by Supreme Court Justices is reflected in judicial decisions?

Table 17 : Values espoused by individual Supreme Court Justices in judgments

| Supreme Court Justice | Total number of coded statements | Coding density | Power | Achievement | Security | Tradition | Conformity | Benevolence | Universalism | Self-Direction |
|-----------------------|----------------------------------|----------------|--------------|--------------|-------------|--------------|------------|-------------|--------------|----------------|
| Average | | | 2.7% (27) | 2.3% (23) | 9% (100) | 23% (244) | 7% (72) | 1% (15) | 30% (315) | 25% (269) |
| Lord Phillips | 126 | 14 | 10.3% | 3.9% | 13.5% | 15.1% | 4% | 0.8% | 30.1% | 22.3% |
| Lord Hope | 188 | 19 | 1.6% | 2.1% | 10.1% | 34% | 12.8% | 0% | 18.6% | 20.8% |
| Lord Brown | 100 | 9 | 4% | 6% | 7% | 27% | 8% | 4% | 17% | 27% |
| Lord Rodger | 64 | 10 | 0% | 0 | 1.6% | 57.8% | 4.7% | 0% | 12.5% | 23.4% |
| Lord Walker | 59 | 7 | 0% | 8.5% | 3.4% | 23.7% | 6.8% | 0% | 35.6% | 22% |
| Lady Hale | 116 | 11 | 2.5% | 0% | 8.7% | 22.4% | 10.3% | 0.8% | 38 % | 17.3% |
| Lord Kerr | 97 | 11 | 2.1% | 0% | 3.1% | 9.3% | 2.0% | 3.1% | 53.6% | 26.8% |
| Lord Mance | 102 | 15 | 0.9% | 0% | 17.6% | 7.8% | 5.9% | 0% | 31.3% | 36.5% |
| Lord Clarke | 76 | 15 | 0% | 2.6% | 6.6% | 14.5% | 1.3% | 1.3% | 39.5% | 34.2% |
| Lord Collins | 34 | 5 | 2.9% | 2.9% | 11.8% | 26.5% | 0% | 0.8% | 20.6% | 34.5% |

There was no coding for *hedonism* or *stimulation* and these values are not included in the table. The values are expressed as a percentage of the total number of value coded statements for each Supreme Court Justice.

7.8 Judicial values and agreement

Studies on the tacit influence of gender suggest that the influence is only evident in a subset of cases where gender plays a role. Personal values reflect many facets of the individual and the influence of personal values should therefore not be limited to a narrow subset of cases. To address whether individual judicial values are reflected in the decisions reached, analysis of agreement between Supreme Court Justices with broadly similar values was carried out. If values have a tacit influence on judicial decision making, then Supreme Court Justices with similar values will reach similar decisions in cases that divide judicial opinion.

A larger data set was used to assess judicial agreement. This data set included all of the cases for which a judgment was delivered in the first four years of the Supreme Court (cases decided between October 2009 and September 2013). The Supreme Court decided 242 cases, 57 (23%) of which divided judicial opinion, 27 (11%) of which resulted in a single dissenting judgment and 30 (12%) of which were divided case, where more than one Supreme Court Justice supported the minority position. The divided cases included those cases that were close call, where a single vote decided the case, cases that were decided with judicial division of 3:2 or 4:3 ($n = 20$), and cases that included more than one Justice supporting the minority position but not a close call ($n = 10$).

During this period, six of the Supreme Court Justices retired.⁷⁷² On average, each individual Supreme Court Justice heard 96 cases, with a range from 51 (Lord Collins) to 133 (Lord Hope). In the smaller subset of cases which divided judicial opinion, the Supreme Court Justices heard, 25 cases on average, with a range from 12 (Lord Collins) to 34 (Lord Hope).

⁷⁷² Lord Collins was the first to retire in May 2011. Lord Rodger died in June 2011. Lord Brown retired in April 2012. Lord Phillips retired in September 2012. Lord Dyson retired from the Supreme Court to take up the role of Master of the Rolls in September 2012. Lord Walker retired in March 2013 and Lord Hope retired in June 2013.

In the cases that divided judicial opinion, with the exception of one case, Lord Collins consistently reached decisions in support of the majority position.⁷⁷³ The remaining Supreme Court Justices supported the majority position in an average of 67% of cases, Lord Phillips was more likely to support the majority position (91%) and Lord Kerr supported the majority position in less than half of these cases. Indeed, Lord Kerr and Lady Hale were the most likely to deliver single dissenting judgments.

Agreement was defined as when two Supreme Court Justices reached the same decision in a case. This was calculated as a percentage of the total number of cases in which both Supreme Court Justices were on the bench. On average, every pair of Supreme Court Justices heard 39 cases together, but this ranged from 16 cases heard by Lord Collins and Lord Brown to 68 cases heard by Lord Hope and Lady Hale. Agreement was calculated for three different categories;

1. *Total Agreement*: The percentage agreement in all cases heard by both Supreme Court Justices and includes both unanimous and divided cases.
2. *Divided agreement*: This was a percentage agreement in cases heard by both Supreme Court Justices in which there was either a dissenting judgment or minority judgments.
3. *Minority agreement*: This was a percentage of agreement in cases heard by both Supreme Court Justices in which more than one Supreme Court Justice adopted a minority position.

⁷⁷³ Lord Collins supported the minority position in *R v Maxwell* (n 758).

7.8.1 A classification of Supreme Court Justices based on value profiles.

To facilitate the value-based agreement analysis, the Supreme Court Justices were broadly categorised based on the dominant values in their profiles. In using broadly defined categories, subtle differences will not be identified and differences associated with values not included in the categorisation will be missed. However, the use of broad categories facilitates an analysis of whether Supreme Court Justices who express similar values reach similar decisions in cases that divide judicial opinion.

As discussed above some values were not espoused in judgments and therefore were not used in the analysis.⁷⁷⁴ The most commonly coded values in judgments were *universalism*, *self-direction* and *tradition* which accounted for 78% of the coding. These values were used initially to identify Supreme Court Justices with similar values. As *conformity* and *tradition* are closely related these values were categorised together.

7.8.1.1 *Tradition and conformity*

Three of the Supreme Court Justices espoused the values encompassed within *tradition* and *conformity* in their judgments at a level above average. Those Supreme Court Justices who promoted *tradition* tended to be less likely than average to espouse values encompassed within *universalism*. They tended to support decisions which affirmed *tradition* and *conformity*. These judges were Lord Hope, Lord Brown and Lord Rodger.

⁷⁷⁴ *Stimulation* and *hedonism* were not coded. *Benevolence* and *achievement* were rarely coded and therefore not included in the analysis.

7.8.1.2 *Universalism*

In contrast, two of the Supreme Court Justices, Lord Kerr and Lord Clarke were less likely than average to espouse values encompassed in *tradition* and *conformity* and more likely to espouse values encompassed within *universalism*. These Supreme Court Justices were also more likely than average to reach decisions which favoured universalistic values and oppose decisions which affirmed values encompassed within *tradition*.

If the study was simply limited to these three values, the Supreme Court Justices could be divided into three groups as follows; the traditionalists who supported values encompassed in *tradition* and *conformity* and opposed values encompassed in *universalism*. The *universalists* who supported values encompassed in *universalism* and opposed values encompassed in *tradition* and *conformity* and those who do not consistently fit either pattern. One other value is consistently expressed at a high level and that is *self-direction*.

7.8.1.3 *Self-Direction*

Values encompassed within *self-direction* include liberty, autonomy, independence and freedom. These values contrast with those of *power* which include dominance over others. Although the coding for *power* was very low, Lord Mance consistently espoused values encompassed within *self-direction* and opposed decisions which affirmed the values encompassed in *power*.

7.8.1.4 *What about the remaining Supreme Court Justices?*

The analysis of values is more nuanced than the basic categorisation identified above. Indeed, although five of the Supreme Court Justices can be classified into the two broad categories, it is evident from the value profiles in the case studies that even within those

categories there are nuanced differences in the values not used in the categorisation. Lord Clarke, although classified as a universalist, also espouses values encompassed within *self-direction*. Indeed, Lord Mance is less likely than average to espouse values within *tradition* and *conformity*.

The remaining Supreme Court Justices cannot be easily classified. To assist classification, values espoused in extra-judicial speeches were analysed, and the value position supported by the Supreme Court Justices in the cases that divided judicial opinion was also used. As discussed in chapter 6, the values espoused by Lord Phillips in his judgments were inconsistent with the decisions that he reaches. Although he was not more likely than average to espouse values encompassed within *universalism* in his judgments, Lord Phillips was more likely to support a position that affirms the values encompassed within *universalism*. Indeed, analysis of his extra-judicial speeches identified that almost half (47%) of all value statements were encompassed within *universalism*, including concepts of liberty, alternative approaches to custodial sentencing and early intervention programmes. Lord Phillips, although unusual in his positive espousal of values encompassed within *power*, was less likely than average to espouse values encompassed within *tradition* and *conformity*. Lord Phillips was therefore categorised with Lords Clarke and Kerr, as a universalist.

As discussed in chapter 6, Lady Hale espoused values encompassed in *universalism* and *self-direction*, and analysis of 13 of her available extra-judicial speeches revealed a high expression of both values. The majority of her speeches have been in the area of human rights and equality, in which she espoused values that are encompassed in *universalism* and *self-direction*, values which were reflected in her judgments. Lady Hale also espoused values encompassed within *self-direction*. Lady Hale could align with either the Supreme Court

Justices who espoused values encompassed within *universalism* or Lord Mance, who espoused *self-direction*. Unlike the universalists, Lady Hale also espoused values encompassed within *tradition*. This profile therefore does not align with those of the other Supreme Court Justices who espoused *universalism* but were less likely than average to espouse values encompassed in *tradition*. For this reason, Lady Hale was categorised with Lord Mance.

Lord Walker was less likely than the other Supreme Court Justices to express values within his judgments. However, even with the limited coding Lord Walker was more likely than average to espouse values within *universalism*, however as with Lady Hale he was not less likely to espouse values encompassed within *tradition* and *universalism*. Analysis of the decisions of Lord Walker revealed that Lord Walker was more likely than average to reach decisions which affirmed the values within *tradition* and *conformity*. Indeed, analysis of the decisions reached revealed that he supported conformity in 93% of cases.⁷⁷⁵ Dickson identified that Lord Walker was likely to adopt a restrained approach, with a preference that changes in the law are brought about by Parliament rather than making the changes himself. He also identified that Lord Walker was more likely to take a literal or positivist approach to interpretation of legislation.⁷⁷⁶ Both of these findings support the view that Lord Walker supported the values encompassed in *conformity*. For this reason, Lord Walker was included with those Supreme Court Justices who espoused values encompassed within *tradition* and *conformity* although his value profile was unusual.

⁷⁷⁵ Lord Walker supported *conformity* in 13 of the 14 cases in which it was opposed to any other value.

⁷⁷⁶ B Dickson, 'Close Calls in the House of Lords' in Lee J (ed), *From House of Lords to Supreme Court; Judges, Jurists and the Process of Judging* (Hart Publishing 2011), page 290

The final groupings based on the values espoused in judgments and extra-legal writing and the values supported in decisions are as follows (those highlighted in italics are those who do not match the profile exactly, some may also be aligned with a different grouping);

Tradition and conformity: Lords Hope, Rodger, Brown and Walker.

Universalism: Lord Kerr, Clarke and Phillips.

Self-direction: Lord Mance and Lady Hale.

7.9 Agreement in cases that divide judicial opinion: Revealing difference.

The study of personal values and agreement builds on the theory of agreement espoused by Sheldon Goldman in 1969, which assumed that ‘if judges agree most of the time (which they do) then the explanation of variance among them must lie in their differing values derived from divergent background experiences’.⁷⁷⁷ In doing so, this study not only examined agreement in all the cases decided, but examined agreement in the subset of cases that divided judicial opinion. Studies of Supreme Court decisions usually focus on agreement, typically used to examine unanimous decisions, with a focus on the court as a whole. In analysing agreement in cases that divide, this chapter starts to examine the role of the individual in the Supreme Court within the context of panel decision making. Indeed, this approach was used by Paterson to examine the voting relationships of the judiciary through the lens of judicial dialogue, which also centred on the role of the individual. Paterson identified high and low degrees of agreement in all cases between certain pairs of Supreme Court Justices, which are affirmed in this study.⁷⁷⁸

⁷⁷⁷ S Goldman, 'Backgrounds, Attitudes and the Voting Behaviour of Judges: A Comment on Joel Grossman's Social Backgrounds and Judicial Decisions' (1969) 31 *Journal of Politics* 214

⁷⁷⁸ A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013)

In Table 18, the agreement between pairs of Justices, identified by Paterson, was examined not only in all cases, but in the subset of cases that divided judicial opinion and minority decisions where more than one Supreme Court Justice supported the minority position, cases in which personal values may play a role. For many of the pairs identified, a high degree of agreement in all cases was associated with a high degree of agreement in divided cases and minority decisions. However, this was not true for all pairings, and analysis of cases that divide judicial opinion revealed differences not previously highlighted. For example, Lords Clarke and Dyson have a high degree of agreement over all cases, but in the four minority cases, they agreed on only one.

Similarly, for the majority of pairings where there is a low degree of agreement in all cases, there was low level of agreement in cases which divided judicial opinion. However, again, there was unexpected agreement. For example, Lords Kerr and Philips, who do not have a high degree of agreement overall, reached a high degree of agreement in cases with minority judgments. The variations in agreement associated with cases that divide judicial opinion, although a limited number of cases, reveals subtle differences that are not revealed by analysis of the entire case data set. Indeed, it is in the cases that divide judicial opinion that values are more visible in legal judgments.

7.10 Shared values reflected in agreement – Tacit diversity

The data are set out in two tables. Table 19 presents the overall agreement between any pair of Supreme Court Justices in all cases and the agreement in cases that divide judicial opinion, while Table 20 presents the agreement in cases with more than one minority judgment.

As expected, overall there is a high degree of agreement in all cases between the Supreme Court Justices (Table 19). The agreement between Supreme Court Justices in each grouping was compared with the average level of agreement between all the Supreme Court Justices. The average agreement overall was very high at 84%, with average agreement in divided cases reducing to 53% and in minority cases reaching a percentage agreement of 44%. In assessing whether there was a high or low degree of agreement, the agreement between pairs of Justices was compared to the average.

Table 18 Comparison between those identified as high/low level agreement in all cases.

| Highest Agreement | All Cases | Divided | Minority | Lowest Agreement | All Cases | Divided | Minority |
|--------------------------|-----------|----------|----------|-------------------------|-----------|----------|----------|
| Dyson-Walker | 97% (29) | 83% (6) | 75% (4) | Brown - Hale | 65% (49) | 23% (22) | 0 (11) |
| Clarke-Hale | 93% (43) | 70% (10) | 100% (4) | Hale - Rodger | 72% (36) | 23% (13) | 0 (7) |
| Dyson-Hope | 94% (35) | 82% (11) | 60% (5) | Kerr - Rodger | 69% (29) | 25% (12) | 22% (9) |
| Clarke- Dyson | 90% (31) | 57% (7) | 25% (4) | Kerr - Mance | 80% (41) | 38% (13) | 33% (9) |
| Collins-Kerr | 94% (17) | 75% (4) | 67% (3) | Brown - Kerr | 73% (55) | 35% (23) | 27% (11) |
| Brown-Dyson | 92% (38) | 78% (14) | 50% (6) | Hale - Phillips | 75% (48) | 40% (20) | 25% (12) |
| Dyson-Phillips | 94% (31) | 82% (11) | 86% (7) | Brown - Clarke | 72% (25) | 30% (10) | 0 (5) |
| Hale-Mance | 93% (54) | 70% (13) | 75% (8) | Brown - Mance | 82% (38) | 36% (11) | 0 (6) |
| Clarke - Phillips | 90% (38) | 67% (12) | 60% (5) | Kerr - Phillips | 81% (37%) | 63% (19) | 67% (12) |
| | | | | | | | |
| Rodger - Brown | 91% (45) | 76% (17) | 80% (10) | Dyson - Hale | 73% (26) | 30% (10) | 25% (8) |
| Walker- Brown | 91% (46) | 76% (17) | 80% (9) | Dyson - Kerr | 77% (35) | 53% (17) | 75% (8) |
| | | | | Hale - Walker | 82% (57) | 47% (19) | 40% (10) |
| | | | | Phillips -Walker | 83% (36) | 54% (13) | 33% (9) |
| | | | | Rodger - Mance | 80% (20) | 55% (9) | 33% (6) |
| | | | | Walker – Kerr | 73% (34) | 40% (15) | 40% (10) |

This table highlights the difference between examining agreement in all cases and agreement in cases which divide judicial opinion. Although broadly similar, in some cases for example Clarke – Dyson had a high degree of consensus overall but in cases in which there is a minority opinion there is a low degree of consensus. Similarly, Lord Dyson and Lord Kerr have a low degree of consensus overall but a high degree of consensus in cases which divide.

Table 19 : Consensus between Supreme Court Justices in all cases and cases which divided judicial opinion decided between October 2009 – September 2013.

Agreement in cases which divided judicial opinion

| Agreement in all cases | Supreme Court Justice | Lord Phillips | Lord Hope | Lord Brown | Lord Rodger | Lord Walker | Lady Hale | Lord Kerr | Lord Mance | Lord Collins | Lord Clarke |
|------------------------|-----------------------|---------------|-----------|------------|-------------|-------------|-----------|-----------|------------|--------------|-------------|
| | Lord Phillips | | 67% (12) | 68% (10) | 54% (11) | 54% (13) | 40% (20) | 63% (19) | 58% (12) | 60% (5) | 67% (12) |
| | Lord Hope | 81% (26) | | 63% (22) | 57% (8) | 64% (22) | 58% (19) | 44% (18) | 38% (13) | 56% (9) | 33% (12) |
| | Lord Brown | 86% (44) | 87% (60) | | 76% (17) | 76% (17) | 23% (22) | 35% (23) | 33% (12) | 71% (7) | 30% (10) |
| | Lord Rodger | 85% (33) | 86% (44) | 91% (45) | | 70% (10) | 23% (13) | 25% (12) | 55% (9) | 50% (4) | 20% (5) |
| | Lord Walker | 83% (36) | 88% (65) | 91% (46) | 91% (35) | | 47% (19) | 40% (15) | 47% (17) | 70% (10) | 38% (13) |
| | Lady Hale | 75% (48) | 88% (68) | 65% (49) | 72% (36) | 82% (57) | | 48% (23) | 70% (13) | 50% (6) | 70% (10) |
| | Lord Kerr | 81% (37) | 84% (64) | 73% (55) | 69% (29) | 73% (34) | 82% (67) | | 38% (13) | 75% (4) | 69% (13) |
| | Lord Mance | 88% (43) | 81% (42) | 79% (39) | 80% (20) | 80% (46) | 93% (54) | 80% (41) | | 67% (6) | 50% (12) |
| | Lord Collins | 90% (20) | 85% (33) | 87% (16) | 91% (22) | 90% (29) | 89% (27) | 94% (17) | 87% (23) | | 40% (5) |
| | Lord Clarke | 90% (51) | 84% (51) | 72% (25) | 85% (26) | 82% (46) | 93% (43) | 88% (32) | 86% (46) | 89% (28) | |

The data is presented as a percentage agreement with the number of cases heard by any pair of Supreme Court Justices presented in brackets. Cases which divided judicial opinion included cases with single dissenting judgments and cases with more than one minority judgment.

Table 20: Consensus between Supreme Court Justices in cases in which more than one Supreme Court Justice supported a minority position in cases heard between October 2009 – September 2013.

| Supreme Court Justice | Lord Phillips | Lord Hope | Lord Brown | Lord Rodger | Lord Walker | Lady Hale | Lord Kerr | Lord Mance | Lord Collins | Lord Clarke | Lord Dyson |
|-----------------------|---------------|-----------|------------|-------------|-------------|-----------|-----------|------------|--------------|-------------|------------|
| Lord Phillips | | 57% (7) | 60% (10) | 33% (6) | 33% (9) | 25% (12) | 67% (12) | 43% (7) | 50% (4) | 60% (5) | 86% (7) |
| Lord Hope | 57% (7) | | 45% (11) | 43% (3) | 65% (14) | 54% (11) | 60% (10) | 14% (7) | 43% (7) | 20% (10) | 60% (5) |
| Lord Brown | 60% (10) | 45% (11) | | 80% (10) | 80% (10) | 0% (11) | 27% (11) | 0% (6) | 66% (6) | 0% (5) | 60% (5) |
| Lord Rodger | 33% (6) | 43% (3) | 80% (10) | | 67% (6) | 0% (7) | 22% (9) | 20% (5) | 33% (3) | 0% (4) | 33% (3) |
| Lord Walker | 33% (9) | 65% (14) | 80% (10) | 67% (6) | | 40% (10) | 40% (10) | 33% (9) | 67% (6) | 22% (9) | 75% (4) |
| Lady Hale | 25% (12) | 54% (11) | 0% (11) | 0% (7) | 40% (10) | | 60% (15) | 75% (8) | 50% (4) | 100% (4) | 25% (8) |
| Lord Kerr | 67% (12) | 60% (10) | 27% (11) | 22% (9) | 40% (10) | 60% (15) | | 33% (9) | 67% (3) | 71% (7) | 75% (8) |
| Lord Mance | 43% (7) | 14% (7) | 0% (6) | 20% (5) | 33% (9) | 75% (8) | 33% (9) | | 33% (3) | 57% (7) | 50% (4) |
| Lord Collins | 50% (4) | 43% (7) | 66% (6) | 33% (3) | 67% (6) | 50% (4) | 67% (3) | 33% (3) | | 50% (4) | 100% (3) |
| Lord Clarke | 60% (5) | 20% (10) | 0% (5) | 0% (4) | 22% (9) | 100% (4) | 71% (7) | 57% (7) | 33% (3) | | 25% (4) |

The data is presented as a percentage agreement with the number of cases, in which there was more than one Supreme Court Justice supporting the minority position, heard by any pair of Supreme Court Justices presented in brackets.

7.10.1 The Traditionalists: Lord Hope, Lord Rodger, Lord Brown and perhaps Lord Walker.

The traditionalists supported values encompassed within *tradition* and *conformity* and opposed values encompassed within *universalism*. Application of these criteria identified three Supreme Court Justices; Lords Hope, Rodger and Brown. Again, if this value based grouping was accurate, then there would be a high degree of agreement between the decisions reached by these Supreme Court Justices.

There was an above average level of agreement between the Supreme Court Justices, with Lords Hope and Brown reaching the same decision in 87% of cases, Lords Hope and Rodger in 86% of cases, Lords Rodger and Brown in 91% of cases decided by both Supreme Court Justices.⁷⁷⁹ There was also a high level of agreement between these Supreme Court Justices and Lord Walker, with agreement between Lords Walker and Hope of 88%, Lords Walker and Rodger of 91% and Lords Walker and Brown of 91%. Indeed, the average agreement between the Supreme Court Justices was 88% (mean = 49 cases) without Lord Walker and 89% with Lord Walker (mean = 49 cases).

The pattern of agreement is more profound when the data set is reduced to those cases which divide judicial opinion. Indeed, in this data set the average agreement between the Supreme Court Justices was 68% (mean = 16 cases). This was higher than the overall average agreement in this data set of 53%. This pattern exists even if cases with a single dissent were excluded, with an average agreement of 64% (mean= nine cases) again significantly higher than the average for this data set of 44%.

⁷⁷⁹ Of note, Lords Rodger and Hope almost always agreed on Scots Appeals. Although the Justices were more likely to disagree on English Appeals, the agreement was still above average. A Paterson, *Final Judgment. The Law Law Lords and the Supreme Court* (Hart Publishing 2013)

7.10.2 The Universalists: Lord Phillips, Lord Kerr, Lord Clarke

The universalists supported values which are encompassed in *universalism* and opposed *tradition* and *conformity*. The application of these criteria identified three Supreme Court Justices; Lords Phillips, Kerr and Clarke. Again, if the grouping was accurate then a high degree of agreement between these Supreme Court Justices would be expected.

As predicted there was a high degree of agreement in decision making between the universalists. In all of the cases combined, there was an average of 86% agreement between the decisions reached by Lords Phillips, Kerr and Clarke. The level of agreement was more significant when the cases which divided judicial opinion were analysed, revealing an average of 66% agreement between the Supreme Court Justices in an average of 14 cases, compared to the average of 53% for all Supreme Court Justices. This level of agreement was maintained when cases were limited to those in which more than one Supreme Court Justice held a minority position. In these cases, the percentage agreement was 66% (mean of eight cases per pairing) compared to the expected agreement of 44%.

7.10.3 Self-direction : Lady Hale and Lord Mance

Lord Mance and Lady Hale supported the values encompassed in *self-direction* and were less likely to affirm those encompassed within *power*. There was significant agreement between the decisions that these two Supreme Court Justices reached, with 94% agreement in the 54 cases that they heard together. In the 13 cases that they heard that divided judicial opinion, Lord Mance and Lady Hale agreed in 70%, while in the eight majority decision cases that they heard, they agreed in 75%.⁷⁸⁰

⁷⁸⁰ Brice Dickson identified a pattern of joint dissent between Lord Scott and Lord Mance. Indeed, he identified an agreement between Lord Scott and Lord Mance of 93% which is similar to the agreement identified between Lord Mance and Lady Hale. This would suggest that Lord Scott may have shared similar values. The Supreme

7.10.4 Do Supreme Court Justices who espouse opposing values reach opposing decisions?

The traditionalists hold opposing values to the universalists; therefore it would be predicted that there would be a low degree of agreement between the decisions reached. Indeed, there was overall a lower level of agreement, with an average agreement of 79% in all cases, between the universalists and the traditionalists. In cases that divided judicial opinion, this was reduced to 42%, and further reduced to 28% in minority decision cases, lower than the average agreement of 44%. These data suggest that Supreme Court Justices with opposing values are less likely than average to agree in cases which divide judicial opinion. Of note if Lord Philips was excluded from this analysis, the level of agreement would have further reduced to 33% (divided cases) and 23% (minority cases).⁷⁸¹

Despite, the overt lack of diversity on the Supreme Court bench, this chapter reveals diversity in values on the Supreme Court bench. Indeed, there were stark differences in the value profiles of some of the members of the Supreme Court bench. However this chapter also reveals that Supreme Court Justices who have similar value profiles will reach similar decisions in cases which divide judicial opinion confirming the close link identified in chapter 6 between personal values and judicial decisions. This analysis contributes to the debates surrounding judicial diversity but also has significant implications on Supreme Court procedure particularly the selection of panels.

Court data set selected for this study did not have sufficient data to facilitate this analysis, although this may be addressed in the future using a data set from the House of Lords. B Dickson, *Judicial Activism in Common Law Supreme Courts* (Oxford University Press 2007); B Dickson, 'Close Calls in the House of Lords' in Lee J (ed), *From House of Lords to Supreme Court; Judges, Jurists and the Process of Judging* (Hart Publishing 2011)

⁷⁸¹ In his analysis, Brice Dickson identified a high level of disagreement between Lord Walker and Lord Mance, indeed this study also identified a low agreement between Lord Walker and Lord Mance, with only 50% agreement in cases which divide judicial opinion and only 37% in minority cases.

7.11 What does the study of personal values contribute to the diversity debate?

Lady Neuberger highlighted in her report that ‘judges drawn from a wide range of backgrounds and life experiences will bring varying perspectives to bear on critical legal issues.’⁷⁸² Despite acknowledgement of the breadth of experiences that can contribute to a more diverse judiciary, empirical studies surrounding judicial diversity have had a narrow focus on overt diversity, overt characteristics and on how the judiciary is seen. To date, the debates surrounding a more nuanced approach to “difference” in judicial decision making has been limited to theory and centres on the decision making process rather than the outcome. This study reveals value diversity on the Supreme Court bench. Indeed, there were stark differences in the value profiles of some of the members. The variation in value expression was reflected in the decisions reached with those Justices who have similar value profiles reaching similar decisions in cases that divide judicial opinion.

Personal values reflect different backgrounds and life experiences and the study of judicial values reveals that despite the lack of overt diversity, there was evidence of inherent tacit diversity and a variety of different perspectives. This chapter confirms the association between these tacit influences, decision making and the decisions of the Supreme Court. It further highlights the association between the influence of values on cases which divide judicial opinion, cases where the outcome is uncertain and the exercise of judicial discretion.

The presence of tacit diversity does not diminish the importance of diversity related to overt characteristics, overt diversity. The arguments that a Supreme Court bench that does not reflect society serves to discriminate directly or indirectly and may lack democratic legitimacy remain. Those arguments centred on legitimacy rely necessarily on the public

⁷⁸²Baroness Neuberger, 'The Report of the Advisory Panel on Judicial Diversity' (Report for the Ministry of Justice, London, 2010) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf>, accessed 9.01.2013>

perception of the judiciary and how the judiciary are seen. Indeed, the Neuberger report highlighted the strength of these legitimacy arguments, which make a strong case for overt diversity, and advocate that in a democratic society it is unacceptable for an unelected institution that has the power of the judiciary, to be drawn from a narrow, homogenous group that does not reflect the diversity of society.⁷⁸³ Indeed, in his most recent book Stephen Breyer, discussing the US Supreme Court, argued that the legitimacy of the Supreme Court rests in the confidence of the people in the institution, an overtly unrepresentative institution may result in lack of confidence and ultimately lack of democratic legitimacy.⁷⁸⁴ It is difficult to argue that the presence of tacit diversity will change the public perception of the judiciary. However, a focus on overt characteristics alone serves to limit the debates surrounding judicial diversity, fails to recognise the importance of inherent characteristics on judicial decision making and diminishes the importance of the Supreme Court Justice as an individual.

The study of personal values has highlighted the limitations of the debates that focus simply on demographic characteristics and suggests that gender and class provide a very narrow view of diversity. Indeed, the limitations of the focus on gender and the ‘unique voice’ argument, which argues that all women speak with one voice and this voice is unique to women, are evident in this research. It is possible that overt characteristics such as gender and race may influence decisions through personal values. Indeed, at a population level gender does influence values with studies demonstrating that a population of women are more likely than males to express concern and responsibility for the well-being of others and less likely than males to accept materialism and competition, which is reflected in the values endorsed, with women attributing more importance to *universalism, conformity* and *security*

⁷⁸³ *ibid*

⁷⁸⁴ S Breyer, *Making Our Democracy Work: A Judge's View* (Vintage 2010), page 11

than men.⁷⁸⁵ Although this variation is modified in women who achieve high levels of success in their chosen career, who do not reflect the values espoused by women in the population in general, these women still affirm different values to men.⁷⁸⁶

But population studies do not reflect the nuanced differences of individuals. The alignment of values between Lady Hale and Lord Mance undermines the argument that one individual female will reflect the values of a population and highlights the limitations associated with the use of population studies to identify the characteristics of the individual.⁷⁸⁷ As Lady Hale suggests,

We should not expect women judges to ‘make a difference’ or that men and women ‘judge’ differently; ‘the great majority of judgments I have written or spoken would just as easily have been written or spoken by a man.’⁷⁸⁸

The study of personal values suggests that gender alone cannot be used as a proxy for the many life experiences that influence personal values. Male and female Supreme Court Justices may have a range of life experiences that have a profound effect on their values and their decision making. These findings support the theoretical “difference” arguments made by Lady Hale, Rackley and others, that gender is but one facet of the many different perspectives that female judges bring to the decision making processes.⁷⁸⁹ Indeed these experiences extend beyond overt demographic characteristics.

⁷⁸⁵ AM Beutel and MM Marini, 'Gender and Values.' (1995) 60 American Sociological Review 436

⁷⁸⁶ RB Adams and P Funk, 'Beyond the Glass Ceiling: Does Gender Matter?' (2012) 58 Management Science 219

⁷⁸⁷ AM Beutel and MM Marini, 'Gender and Values' (1995) 60 American Sociological Review 436

⁷⁸⁸ Lady Hale 'Equality in the Judiciary: A Tale of Two Continents. (10th Pilgrim Fathers' Lecture Plymouth, 24 October 2003) cited in E. Rackley, "What a Difference Difference Makes: Gendered Harms and Judicial Diversity." (2008) 35, 41

⁷⁸⁹ B. Hale, 'Equality and the Judiciary: Why Should We Want More Women Judges?' (2001) Public Law 489; B. Hale 'Making a Difference? Why We Need a More Diverse Judiciary.' (2005) 56 Northern Ireland Legal

The study of personal values highlights the limits of arguments that centre on overt characteristics alone. This is equally true for the diversity arguments that centre on class. These arguments serve to diminish the importance of the individual. Views such as those espoused by JAG Griffiths in his book *The Politics of the Judiciary*, where he argues that judicial decision making is a consequence of a class-conditioned perspective, treat the judiciary as homogenous and interchangeable.¹⁰⁷ Although class and education may influence values, it is clear that values are more nuanced than class and education alone. Indeed, this study suggests that the Supreme Court Justices are more diverse in their values than the white Oxbridge stereotypes. In treating the judiciary as a homogenous group, the significant influence of the individual on decisions in cases that divide judicial opinion may be lost. This chapter highlights tacit diversity in the Supreme Court. In doing so, it serves to contribute to the broader discussions of judicial diversity, but also recognises the importance of the individual and the exercise of judicial discretion.

Although there was more variation in the value expression and associated decisions by the Supreme Court judiciary than would be suggested by their demographic profiles alone, there were also patterns of value expression and decision making that were shared by individuals. This finding suggests that although there is an unseen diversity in the judiciary, this is still limited and raises questions of judicial selection at two levels; judicial appointments and

Quarterly, 281; E. Rackley 'Difference in the House of Lords' (2006) 15 *Social & Legal Studies* 163; Lady Hale, 'A Minority Opinion?' (Maccabaeon Lecture in Jurisprudence, London, 13 November 2007); R. Hunter, 'Can Feminist Judges Make a Difference?' (2008) 15 *International Journal of the Legal Profession* 7; E. Rackley, "What a Difference Difference Makes: Gendered Harms and Judicial Diversity." (2008) 15 *International Journal of the Legal Profession*, 37; D. Feenan, 'Women Judges: Gendering Judging, Justifying Diversity' (2008) 35 *Journal of Law and Society*, 490; E. Rackley, 'Detailing Judicial Difference.' (2009) 17 *Feminist Legal Studies*; 11; K. Malleson 'Diversity in the judiciary: The case for positive action' (2009) 36 *Journal of Law and Society* 376. E. Rackley, 'Women, Judging and the Judiciary: From difference to Diversity' (Routledge, 2013); R. Hunter 'More than Just a Different Face? Judicial Diversity and Decision Making. (2015) 68 *Current Legal Problems* 119.

panel selection. Although both could constitute a thesis in their own right, it would be remiss not to briefly set out the potential implications of tacit diversity on both of these areas.

7.11.1 What do values mean for judicial selection?

Higgins and Rubin argue that ‘judges may be selected so that the values which they choose to impose on society are in fact the values consistent with the certain interpretations of the common law.’⁷⁹⁰ This study is not suggesting the judicial appointments should be made based on values, or that there should be an introduction of a ‘confirmation hearing’ approach. Indeed, to incorporate psychometric testing of values into the selection process would require a determination of which values the judiciary should espouse and affirm and a prediction of the influence of the external and internal modifiers on value expression.

However, questions of diversity relate to questions of justice and Cameron, Cummings and others suggest that a diverse bench reaches more ‘just’ decisions.⁷⁹¹ The more diverse the values espoused and affirmed by the judiciary, the more values of society will be reflected in the judicial decisions. Although this study did find some variation in both the values expressed and the related decisions of the Supreme Court judiciary, this study suggests that this diversity could be enhanced by drawing from a population with more diverse backgrounds and life experiences. Personal values are influenced by life experiences, a diversity of life experiences including gender, race and other factors will allow different voices to be heard and although these voices may not be distinctive to gender, or education or

⁷⁹⁰ JM Scheb II and W Lyons, 'Judicial Behaviour and Public Opinion: Popular Expectations Regarding the Factors that Influence Supreme Court Decisions' (2001) 23 Political Behaviour 181, page 137

⁷⁹¹ CM Cameron and CP Cummings, *Diversity and Judicial Decision-Making: Evidence from Affirmative Action Cases in the Federal Courts of Appeals 1971 - 1999* (Princeton University Working Paper, 2003); JP Kastellec, 'Racial Diversity and Judicial Influence on Appellate Courts' (2013) 57 American Journal of Political Science 167.

class, the more diverse life experiences of the judiciary, the more likely diverse values will be represented on the judicial bench and these will be reflected in the decision making process.

7.11.2 Values, agreement and panel decision making.

In an interview in 2011, Lord Phillips highlighted the importance of panel selection on case outcomes:

If you sit five out of the twelve Justices and you reach a decision 3:2 it is fairly obvious that if you had a different five you may have reached a decision 2:3 the other way. This is one of the reasons when we have a really important case we sit more than five, seven or even nine.⁷⁹²

The UK Supreme Court engages in decision making in panels of five, seven or nine judges.⁷⁹³

The majority of cases are heard by a panel of five Supreme Court Justices (78%), with 16% heard by a panel of seven and 6% (14 cases) heard by a panel of nine Supreme Court Justices.⁷⁹⁴ Lord Hope in a speech discussing the Supreme Court highlighted the factors that influence the decision to hear cases in panels greater than five:

The default position is that we sit in panels of five. But our practice is to sit in panels of seven or nine if the Court is being asked to depart from a previous decision, or there is a possibility of its doing so, or if the case

⁷⁹² Lord Phillips 'The Highest Court in the Land: Justice Maker', (BBC4, 27 January 2011) <<http://www.bbc.co.uk/programmes/p00dhn8n>> accessed 3.08.2015

⁷⁹³ The term judges not Justices was used in this sentence as judges from the lower courts may occasionally (or more frequently as in the case of Lord Judge) hear cases in the Supreme Court bench.

⁷⁹⁴ One case was heard by a panel of three Supreme Court Justices *Apollo Engineering Limited v James Scott Limited* (Scotland) [2013] UKSC37.

raises significant constitutional issues or for other reasons is of great public importance.⁷⁹⁵

The position of the Supreme Court is that Supreme Court Justices are selected based on availability and largely at ‘random although there is some consideration given to including Justices with specialist experience in the area of law raised by the appeal’ adopting an largely interchangeable approach.⁷⁹⁶ Notwithstanding this stated position, it has been suggested that the area of expertise has a significant influence selection for judicial panels. Lord Hope emphasised the use of the ‘selective approach’ in panel selection:

The selective approach raises questions as to which Justice should sit on which case. Courts which always sit *en banc*, such as the US Supreme Court, do not need to address this problem. Nor do courts whose function is limited to dealing with constitutional issues in which all its members have equal expertise. As we take all sorts of cases, we have to decide upon the membership of the panel for each case individually. It has been suggested that we should sit in rotation or that the Justices should be chosen for each case at random. But that approach would mean abandoning the convention that the two Scots Justices sit on all appeals from Scotland, if available. It would also risk depriving the panels of the assistance of those members of the Court who had expertise in the point at issue. One might end up with a criminal appeal from the Court of Appeal in England, for example, being heard by five Justices who had never sat in an English criminal court at all. So here too a selective approach is being

⁷⁹⁵ Lord Hope, 'The Creation of the Supreme Court – Was it Worth it?' (Barnard's Inn Reading, London, 24 June 2010)

⁷⁹⁶ Personal communication from the Supreme Court Head of Communications Ben Wilson.

adopted, as it was in the House of Lords, under the supervision of the President and the Deputy President. The result is that the panel will normally include at least two Justices with experience in the area of the law that is the subject of the appeal.⁷⁹⁷

Indeed, the pattern of frequency of hearings between Supreme Court Justices suggests that this 'selective' approach is often in practice in the Supreme Court. The findings of this study have significant implications for the 'selective' approach. As discussed, although there is variation in the values and decisions of the Supreme Court Justices, there is also similarity. It could be conceived in cases heard by a panel of five, three of the Supreme Court Justices hearing the case could share the same value priorities and reach the same decision. This idea is supported by the principle of conversion, a systems theory concept, which suggests that judges convert inputs into case outcomes and that 'common values and common background experiences impel towards agreement.'⁷⁹⁸

This sharing of value priorities may be enhanced by the shared experiences of practice. Research into personal values in a corporate context, suggests those who achieve success quickly in their chosen area do so in part due to an alignment of their personal values with those of the corporation.⁷⁹⁹ Although not empirically assessed, theoretically this principle may also apply to members of the judiciary who have all achieved success in their chosen area of practice. Those who achieve success in a particular area of law may have shared

⁷⁹⁷ Lord Hope, 'The Creation of the Supreme Court – Was it Worth it?' (Barnard's Inn Reading, London, 24 June 2010)

⁷⁹⁸ W Murphy, *Elements of Judicial Strategy* (University of Chicago Press 1964); S Goldman, 'Backgrounds, Attitudes and the Voting Behaviour of Judges: A Comment on Joel Grossman's Social Backgrounds and Judicial Decisions' (1969) 31 *Journal of Politics* 214, page 214

⁷⁹⁹ GW England and R Lee, 'The Relationship between Managerial Values and Managerial Success in the United States, Japan, India, and Australia' (1974) 59 *Journal of Applied Psychology* 411; C Thomas, 'The Relationship between Values and Success for Managers in Large Corporations' (1997) 12 *Journal of Social Behavior and Personality* 671

value priorities which would lead them to a high degree of agreement. For example, those who engage in practice in the area of human rights may have different inherent values priorities to those who achieve success at the commercial Bar. In using the ‘selective’ approach there is potential to skew the decision making process in favour of the values which are held in high regard in a specific area of law. Similarly, appointments to the Supreme Court Judiciary from one area of law may also serve to skew decisions in favour of specific values. The early Supreme Court had a significant number of Justices who practiced at the Commercial Bar, however recent retirements and appointments have served to reduce this potential influence.

Although, the importance of experience and unique knowledge is recognised, this study suggests that panels should be assigned randomly and if there is a requirement for an area of expertise in a case this should be provided by a single Supreme Court Justice. If more than one is required then a larger panel should be convened. In choosing random selection, there is potential to reduce the influence of one particular set of value priorities on the final outcome.

This chapter provides further evidence of the value: decision paradigm at work in the Supreme Court. The analysis reveals a range of value priorities among the Supreme Court judiciary. The evidence of difference in value priorities suggests that despite the lack of overt diversity, there is tacit diversity in the Supreme Court which is related to decision making. Indeed, in cases which divide judicial opinion, diversity of values may underpin the decision making process. These findings extend the debates surrounding judicial diversity and judicial selection.

Chapter 8

The role of values in judicial decision making in the Supreme Court

At the start of this thesis was a letter on behalf of Lord Dyson, Master of the Rolls, which stated:

Your research proposes to examine the relationship between the personal values that a judge may hold and the role these play in decision making. As you will be aware, on appointment to judicial office all judges take the judicial oath and undertake to '*do all manner of people after the laws and usages of this realm without fear or favour, affection or ill will.*' It is therefore our view that judges administer the law in accordance with the judicial oath and any perception that judges allow matters other than the evidence and arguments presented in the court to influence their decision making could potentially undermine public confidence in the judiciary.⁸⁰⁰

This thesis demonstrates that despite the external and internal constraints imposed by judicial procedure and the judicial oath, judicial decision making is influenced by matters other than the evidence and arguments presented in the court. The judicial oath and the limits it imposes serve to constrain conscious decision making processes, but members of the judiciary, as with any decision makers, are the subject of psychological influences on decision making and this thesis demonstrates a role for one such influence, personal values, on the decision making of the Supreme Court.

⁸⁰⁰ Simon Carr, Assistant Private Secretary, Senior President of Tribunals on behalf of the Master of the Rolls, Lord Dyson, page 18 of this thesis.

The influence of personal values on judicial decision making is mediated through the exercise of judicial discretion. It has long been accepted that in reaching a decision in hard cases a judge may exercise discretion, and as Lord Bingham suggests this is particularly true when a case is ‘governed by no rule of law, [and] its resolution depends on the individual judge’s assessment (within such boundaries as have been laid down) of what is fair and just to do in the particular case.’⁸⁰¹ It is in these cases, where the outcome is not clearly dictated by legal rules and principles, that the exercise of discretion may play a particularly significant role. By definition, hard cases populate the docket of the UK Supreme Court and although it is impossible to accurately quantify the number of cases where the exercise of judicial discretion played a role in the final outcome, it may be speculated that judicial division on the result is an overt manifestation of the exercise of discretion. Such cases account for almost one quarter of all cases decided by the UK Supreme Court at the time of this analysis.

The psychological value framework developed in this thesis provides a novel method of analysing and understanding difference in judicial decisions and a unique insight into the subconscious influences that underpin the judicial decision making processes. Value content analysis of legal judgments demonstrates a relationship between the exercise of judicial discretion, values and judicial decisions in cases which divide judicial opinion. The value analysis identified a differential pattern of values expressed in the majority and minority judgments of cases that divided the Supreme Court. This value: decision paradigm was replicated in a study of legal academics which demonstrated an association between personal values and legal decision making. The pattern of differential expression was not limited to ‘close call’ cases. Indeed, this research identified evidence of competing values in the judgments of all the cases analysed that divided judicial opinion. In reaching a decision, at

⁸⁰¹ LT Bingham, *The Business of Judging*. (Oxford University Press, Oxford 2000), page 36

least one not governed by legal rules and precedent, a judge will support one or more values above another. This research suggests that a judicial decision in cases that divide judicial opinion is not simply a decision between one position or another but a more detailed nuanced balancing of competing values.

The scrutiny of cases where an individual Supreme Court Justice dissented alone, or those cases which resulted in outcome consensus but division within the reasoning, facilitated the analysis of value expression within the context of uncertainty. Posner suggests that ‘uncertainty is a salient feature of [the US] legal system.’⁸⁰² It is equally salient in the legal systems of Scotland, England and Wales. The analysis of these cases revealed an association between the expression of values in legal judgments and judicial perception of legal uncertainty. Uncertainty is central to the dual system model of decision making proposed by Kahneman, Slovic and Tversky.⁸⁰³ This model encompasses two systems, system 1 the rapid, intuitive part of the process which includes the ‘gut instinct’ or affect heuristic and system 2 the more conscious deliberative reasoning processes.⁸⁰⁴ The affective response is a rapid and instinctive response to a trigger and in the judicial decision making context the trigger is the evidence and law surrounding a case. This response which reflects individual personal values, frames the system 2 response. The initial system 1 response can be affirmed, rejected or modified by the systematic deliberation and reasoned decision making of system 2. It is in decisions where uncertainty remains after deliberation, that the influence of the system 1 response is the strongest and the final decision reflects the initial affective response and personal values. The results of the value: decision analysis suggest that although the law provides the basis for framing and constraining judicial discretion, in difficult cases where

⁸⁰² RA Posner, *How Judges Think* (Harvard University Press 2008), page 4

⁸⁰³ D Kahneman D, P Slovic and A Tversky, *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge University Press 1982)

⁸⁰⁴ *ibid*

there is a perception of uncertainty, the personal values of individual judges' influence how judicial discretion is exercised and may influence the outcome of the case. As such, this study situated the judicial decision making process within the limits of the legal system and unlike the attitudinal models of judicial decision making does not suggest that the influence of intrinsic subconscious personal preferences and motivations are without constraint.

The constraints exerted by legal principles and rules are not the only constraints and influences on judicial decision making and the interpretation of judicial decision making within the context of psychological systems facilitates a more detailed understanding of these role of constraints and incentives.⁸⁰⁵ Studies of judicial behaviour suggest that external extra-legal factors including institutional factors such as collegiality can influence judicial decisions. The psychological systems model of decision making also recognises the potential influence of external factors which can modify the influence of subconscious responses on the final outcome. This thesis presented two cases studies in which the value: decision making paradigm was modified and drawing on psychological and judicial behavioural studies speculated on some of the external influences that may have modified the final outcome. Despite these external and internal limitations on the influence of values on legal judgments, this thesis demonstrates that even with the restrictions placed on the judiciary by the judicial oath, in the majority of cases which divided judicial opinion, individual members of the Supreme Court judiciary reached decisions which aligned with their espoused values.

In recognising the psychological influences on judicial decision making, this study also considered the members of the Supreme Court judiciary as individuals within a collective decision making process. The analysis of individual decision making revealed that there was

⁸⁰⁵ RA Posner, *How Judges Think* (Harvard University Press 2008), page 7

diversity in the espoused value hierarchy of individual Supreme Court Justices and this diversity was reflected in the decision making of the Supreme Court. Indeed, despite the lack of overt diversity, there is diversity of values on the Supreme Court bench. This finding extends the debates surrounding judicial diversity. The diversity of values espoused and affirmed in the decision making of the Supreme Court bench should be celebrated. However, the diversity is limited and this research supports the calls for wider diversity on the bench, but suggests that the definition of diversity should be extended beyond overt visible characteristics to include the diversity of life experiences which reflect in personal values.

It has been argued for decades that extra-legal factors including facets of the judicial personality including judicial morality, activism and political ideology influence judicial decision making.⁸⁰⁶ These early studies were limited to the overt manifestations of individual characteristics such as gender and framed judicial decision making as a conscious binary decision between for example one political position or another. Although these facets of the judicial personality are underpinned by individual personal values, this research provides a more nuanced understanding of judicial decision making and the conscious and subconscious facets of the judicial personality which influence that process.

This thesis has demonstrated, despite significant constraints and limitations, the influence of personal values, mediated through intuition, on the decision making process in the Supreme Court. The influence of intuition and values in judicial decision making is not necessarily adverse. Indeed, Guthrie, Rachlinski and Wistrich argue that ‘removing all intuition from judicial decision making is both impossible and undesirable because it is an essential part of

⁸⁰⁶ JL Gibson JL, 'Judges Role Orientations, Attitudes and Decisions: An Interactive Model' (1978) 71 *The American Political Science Review* 911; JL Gibson, 'The Role Concept in Judicial Research' (1981) 3 *Law & Policy Quarterly* 291; For an excellent review see Justice Michael Kirby, 'A Darwinian Reflection on Judicial Values and Appointments to Final National Courts' in Lee J (ed), *From House of Lords to Supreme Court Judges, Jurists and the Process of Judging* (Hart 2011)

how human brains function.’⁸⁰⁷ Personal values mediated through judicial intuition, reflect the humanity of those who have to make these difficult decisions as highlighted by Lord Sumption;

The judiciary's instincts are moulded by their experience of individual cases, many of which have involved profound human tragedies to which no judge could be indifferent.⁸⁰⁸

In cases where the decision is not clearly dictated by law, the members of the Supreme Court judiciary are required to exercise discretion and to reach a decision. In doing so the judiciary are subject to subconscious influences of decision making. These subconscious influences are inevitable in judicial decision making where the law is uncertain.

The acknowledgment of these influences on judicial decision making may lead to better insight into judicial reasoning and a more nuanced understanding of judicial diversity and division. Indeed, acceptance and acknowledgement of the important role of personal values, subconscious influences and judicial humanity on judicial decision making would render the judicial process more transparent and should serve to enhance public confidence rather than diminish it.

⁸⁰⁷ C Guthrie, JJ Rachlinski and AJ Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93 Cornell Law Review 101, page 105.

⁸⁰⁸ Lord Sumption in Owen Bowcott 'Supreme Court Appointee says Role of British Judges is Too Politicised' *The Guardian* (London, 8 November 2011)

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Appendix

Vignette based on R (on the application of E) v. JFS Governing Body [2009] UKSC 15.

The Jewish Free School (JFS) is a highly regarded state funded school which is oversubscribed. The admission policy is based on the requirement that students are recognized as Orthodox Jews as defined by the Office of the Chief Rabbi (OCR). The OCR applies the matrilineal test. This requires that the mother of the child be either an Orthodox Jewess or converted to Judaism in compliance with Orthodox methods.

Boy X is raised as an Orthodox Jew by his father, a recognized Orthodox Jew. His mother was raised as a Catholic and she converted to Judaism under the auspices of a non-Orthodox Synagogue. She is a practising Jew. Her conversion is recognized by Masorti, Reform, and Progressive Jews but not by the OCR. As his mother was not recognized as a Jew by the OCR, Boy X was denied admission to the school.

The Court of Appeal decided that the JFS admissions policy had directly racially discriminated against boy X contrary to the Race Relations Act 1976 s.1. A breach of the Race Relations Act 1976 requires that the admission criteria discriminate against a person based on racial grounds. The definition of racial grounds in s. 3 of the Act is limited to colour, race, nationality or ethnic or national origins.

It was held in the Court of Appeal that, as Boy X was descended from an Italian Catholic, his ethnic origins could not include a matrilineal connection to Orthodox Jewry required by the OCR. As the descent required by the OCR traced back to racial or ethnic origins, the

admission criteria discriminated against an ethnic group and was in breach of the Race Relations Act 1976 s. 1.

The JFS argue that there is a Jewish ethnic group but it is not defined by the OCR criteria. The JFS argue that the Jewish ethnic group encompasses all those who are identified or identify themselves as Jews, regardless of whether they are recognized as Orthodox Jews by the OCR. The JFS argued that discrimination against this ethnic group would be racial discrimination. The JFS claimed that the OCR matrilineal test identifies a subset of the Jewish ethnic group. As the test only identifies a subset of an ethnic group, the test is not of ethnic origin. The JFS argue that the OCR criteria assess religious not ethnic origin and therefore the selection criteria are legally valid and similar to other religious schools.

Question 1: Did the admissions policy breach the Race Relations Act 1976 s. 1?

Question 2: What factors do you consider important in reaching this decision?

Please rate each factor on the scale based on its importance in your decision.

Factors are rated on a scale from – 1 (irrelevant) to 7 (extremely important)

1. Social justice (The principle of a society which is based on equality and fairness)
2. Authority of the State (Respect for authority of legislature and executive)
3. Transparency in the law (Law must be accessible to the public)

4. Limits on power (Limits on the power of governing bodies)
5. Individual responsibility (Individual responsibility for actions and duty to others in society)
6. Limits on the obligations of the State (Recognition that the obligations of the State to the individual cannot be without limitation)
7. Reduction of costs to society (Reduction of the financial and social costs to society)
8. Equality (Equal treatment and rights for all people regardless of their difference)
9. Benefit to society (Recognition that an action may benefit society rather than the individual).
10. Tolerance of others beliefs (A fair, objective, permissive attitude towards those whose judgments, beliefs, practices, race or religion differ from one's own)
11. Duty to conform to rules (Duty of individual or group to conform with the rules/regulations/laws governing society as a whole)
12. Respect for tradition (Feeling or showing deferential regard for inherited, established or customary pattern of thought, action or behaviour (religious, legal, social))
13. Autonomy (Independence or freedom of will of the individual)
14. Freedom of enterprise (Freedom of private business to operate for profit in a competitive system without interference by government beyond regulation necessary to protect the public interest and the national economy)

