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Hidden influence: Extra-Legal Factors in Judicial Decision Making

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Abstract

It has long been accepted that in hard cases extra-legal factors may play an important role in judicial decision making. Our values are a central component of our identity and play a significant role in the decision-making processes. They serve as the lens through which we see a choice and underpin the first instinctive response to the decision. In decisions, where there are two equally valid legal answers, the decision may remain anchored in the instinctive value response. Values in this context, provide certainty and consistency in uncertain decisions. But if unchallenged, these normal instincts can narrow the frame of decision making and may shift the pattern of decision making towards unacceptable bias. Challenge and reflection may limit the risk of hidden value bias and ensure that values remain a normal facet of decision making.

Key Words: Instinct, Intuition, Values, Decision Making, Bias

Introduction

‘[A judicial decision] 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.’

Lady Hale, now retired President of the UK Supreme Court (2008)

The quotation above notes that every judicial decision is shaped by the facts, legal principles, and the norms of judicial office, but even within these constraints, the identity of the decision maker may play an important role in the exercise of discretion. Indeed, the role of the individual judicial decision maker in shaping the law has been the topic of extensive research and debate. It is not the ambition of this article to rehearse these debates or detail the

extensive research that highlights the importance or otherwise of the individual decision maker. Rather this short article draws on a case study of the UK Supreme Court to highlight one facet of the individual - personal values, and the importance of values in legal decision making in the highest courts. In many cases which divide the highest courts, the choice can be framed as a decision between two or more values. In reaching a decision, the Justice must prioritise one value or set of values above another. In this context, values provide consistency in the exercise of discretion and Justices will frequently prioritise the same values across a range of cases which divide judicial opinion. Values are an important and perhaps an inevitable influence on decision making. But without the opportunity and time to reflect on, and challenge, the influence of values, the role of values may shift from a normal acceptable influence on decision making to an unacceptable bias. This short article explores the steps a judge may take to ensure that values remain an acceptable influence.

What are values?

Values, in the context of decision making, have been the subject of decades of extensive research by psychologists and the definition of values by Shalom Schwartz and colleagues (1994) highlights the key features;

'[A value is] 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.'

Values are thus motivational goals which guide decision making and serve to make one outcome more personally or socially acceptable than another. In choices, where the answer is not predetermined and where discretion must be exercised, values serve as a guide in the decision making process. In reaching a decision between competing values, a decision maker will elevate one value (or set of values) above another, and it is this hierarchy of values that is psychologically important. Indeed, it has been demonstrated in a wide range of contexts, that the majority decisions where discretion is exercised may be reduced to a value choice.

The seminal work by Shalom Schwartz and his team (1994) have identified that all stable values can be related to ten overarching motivations. The motivations are driven by three 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. The ten motivational goals, which encompass universal values, are *self-direction*, *stimulation*, *hedonism*, *achievement*, *power*, *security*, *conformity*, *tradition*, *benevolence*, and *universalism*. Schwartz defined each of these ten primary motivational goals and used examples of the individual values that the goal encompasses. For example, *self-direction* has the motivational objective of independent thought and action. Those who prioritise self-direction enjoy being outside the control of others. In contrast, *tradition* has the motivational goal of respect, commitment and acceptance of the customs and ideas that one's culture or religion impose on an individual. Those who prioritise *tradition* place cultural customs and ideals above personal interests. *Universalism* is the broadest value with the motivational goal of understanding, appreciation, tolerance, and protection of the welfare of all people. Values encompassed with *universalism* include equality, wisdom, social justice and protecting the vulnerable. An individual who prioritises *universalism* above other values will place the needs of society as whole above those of any individual. Schwartz and his team have demonstrated that although an individual decision maker can affirm all of these value motivations, in reaching a decision between competing values, it is how the decision maker prioritises the values that is important. This process of value prioritisation may be a conscious, but values also serve as a more hidden influence.

Values and decision making

It is increasingly recognised that we do not always have conscious control over the processes that motivate decision making. This has been brought to public attention by the publication Daniel Kahneman's book *Thinking Fast and Slow* (Penguin Books, 2012) and, more recently, *Noise* (William Collins 2021) with Olivier Sibony and Cass Sunstein. This work demonstrates how a final decision is influenced by a series of heuristics (short-cuts) mediated by two systems of decision making. System one is intuitive and occurs spontaneously. It is at this stage of the process of decision making, that prior beliefs and heuristics are generally thought to have the most influence and it is in these system one processes that the value response is initiated. Our values frame our affective response or instinctive 'gut reaction'. The affect heuristic operates as a quick and immediate positive or a negative reaction to some idea, proposal or argument and typically occurs less consciously, most often outside our awareness. It is this 'gut reaction' that provides an anchor for system two reasoning and

guides the information processing in the second slow deliberative stage of decision making. Values thus serve as the lens through which we view the decision and whilst the values shape the initial response, they do not determine the outcome.

System two processing is the form of decision making typically attributed to the judge, slow deliberative and rule based, which requires articulated reasons and fully developed detailed consideration of evidence. System two reasoning can affirm, modify, or reject the initial system one response. The systems understanding of decision making and the role of instinct or intuition aligns with theories of judicial decision making that suggest that a judge has an initial instinctive gut reaction (a system one value response) as to what is 'right' or 'fair' in response to the stimulus of the facts of the case and the legal arguments (See for example BL Bartels in *The Psychology of Judicial Decision Making* (2010, OUP). In uncertain decisions, where system two reasoning does not provide a clear answer, the decision will remain anchored in system one reasoning, the gut instinct and values. It is important to note that in uncertain judgements information which could serve to supplement or correct the heuristic is not neglected or underweighted, it is simply not available. This is what we see in the most difficult cases decided by the UK Supreme Court - those cases that divide judicial opinion.

Values in cases which divide judicial opinion

Evidence from the analysis of the judgments of the UK Supreme Court suggest that in the most difficult decisions, those that divide the Supreme Court bench, values play a significant role. Take for example the case on the question whether the prohibition of abortion in Northern Ireland, in the most extreme situations, was incompatible with the European Convention on Human Rights; *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) Reference by the Court of Appeal in Northern Ireland pursuant to Paragraph 33 of Schedule 10 to the Northern Ireland Act 1998 (Abortion) (Northern Ireland), (2018) UKSC28*. The case dealt with two issues, first, a procedural issue which challenged the standing of the Northern Ireland Human Rights Commission (NIHRC) to bring proceedings for judicial review, and second, the substantive issue whether the law prohibiting abortion in Northern Ireland was compatible with Articles 3 and 8 of the European Convention on Human Rights insofar as that law prohibits abortion in cases of fatal foetal abnormality, rape, and incest. The majority (Lady Hale, Lord Mance,

Lord Kerr, Lord Wilson, and Lady Black) held that the legislation at that time was incompatible with Article 8 (the right to respect for private and family life), although Lady Black provided that the breach was only in the limited context of fatal foetal abnormality. However, the case failed on the procedural issues, when a differently constituted majority (Lord Mance, Lord Reed, Lord Lloyd Jones, and Lady Black) held that the NIHRC had no standing and as such, the court had 'no jurisdiction formally to declare the majority's view'. Yet, the Justices did deliver written judgments on the substantive issue.

The dominant values espoused in the judgments were those encompassed within self-direction (autonomy) and universalism (protection of the vulnerable) and security (maintaining social order), conformity and tradition (adherence to precedent and respect for Parliamentary sovereignty). When the judgments were analysed what emerges is a pattern of value expression which reflects a value choice decision. Those who held that the legislation was incompatible with Article 8 affirmed values encompassed in universalism and self-direction and those who reached the opposite decision affirmed different values; security, conformity and tradition. Whilst the justices recognised the importance of all of the values; in reaching the final decision individual Justices prioritised one set of values above another. This is what would be expected in decision making in these hard cases, where there are two equally legally valid outcomes, the ultimate decision will reflect the prioritisation of one set of values. This pattern of value choice decision making was evident in every case analysed which divided judicial opinion in the UK Supreme Court (see R Cahill-O'Callaghan, *Values in the Supreme Court: Decisions, Division and Diversity* (Hart Publishing, 2021)). The value data analysis also demonstrated individual patterns of value decision making in these most difficult cases. A pattern emerges of value consistency in uncertain decisions.

In the Northern Ireland abortion case, Lady Hale and Lord Kerr prioritised the values encompassed within universalism and self-direction when these values were opposed to conformity and tradition. This pattern was reflected in other cases. In a sample of cases which divided judicial opinion, Lady Hale heard 19 cases in which universalism was opposed to other values and Lady Hale reached a decision that prioritised universalism in 58%. Lord Kerr was more consistent in his decision making reaching a decision which affirmed values encompassed in universalism in 15 of the 19 cases he heard in which universalism opposed

another value. Lord Kerr also affirmed self-direction in 86% of cases, in which self-direction was opposed to another value. Lady Hale was also more likely to affirm self-direction in 58% of cases in which self-direction was opposed to other values. Both Lady Hale and Lord Kerr were more likely than other Justices of the UK Supreme Court to deliver a dissenting opinion alone and both delivered dissenting opinions that affirmed either universalism or self-direction or both values.

Although Lady Hale was not more likely to oppose tradition in her decisions, she reached a decision which opposed conformity in 11 of the 15 cases which divided opinion in which this value was opposed to other values. Similarly, although Lord Kerr was more likely than Lady Hale to oppose tradition, it is conformity which he opposes in three quarter of cases. This data suggests that in cases in which universalism and self-direction oppose tradition and conformity, Lady Hale and Lord Kerr are more likely to affirm a decision which prioritises universalism and self-direction. This pattern of decision making is consistent over time and across a range of areas of law. This consistency is also evident in the decision making of those who reached the opposite decision.

In stark contrast to the decision of Lady Hale and Lord Kerr, Lord Reed held that the legislation was compatible with Article 8. In his judgment, he affirmed the values encompassed within *tradition* and *conformity*. Indeed, he affirmed these values in the majority of cases he heard in which these values were opposed to any other values (*tradition* in five of eight cases and *conformity* in six of seven cases in a sample analysed). Lord Reed was also more likely to oppose the values encompassed in *self-direction* and *universalism* in the sample, opposing *universalism* in six of eight cases and *self-direction* in three of four cases. This consistent pattern of value decision making is not unexpected in cases which divide judicial opinion. It is an expected pattern of decision making, and in this context where the Justices are challenged both by colleagues and advocates and have extensive time to reflect on the evidence and the decision, this form of value influence is an acceptable form of bias.

Values, decision making and bias

This paper does not use the term bias in the traditional sense which centres on the negative impact hidden influences have on those that are traditionally disadvantaged in society.

Indeed, the author is not suggesting that values mediate this form of bias. Rather this author considers bias as nudge in a direction of a specific decision, a displacement along a continuum of choice. Values shift the decision-making process along the continuum and in the context of judicial decision making, it is simply a nudge that may be modified through detailed consideration, discussion and debate. In this context, values serve as a nudge not an anchor, the instinctive decision may be modified and changed.

But in quick decisions, decisions where the decision maker is not challenged or provided with adequate time to reflect on the decision, their values, and their individual pattern of decision making may play a more significant role. In these contexts, the influence of values may shift from an acceptable predisposition to less acceptable form of influence, one that narrows the frame of decision making and limits consideration of alternatives and as such may determine the final answer. This research 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 norms and by the judges desire to make good law. Indeed, it is recognised that the judiciary strives to make decisions that are correct, fair, ethical, and free from the influence of biases. But with a heavy case load, where decisions are quick and under time pressure, the initial gut instinct response, the value response may play a more significant role. In this context, the value response may move from a nudge to an anchor, and it is in these situations challenge and reflection are vital to ensure that the influence of values remains acceptable.

Disrupting value decision making: Challenge and reflection

Challenge disrupts consistent patterns of decision making. In the context of panel decision making, it has been shown that diversity of opinion fosters disagreement in decision making which in turn improves decision quality and limits bias. In part this is because the expression of disagreement increases discussion intensity, diversity of thought and innovation. Indeed, there is significant evidence from the courts that disagreement on a panel, encourages the other decision makers to reflect on their decision making processes and refine their reasoning. Indeed, this form of influence is attributed to dissent by Lord Kerr in his Birkenhead Lecture, Dissenting judgments – Self Indulgence or Self Sacrifice (2012);

‘In my firm opinion (and I would say this, of course) the existence of contrary views and their enunciation in dissenting judgments do not inevitably detract from the authority of the opinion of the majority. On the contrary, where the majority has been required to address and deal with challenges to their reasoning, their judgments should be the more cogent and compelling as a consequence. After all, arguments which underlie minority opinions do not disappear simply because they have not been expressed in dissenting judgments.’

But what about a judge who sits alone? How can a judge monitor and moderate their value-based decision making? Whilst, a decision maker may be able to identify their dominant values, value priorities are less conscious. As with other forms of implicit forces, bringing the ‘hidden’ into view reduces the potential of these influences to determine the decision. Indeed, the core aim of implicit or unconscious bias training is to raise conscious awareness of the biases that may influence the decision-making process. This is possible with personal values. Psychologists have developed tools to classify and identify value priorities. The SVS is a short and simple questionnaire which provides an insight into both an individual’s values and their value priorities. This insight into an individual’s values priorities and the role this may have on decision making offers an opportunity to reflect and challenge repeated patterns of decision making.

Concluding thoughts

Even in the absence of a psychometric test, every judge should find the time and space to reflect on their patterns of decision making and how value priorities may shape those decisions. Every judge should pause and reflect on repeated decision-making patterns and create opportunities to challenge these patterns and consider alternatives. To do so will ensure that values remain an acceptable influence in judicial decision making.